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THE  
CANADIAN  
LAW TIMES

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VOLUME XXVI.

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# THE CANADIAN LAW TIMES.

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## HOW FAR INSANITY AVAILS AS AN ANSWER IN ACTIONS OF TORT.

**N**O recent decision of an authoritative Court defines with precision the law as to how far insanity avails as a defence in actions of tort. In the absence of binding authority, the conflicting obiter dicta of Judges and the sometimes hasty generalizations of text writers tend rather to perplex than enlighten the practitioner on this important branch of the law.

Mr. Underhill inclines to the view that the plea of insanity is no defence to an action of tort not depending on fraud or malice; but when the tort depends on fraud or malice, and the unsoundness of mind is such that the tort-feasor is mentally incapable of contriving fraud or malice, he is not liable. This view, however, he seems to express with a certain degree of doubt.

Pollock holds, as a general rule, that in the law of tort there is no limit to personal capacity either in becoming liable for civil injuries, or in the power of obtaining redress for them. And yet, while such may be the general rule, he thinks the mental capacity of the one charged as a wrongdoer should be taken into account in all cases where a particular intention, knowledge, or state of mind of the alleged tort-feasor is an element in constituting the wrong. He illustrates this view by reference to an idiot and a monomaniac.

He thinks an idiot would scarcely be held liable for incoherent words of vituperation, which, if uttered by a sane man, would be slander. While, on the other hand, if a monomaniac should write words derogatory of another, he would subject himself to an action for libel. The amount of damages recovered might be reduced by reason of the insignificance of the libel; but that would be all.

Clerk & Lindsell, in the last edition of their excellent work, do not add much to the general information on the subject. At pp. 39 and 40 they thus dispose of the question:—"There is no reported instance of an action of tort ever having been brought in this country against a lunatic, but it is apprehended that lunatics are liable for torts to the same extent as sane persons, provided that the torts are committed by them while in that condition of mind which is essential to liability in sane persons. If a lunatic commit a trespass while in a state of frenzy he will not be liable any more than a sane person who does a similar act while under the influence of sudden terror which deprives him of all power of deliberate choice; but subject to that exception the defendant's lunacy will be no answer to an action of trespass, for he is capable of intending the physical act which he does. Whether a lunatic can be sued for a libel would seem to depend upon the question whether he was insane upon the subject to which the libel related; if he was, then, presumably, he would not be liable, for liability in libel depends upon the consciousness that the matter published is defamatory; but, if he was sane on that subject, then, although insane on other subjects, he ought to be held answerable in damages. But there is no authority on the point to be found in the books. The liability of a lunatic in an action for negligence seems to stand on the same footing as the liability of a young child in a similar action, that is to say, it is a question for the jury whether he was sufficiently self-possessed to be capable of taking care."

Shearman & Redfield hold, unqualifiedly, that lunatics, even violent lunatics, are liable for their wrongful acts caus-



ing injury to others. See Shearman & Redfield on Negligence, sec. 121.

Wharton gives expression to a directly opposite view in the following emphatic language:—"Neither an idiot nor a maniac can be a juridical cause. And the same reasoning applies to persons so young and inexperienced as to be unable to exercise intelligent choice as to the subject matter." See Wharton on Negligence, sec. 88.

A careful examination of the reported cases leaves much to conjecture and doubt.

*Cross v. Andrews*, Cro. (40) Eliz. 622, was an action brought by a guest against an inn-keeper for loss of goods through the defendant's negligence. To a plea that at the time of the loss of the goods defendant was sick and insane, the plaintiff demurred. The demurrer was sustained without argument.

In *Weaver v. Ward* (1646), Hobart 134, the Court gave the following unqualified expression as to the liability of an insane person in tort: "If men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man or the like; because felony must be done *animo felonico*; yet, in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man he shall be answerable in trespass."

In 1801 Lord Chief Justice Kenyon in delivering judgment in *Haycraft v. Creasy*, 2 East at p. 103, remarked that according to Lord Bacon's maxims there was a distinction with respect to answering *civiliter et criminaliter* for acts injurious to others; in the latter case, the maxim *actus non facit reum nisi mens sit rea*, applied; but it was otherwise in civil actions, where the intent was immaterial if the act done were injurious to another.

This holding of Lord Chief Justice Kenyon was on the lines of the judgment of the case reported by Lord Chief Justice Hobart over one hundred and fifty years before. Since

the case of *Haycraft v. Creasy*, no English case can be found where the question came squarely before the Court for consideration.

The reporter in *Barradaile v. Hunter* (1843), 5 M. & G., at p. 669, in commenting upon the judgment of the Court, remarked:—"No distinction appears to have been taken in this case between criminal and civil liability. If an insane person kills a man he is not criminally liable; but if he slaughters his neighbour's sheep he is liable in damages to the owner."

The first Canadian case in which the question was considered is that of *Taggard v. Innes* (1862), 12 C.P. 77. This action was brought for an alleged assault. In addition to the pleas of "not guilty," and "son assault desmesne," there was entered as a third plea, that the defendant was and is a lunatic. The plaintiff demurred to the last mentioned plea, on the ground that lunacy is no defence to an action for a tort. The demurrer was allowed.

Chief Justice Draper, in delivering the judgment of the Court, said:—"It appears to me that the authorities are very clear in the plaintiff's favour, and establish a plain distinction between civil and criminal liability. Thus in Hale P. C. 38, a difference is taken between civil actions that are in *compensationem damni illati*, and criminal prosecutions which are in *vindictam criminis commissi*. In Co. Litt. 247a, it is said: 'If an idiot make a feoffment in fee he shall in pleading never avoid it by saying that he was an idiot at the time of his feoffment.' And in *Beverley's case*, 4 Co. 123, it is laid down that no man of full age shall, in any plea to be pleaded by him, be received by the law to stultify himself and disable his own person. And again in *Haycraft v. Creasy*, 2 East 104, where Lord Kenyon observes he had learned from Lord Bacon's maxims a distinction between answering *civiliter et criminaliter* for acts injurious to others—in the latter case the maxim applied *actus non facit reum nisi mens sit rea*—but it was otherwise in civil actions where the intent was immaterial if the act done were injurious to another. In Bac. Abr., Title Trespass G., it is said, wherever a person receives

an injury by an act of immediate force, it is a trespass voluntary or involuntary. And in the same work, Title Idiot E.; there is a statement to a like effect."

The only other Canadian case is that of *Stanley v. Hayes* (1904), 8 O. L. R. 81. In this case a lunatic was held to be civilly liable in damages for setting fire to the plaintiff's barn. The trial Judge, Boyd, C., held that the correct result of the common law was stated by Gray, C.J., in *Morain v. Devlin*, 132 Mass. 87, hereinafter referred to, and assessed the damages at \$2,237 and costs of action. He found that, as a matter of fact, the defendant was not so bereft of reason as to be incompetent at the time to know and in some measure to appreciate what he was doing. Boyd, C., in delivering his judgment, referred to a New Zealand case, *Donaghy v. Brennan* (1900), 19 N. Z. L. R. 289, in which the Court held, in a considered judgment, that insanity is not a defence in an action claiming damages for an assault.

American cases follow the English and do not throw much additional light upon the subject.

In *Bullock v. Babcock*, 3 Wend. (N. Y. 1829), Marcy, J., in delivering the judgment of the Court, at p. 393, said:—"The liability to answer in damages for trespass does not depend upon the mind or capacity of the actors; for idiots and lunatics, as we see by the case reported in Hobart, are responsible in the action of trespass for injuries inflicted by them."

Chief Justice Gray, in *Morain v. Devlin* (1882), 132 Mass. at p. 88, said:—"By the common law, as generally stated in the books, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, although, being incapable of criminal intent, he is not liable to indictment and punishment," citing *Weaver v. Ward*, Hob. 134; *Bacon's Abr.*, Idiots and Lunatics; *Haycraft v. Creasy*, 2 East 92, at p. 104; *Bullock v. Babcock*, 3 Wendell 391, 393, 394.

It has been held by some American Courts that in actions against an insane person for a tort, the damages are limited to the actual loss sustained; that punitive or exemplary damages are not recoverable. See *Krom v. Schoomaker*, 3 Barb. (N.Y.) 647; also see *Jewell v. Colby* (1891), 24 Atlantic Reporter 902 (Sup. Court, New Hampshire).

There are also American cases to the effect that while an insane person is liable for his torts the same as a sane person, yet in an action for slander, since malice is an element of slander, he is not liable if at the time of speaking the defamatory words he is totally deranged, or the victim of some hallucination on the matter to which the words related.

It will be seen that many of the deductions of text writers are mere conjectures. Pope, in his excellent work on Lunacy, in treating of the responsibility of lunatics for civil delicts, lays down the broad proposition, that if an insane person commit a trespass or other offence against the person or property of another, he is responsible for it, and may be compelled to make satisfaction in damages, and in such a case the intention is immaterial, if the act done is prejudicial. On the other hand, it will be seen in reference to Clerk & Lindsell above quoted, that if a lunatic commit a trespass while in a state of frenzy he will not be liable any more than a sane person who does a similar act while under the influence of sudden terror which deprives him of all power of deliberate choice. They further think a lunatic could not be sued for libel if he were insane upon the subject to which the libel relates; but if he were sane on that subject, and insane on others, he ought to be held answerable in damages. This is their mere conjecture, for they say there is no authority on the point to be found in the books.

Insanity implies the absence of will and intention, and, if so, what of the dictum of Pope, that intention is immaterial? Does the question rest with the jury to decide as to the degree of mental unsoundness which renders a lunatic responsible for his civil delicts? If so, where is the dividing

line to be drawn? If a raving madman, breaking through every restraint, inflict, when in a state of frenzy, personal injury, is he responsible for the civil delict, and if not, at what stage in his course towards insanity does he cease to be liable?

The general result of the cases and dicta referred to, which are not by any means satisfactory, may be briefly summarized as follows:

1. English reported cases.

The English cases, and there are none of recent date, incline to the view that the defence of insanity in tort is not available. Such is the law as laid down in Bacon's Abridgment. In the Digests and Reports of Nova Scotia and New Brunswick, no case can be found in which the defence of lunacy or insanity has been set up in an action of tort. The cases of Taggard v. Innes and Stanley v. Hayes above referred to seem the only ones in which the question was considered in the Courts of Ontario.

2. United States Courts.

Some of the Courts of the United States have carried the law beyond the English decisions.

The Courts of New York and New Hampshire have held, as already stated, that in an action of tort against an insane person, only compensatory, and not punitive or vindictive damages, can be recovered.

Also some of the United States Courts have held that if at the time of speaking defamatory words, a person is the victim of insane delusions, or his mind is totally deranged, he is not liable in damages in tort, on the ground that he is not capable of malice, since malice actual or implied is an element of slander. And further, if at the time of uttering the words he was not totally insane, the unsound condition of his mind may be given in evidence in mitigation of damages.

The Courts of Massachusetts and New York have held that an insane person is liable for injuries caused by tortious neglect, whether of nonfeasance or of misfeasance, on the

principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it. However, in a very recent New York case, *Williams v. Hays*, 157 N. Y. 541, it was held, that the master of a vessel who became physically exhausted and was driven temporarily insane by his efforts to save his ship from the perils of a storm, was not liable for the consequences of negligence resulting from such insanity.

### 3. Conflicting views of text writers.

We have already given examples of the unsatisfactory opinions of text writers who venture to lay down the law when not under the guidance of decisions of competent courts. In this connection we will cite but one more instance. The text writer is A. Wood Renton, who, in 1896, published a remarkably able and complete treatise on lunacy, a book which has already become the standard work on the subject. Mr. Renton takes the view that insanity is a good defence in an action of tort if it be proved that the defendant is so insane as not to know the motive and consequence of his act.

### 4. Obiter dicta.

While we cannot find in late reports any "express ruling" on this vexed question, the obiter dicta of able Judges are to be found here and there.

In *Hanbury v. Hanbury* (1892), 61 L. J. P. 116, Butt, J., said:—"I am not entirely satisfied that a mere plea of insanity is a sufficient answer to a suit. It may be that a person is so insane as to necessitate his or her confinement in an asylum or some other place of permanent detention; and the disease may be such that there is no hope of recovery or amelioration such as will allow of his or her discharge. When a disease of that sort seizes upon a person, and he or she has to be incarcerated or permanently to be placed in confinement, I should hesitate to say that in regard to an act committed in such a state of insanity a plea of insanity might not be an answer."

In *Mordaunt v. Mordaunt* (1870), 39 L. J. P. & M. at p. 59, Chief Baron Kelly, during the argument of counsel, in an obiter dictum gives expression to the opinion that "A lunatic is liable to an action for libel."

Mr. Beven holds that no case concludes the matter; and from the fact that liability has its root in some personal fault it points to the exoneration of one irresponsible for his act. He claims Dr. Wharton's view the correct one. See Beven on Negligence, 2nd ed., p. 55. In referring to the judgment in *Weaver v. Ward*, Mr. Beven proffers the query:—"Why, if a man by force take my hand and strike you, I should not be liable; while if a lunatic—not in the sense of one merely of defective intelligence, but of one wholly without intelligence—hurt a man, he is answerable?" And also, if a child so young and inexperienced as to be unable to exercise intelligent choice as to the subject matter is not responsible in damages for his torts, why should one entirely bereft of reason and incapable of exercising any choice be held answerable for his delicts?

And such then the decisions of courts on this perplexing question. And such the diversity of opinion among our ablest text writers. And such the obiter dicta of eminent Judges. And yet how small the aid this great array of legal talent affords in solving this long standing subject of controversy. At the end of our researches we find ourselves in the same state of mind as at the first, one of uncertainty and doubt, for still the question of the exact extent of the liability of a lunatic for tort is undetermined. Only the well considered judgment of a court of last resort, or the enactment by the High Court of Parliament of a code, harmonizing all controversial points, can give satisfaction to the profession and certainty to litigants.

SILAS ALWARD.

St. John, N. B.

## THE INTERIM RECEIPT IN FIRE INSURANCE.

The interim receipt in fire insurance is very similar to the slip in marine insurance, and strictly cannot be enforced until it is embodied in a policy. This is expressed by Garrow, J.A., in *Coulter v. Equity Fire Ins. Co.*, 9 O. L. R. at p. 39, as follows: The right to sue on the receipt is by virtue of the Judicature Act; "formerly . . . the remedy would have been in equity to compel delivery of a policy and consequential relief." See *Thompson v. Adams*, 23 Q. B. D. 361.

The receipt is usually as follows:—"Received from A. B. the sum                  premium for an insurance of \$                  on a policy of said company, to be issued for 12 months from this date on the following property (description of property), subject to the terms and conditions of the policy. C. D., Agent." Where the agent has not the power of issuing the policy himself and has to refer the risk to the head office, there is a stipulation that it only covers the property for so many days or until the company give notification of the declination of the risk.

The fact that no policy is issued does not preclude the company from objecting on the ground of alienation by mortgage or otherwise according to the usual condition, as it might be indorsed on the interim receipt, as "policy" means insurance or some equivalent: *Patterson v. Royal Ins. Co.*, 14 Gr. 169. See also *Whitla v. Royal Ins. Co.*, 22 Occ. N. 69, 72, 266, 14 Man. L. R. 90.

The receipt incorporates the conditions of the policy and includes the statutory conditions, even though the Ontario statute provides that any change from the statutory conditions must be printed in red ink: *Compton v. Mercantile Ins. Co.*, 27 Gr. 334; *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 96.



An immaterial variation in the condition does not invalidate the condition. The interim receipt provided for the issue of a policy subject to the terms and conditions contained in policies of the company issued at the date of the receipt. The policy differed somewhat from the form put in evidence as that used at the date in question, but in no respect as to the condition upon which the issue was raised: *Coleman v. Economical Mutual Fire Ins. Co.*, 4 O. W. R. 466, 5 O. W. R. 79. See also *Jones v. Provincial Ins. Co.*, 16 U. C. R. 477; *Penley v. Beacon Assce. Co.*, 7 Gr. 130.

If the interim receipt is wider than the policy afterwards issued, the insured may rely on the receipt and recover for all the goods: *Wyld v. Liverpool, etc., Co.*, 23 Gr. 442. Upon appeal to the Supreme Court of Canada it was held that the application, interim receipt, and policy should be read together, and that they established a contract which embraced the goods claimed, and that notwithstanding the insured accepted the policy: 1 S. C. R. 604.

Where notification declining the risk is required in the interim receipt, it must be given within the time specified, and a ratable proportion of the premium tendered before the company can terminate the insurance: *Grant v. Reliance Mutual Fire Ins. Co.*, 44 U. C. R. 229.

The insured, under an interim receipt good for 30 days, can sue thereon even though the 30 days have expired before the fire, unless the company give notice to him and offer a pro rata return of the premium paid, both by virtue of the statutory conditions and on the ground of equitable estoppel: *Coulter v. Equity Fire Ins. Co.*, 7 O. L. R. 180, 9 O. L. R. 35. The receipt binds the company until a good notification and return of premium, that the receipt merely enabled the company to put an end to the contract: *Kelly v. Isolated Risk and Farmers' Fire Ins. Co.*, 26 C. P. 299.

Where the notification had been mailed by the company properly addressed, and the insured swore he had never received it, the Court held that it was for the jury, who should

have found that it had been mailed: *Johnson v. Provincial Ins. Co.*, 27 C. P. 464.

If the agent issues an interim receipt, the property to be considered insured until a notification of declination of the risk, and fails to forward receipt to head office, he cannot issue other receipts on same risk and bind the company: *Patterson v. Royal Ins. Co.*, 14 Gr. 169.

It might be that where an interim receipt was issued subject to approval within so many days, this would be extra insurance within a condition making the policy void if no notification thereof and indorsement on the policy, for the party is insured until declination. In *Temple v. Western Assee. Co.*, 35 N. B. R. 171, 31 S. C. R. 373, and *Commercial Union Assee. Co. v. Temple*, 29 S. C. R. 206, there was only an application for extra insurance, the acceptance of which did not reach insured until after a fire had occurred. In *Whitla v. Royal Ins. Co.*, 22 Occ. N. 69, and *Whitla v. Manitoba*, *ibid.* 72, it was held, where there was an application for insurance, insured intending to abandon an insurance in the Manitoba company, and the agent issued an interim receipt and received the premium, that, although the language of the receipt to some extent imported a present contract, it was in reality executory only, that it was not an insurance, owing to the fact that the former insurance in the Manitoba company had not been abandoned, and that the Manitoba company were liable, there being in fact no extra insurance on account of such non-abandonment.

EDMUND G. KAYE.

St. John, N. B.

## RECENT CASES FROM THE TIMES REPORTS.\*

**Accord and Satisfaction.**]—The judgment in *Nathan v. Ogdens*, 21 T. L. R. 775, noted 25 C. L. T. 531, holding that an acceptance of a cheque marked as being the recipient's share of a "final bonus distribution" was not an accord and satisfaction of the recipient's claims, there being no intention to waive them, has been affirmed by the Court of Appeal: 22 T. L. R. 57.

**Arbitration.**]—Section 12 of the Arbitration Act, which is the same as R. S. O. 1897 c. 62, s. 13, provides that "an award on a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect." In *China Steam Navigation Co. v. Van Laun*, 22 T. L. R. 26, it was held that obtaining an order under this section to enforce an award is not a bar to an action upon the award.

**Attachment of the Person.**]—In *Townend v. Townend*, 22 T. L. R. 50, an order had been made requiring the respondent in a divorce action to "attend before one of the registrars for the purpose of being examined," and upon the order was subsequently indorsed by one of the registrars an appointment fixing a time and place for the examination. It was held that this was not a compliance with the provisions of Order 41, Rule 5 (see Con. Rule 854), for under that Rule an order requiring an act to be done must itself limit the time within which the act is to be done, and a warning of the possible consequences of default must be given.

**Bailment.**]—*Phipps v. New Claridge's Hotel*, 22 T. L. R. 49, deals with the question of onus of proof in the case of

\*Including the cases in No. 5, Vol. 22, week ending November 28, 1905.

goods lost while in the hands of a bailee, and decides that if the bailor shews that the goods bailed were in the sole custody of the bailee and were not forthcoming when demanded, a *prima facie* case is made, and the onus is shifted to the bailee to shew that there has been no negligence on his part.

**Building Covenant.**]—The lease in question in *Gibbon v. Payne*, 22 T. L. R. 54, demised to the lessee “all that messuage, coach-house, stable, and premises” known, etc., and the lessee covenanted that he would within six months “complete and finish to the reasonable satisfaction of the lessor the said messuage and buildings thereby demised,” and would keep in repair “all other buildings thereby demised.” The lot in question was one of a number of lots subject to a building scheme, and as part of the general scheme a coach-house and stable were to have been built on this lot. The scheme was modified, however, and the coach-house and stable were not built, and the land upon which they were to have been built was used as part of the gardens of three adjoining houses. It was held that there had been in effect a release of the covenants as far as the coach-house and stable were concerned, and that an assignee of the lessor had no right of action for their alleged breach.—*Molyneux v. Richard*, 22 T. L. R. 76, also deals with a building lease, and it was there held that a covenant to build seven dwelling-houses “similar to the messuages or dwelling-houses and premises erected in” an adjoining street, was sufficiently definite to be enforced, although the houses in the adjoining street were not all of exactly the same size and pattern. It was also held that mortgagees of the reversion were entitled to enforce the covenant.

**Church.**]—In *Morley v. Makin*, 22 T. L. R. 7, the deacons of a Baptist church, who had signed a document inviting the plaintiff to become the minister thereof at a stated salary, were held not to be personally liable to pay to the plaintiff arrears of his salary, the contention that they had in effect

contracted as agents for undisclosed principals (the members of the congregation) not being given effect to.

**Company.]**—In *Chida Mines v. Anderson*, 22 T. L. R. 27, it was decided that a transfer of shares entered in the company's register by the secretary before it had been approved of by the directors was not binding, and that the transferor was liable for calls, the secretary swearing that he had made the entry without authority in the expectation that the transfer would be approved of and merely for the purpose of keeping pace with his work.—The judgment in *In re West Coast Gold Fields*, 21 T. L. R. 375, noted 25 C. L. T. 269, holding that the trustee in bankruptcy of a contributory upon whose estate the company has ranked for calls and has received a dividend, cannot in the subsequent distribution of assets of the company have the bankrupt's shares treated for the purpose of ranking as paid up, but can claim only the proportion of assets applicable after other shareholders have been repaid the excess paid by them, has been affirmed by the Court of Appeal: 22 T. L. R. 39.—The judgment in *In re Risdon Iron and Locomotive Works*, 21 T. L. R. 179, noted 25 C. L. T. 132, has also been affirmed by the Court of Appeal: 22 T. L. R. 45; the point being that unlimited liability of shareholders according to the law of a foreign state does not override the protection afforded by the valid incorporation of an English company with the fundamental principle of limited liability.

**Contract.]**—The coronation case of *Elliott v. Crutchley* has reached the House of Lords: 22 T. L. R. 83; and the judgment of the Court of Appeal, 20 T. L. R. 286, has been affirmed. The plaintiff had agreed with the defendants to do the catering on a steamer hired by the defendants for the naval review. The contract provided for payment to the plaintiff of £300 on a named date, but there was a further provision that in the event of cancellation of the review before expense was incurred there should be no liability on

the defendants' part. The review was cancelled after a cheque for £300 had been given to the plaintiff, but payment of this had been stopped. It was held that the plaintiff was entitled to recover only the amount of certain expenses incurred before cancellation.

**Criminal Law.]**—It is not, it is decided in *The King v. Barracrough*, 22 T. L. R. 41, essential that an indictment for publication of an obscene libel, should allege that the publication was to the manifest corruption of the morals of his Majesty's subjects, though it is advisable to insert these words. —Under the Falsification of Accounts Act the book, document, or account, in which the false entry is alleged to have been made, must, it is held in *The King v. Palin*, 22 T. L. R. 41, be one belonging to or in the possession of the employer, or received by the accused servant on his behalf.

**Crown.]**—In *Secretary of State for War v. Wynne*, 22 T. L. R. 8, is decided the short point that goods belonging to the Crown, which are upon land leased by a person temporarily in possession of the goods in question, are not liable to be distrained for rent due by that person to his landlord. —The well known principle of the non-liability of the head of a department of state for the negligence of his subordinates is held in *Bainbridge v. Postmaster-General*, 22 T. L. R. 70, not to have been altered as regards the Imperial Postmaster-General, by the provisions of the Telegraph Acts of 1868 and 1878. The alleged negligence consisted in want of care in repairing a footway after the laying of some telegraph wires.

**Damages.]**—The judgment in *Weinberg v. Ogdens*, 21 T. L. R. 778, noted 25 C. L. T. 533, has been reversed (22 T. L. R. 58) by the Court of Appeal, who held that a claim for damages for breach of a contract to distribute profits among customers, passed under an assignment by a customer's trustee in bankruptcy to the plaintiff of the bankrupt's business and goodwill and the "plant, stock-in-trade, book and

other debts, securities, moneys, credits, effects, contracts, and engagements to which the vendor is entitled as trustee in connection with the said business." The decision is based mainly on the ground that the contract, though it had been broken, was still a subsisting contract, and therefore that all rights under it, including the right to damages, passed under the word "contracts." The right also passed, it was thought, under the words "effects" and "goodwill."

**Distribution of Estates.]**—It is decided in *In re Gist, Gist v. Timbrill*, 22 T. L. R. 35, that under the Statute of Distributions the children of a deceased brother or sister of an intestate take in their own right, and not merely the share which their deceased parent would have taken had he or she survived. The result in this case was that advances made in the intestate's lifetime to a deceased sister were not brought into hotchpot in ascertaining the share of that deceased sister's children.

**Evidence.]**—*Beresford v. Justices of St. Albans*, 22 T. L. R. 1, raises a practical question as to evidence under the Motor Car Act. The defendant was convicted of the offence of driving a motor car at a rate exceeding the statutory limit, the evidence being that the car in question passed a certain milestone at a certain hour and that it arrived at another milestone four miles away at a certain hour, and that the defendant was then driving the car. It was held that the justices, in the absence of any evidence to the contrary, were justified in inferring that the defendant had driven the car the whole distance in question, and, as the car must have been driven at a rate exceeding the statutory limit, in convicting him.—It is decided in *Dawson v. Dawson*, 22 T. L. R. 52, an action for dissolution of marriage, that evidence of the wife of a statement made to her as to the nature of an illness from which she was suffering by a medical man whom she had consulted, and who had died before the trial, was not admissible, there being no legal duty imposed upon a medical man to make such a statement.

**Expropriation.]**—It was decided in *In re Furness and Willesden Urban District Council*, 22 T. L. R. 52, that proceedings under the Lands Clauses Act to expropriate part of an estate which had been leased by the owners under a building lease providing for the building of a number of houses, did not put an end to that lease in toto, but only as to the part of the estate expropriated.

**False Trade Description.]**—A chemically true description may, it is held in *Fowler v. Cripps*, 22 T. L. R. 73, be false as a trade description. The defendant sold as “soda crystals” a compound of crystallized carbonate of soda and crystallized sulphate of soda, while in the trade the description “soda crystals” was usually applied to crystallized carbonate of soda—washing soda. His conviction under the Act was upheld.

**Highway.]**—In *Mayor of Chichester v. Foster*, 22 T. L. R. 18, the owner of a very heavy traction engine was held liable for damage done by the weight of the engine to mains laid under a highway along which it was passing, the mains having been laid in such a way as to be protected from injury from any ordinary traffic.

**Interest.]**—In affirming the judgment of the Court of Appeal for Ontario, the Judicial Committee in *Toronto Railway Co. v. City of Toronto*, 22 T. L. R. 32, point out the important difference between the Ontario statute as to interest (R. S. O. 1897 c. 51, s. 113) and the English Act, and state the principle of allowance under the former Act to be that “in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right.”

**Life Insurance.]**—*Molloy v. Mutual Reserve Life Ins. Co.*, 22 T. L. R. 59, is another case of rescission of contract



(fifteen years old) and repayment of premiums, following *Mutual Reserve Life Ins. Co. v. Foster*, 20 T. L. R. 715, the only question being whether there had been such delay and acquiescence as to bar the plaintiff's rights, a question of fact decided on the evidence in his favour.

**London Water Commissioners.]**—The judgment of the Judicial Committee in *Saunby v. London Water Commissioners*, reversing that of the Supreme Court of Canada, 34 S. C. R. 650, and restoring that of the Court of Appeal for Ontario, with a variation limiting the damages to those suffered within six months prior to the bringing of the action, is reported 22 T. L. R. 37.

**Municipal Corporations.]**—In *Stanbury v. Mayor of Exeter*, 22 T. L. R. 3, the defendants were held not to be liable for the negligent act of a veterinary inspector appointed by them under the provisions of the Diseases of Animals Act, the distinction being that the inspector was not an agent of the corporation, but though appointed by them was bound to perform statutory duties as to which they had no control. The case is not unlike *Forsyth v. Canniff*, 20 O. R. 478 (medical health officer's alleged negligence) and that case was cited by counsel for the defendants, one of the few instances of the citation to an English Court of a Canadian decision.—Very pronounced was the negligence of the defendants in *Mayor of Hawthorn v. Kannalink*, 22 T. L. R. 28, and the Judicial Committee had little difficulty in affirming the judgment of the Supreme Court of Victoria, holding the defendants liable in damages for the flooding of the plaintiff's land with sewage and water, carried down a sewer which had proved on several occasions to be of insufficient capacity; a feature which easily distinguishes the case from *Garfield v. City of Toronto*, 22 A. R. 128, where the flooding was the result of an unprecedented rainfall.

**Principal and Agent.]**—An agreement to pay a certain extra commission in the event of the sale of a property being

“completed” by a certain date by a definite offer and acceptance, is not, it is decided in *Henry v. Gregory*, 22 T. L. R. 53, satisfied where an offer to purchase is made subject to a proposed examination being satisfactory to the intending purchaser, and without any bad faith or intentional delay a definite agreement to purchase is not made by the time limited.

**Statutes.]**—Though not dealing with a question of immediate interest, *The King v. Vasey*, 22 T. L. R. 1, is useful because of the clear recognition there of the principle stated in Maxwell, 4th ed., p. 344, that “where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence.” Accordingly in the case in hand the language of an amending section which, if read strictly and grammatically, would have completely defeated what was held to be the intention of the principal section, was re-arranged so as to carry out that intention.

**Striking out Pleadings.]**—The judgment in *Marchioness of Huntley v. Gaskell*, 21 T. L. R. 752, noted 25 C. L. T. 539, has been affirmed by the Court of Appeal: 22 T. L. R. 20.

**Vendor's Lien.]**—In *re Stucley, Stucley v. Kekewich*, 22 T. L. R. 33, is an important and interesting decision of the Court of Appeal as to the nature and extent of a vendor's lien. Such a lien it is held extends to personal property—in this case a reversionary interest in a legacy—and the vendor has a charge upon and interest in the sold property which he can enforce just as if it were a charge expressly given in writing. Interest runs upon the amount of the lien, and in the case of personalty there is no limitation applic-

able. The lien in the case in hand arose thirty years before action, and in enforcing it interest for the whole period was allowed.

**Will.]**—A bequest of the plate in each of two houses to the devisees of the respective houses was held in *In re Stamford*, 22 T. L. R. 81; to apply to the plate actually in the respective houses at the time of the testator's death, although there was in one of the houses at that time a large quantity usually kept in the other and transferred for temporary use shortly before the testator's death.

**Workmen's Compensation Act.]**—The plaintiff in *Morris v. Mayor of Lambeth*, 22 T. L. R. 22, was a night watchman employed to look after lights and tools during the construction of a sewer. There was a watch-box for his use. On the night in question he had a fire in front of his watch box, but as it was raining he went into a small shanty, which the workmen were in the habit of using, to cook his food. While so engaged the shanty fell and he was injured. It was held that as he had not been forbidden to use the shanty he could fairly be treated as being there in the course of his employment, and that, his presence in the shanty not having anything to do with causing it to fall on him, he was entitled to compensation.

## THE LATEST ONTARIO DECISIONS.\*

**Alimony.**]—In giving judgment in *Reynolds v. Reynolds*, 6 O. W. R. 782 (dismissing the action), Britton, J., said, in part: "The last alleged act of violence and cruelty which caused the entire separation between plaintiff and defendant occurred probably towards the spring of 1903. Plaintiff says . . . defendant took her by the shoulders and threw her out of the room. . . . Defendant admits putting her out of his room, but denies any force or violence other than what he thought was the slight force necessary. . . . Plaintiff's evidence does not establish to my satisfaction that she was thrown out of the room." "The evidence, especially plaintiff's letters written in 1900, 1901, and 1902, shews complete condonation of all that plaintiff complained of prior to the last assault and violence charged. I cannot, upon the evidence, find such violence and cruelty on the last occasion established as to entitle plaintiff to judgment." "The evidence does not, in my opinion, shew that plaintiff is in any danger in fact, or that she need be apprehensive of danger to her person or her health from any violence of defendant."

**Cheque.**]—The decision of Boyd, C., in *Bank of Ottawa v. Harty*, 6 O. W. R. 925, which was an action to recover from defendant Harty, a customer of plaintiffs, \$573, as the amount of an overdrawn account, and to recover from both defendants (Harty and McEwan) the same amount, being the balance due upon a cheque indorsed by McEwan and then by Harty and deposited to the credit of the latter, the amount of which was paid to plaintiffs by the bank upon which it was drawn, but afterwards charged back to plaintiffs by the other bank, upon discovery that the indorsement by McEwan was not that of the payee, turned upon a question of fact,

\*Short notes of the most important cases in volume VI. of the *Ontario Weekly Reporter*, Nos. 21, 22, 23, 24, pp. 769 to 960, inclusive.

that is, the failure of plaintiffs to prove that the defendant **McEwan** was not the real **McEwan** named in the cheque (they having sought to make a case by reading parts of the examination of **McEwan** for discovery, under Rule 461, as against his co-defendant **Harty**, which the Court considered they were not entitled to do), so rendering it unnecessary to decide the questions suggested by the situation.

**Company.**—On appeal by the plaintiff from the judgment of **MacMahon, J.**, in **Meyers v. Cain**, 6 O. W. R. 297, a Divisional Court (6 O. W. R. 834) held that the action (for an account of profits made by defendants, the president and treasurer of the **Lucknow Elevator Co., Limited**, under leases of the company's elevator in the village of **Lucknow**, entered into with the directors, including the defendants themselves), was not maintainable without the company being before the Court, and leave was given to the plaintiff, on terms, to amend by adding the company as a defendant.

**Constitutional Law.**—The conviction moved against in **Rex v. Meikleham**, 6 O. W. R. 945, was for allowing liquors to be sold on the steamer "**Greyhound**" of the city of **Detroit**, on Canadian waters adjacent to the harbour of the town of **Goderich** in the county of **Huron**, and the first five objections thereto involved an attack upon the authority of the province to enact clause 10 of the **Liquor License Act**. It was also objected that neither the evidence nor the conviction disclosed an offence. The judgment of a Divisional Court was delivered by **Meredith, C.J.**, who overruled the first five objections, pointing out that, since the province of **Ontario** extends to the international boundary line, and the subject matter was clearly one of those assigned to the provincial legislatures, **The Queen v. Keyn**, 13 Cox C. C. 403, was wholly inapplicable to this case, and that, since the limits of the county of **Huron** extend to the western boundary of the province (**B. N. A. Act** and **R. S. O. c. 3**), and the magistrate had jurisdiction over the whole of that country, he had, notwithstanding **The Queen v. Albert Sharp**, 5 P. R. 135, jurisdiction to

try the case, and the conviction could not be held to be bad, as not shewing jurisdiction, because the place in the county where the offence was committed was not stated with more particularity; and, furthermore, whether or not the license law of the province could be held to apply to a foreign ship travelling from one foreign port to another, and for some distance within the territory of Ontario. In this case the Greyhound was practically in the harbour of Goderich, and contravening the local law which prevailed there to the knowledge of the captain (the defendant). The Court was of opinion that the 6th objection was well taken, there being no such offence created by the Act as "allowing liquor to be sold, etc.," but, with some hesitation on the part of Meredith, C.J., who expressed doubts as to the applicability of s. 889 of the Criminal Code and as to whether the captain of the vessel was an occupant within s. 111, and whether any of the words mentioned in the section—"house, shop, room, or other place"—included a vessel, allowed an amendment so as to make the conviction for an offence under s.-s. 1 of s. 49.

**Costs.]**—On appeal by the defendant in *Mann v. Crittenden*, 6 O. W. R. 799, from the ruling of the senior taxing officer disallowing costs of examining for discovery more than one of the plaintiffs in an action, Anglin, J., said, in part: "Formerly the allowance or disallowance of such costs in High Court actions might be determined either by a Judge of the High Court or by the senior taxing officer, and it was then held that no appeal lay from such an adjudication by the senior taxing officer to a Judge in Chambers, because the jurisdiction conferred by Rule 1136, as it then stood, upon the senior taxing officer, was concurrent with that given to a Judge of the High Court. In my opinion, it was not intended that the change effected by Rule 1267, doing away with the original jurisdiction in this matter formerly vested in a Judge of the High Court, should render an adjudication of the senior taxing officer under Rule 1136 appealable; and I strongly incline to the view that from such a decision there

should be no appeal." Notice of appeal, if any, should be given within 4 days, and it should be returnable within 10 days, and the Court was of opinion that, having regard to the character of the decision complained of, no extension of time should be granted in this case.

**Criminal Law.]**—A reserved case having been refused by the trial Judge in *Rex v. Bennett*, 6 O. W. R. 835, upon the question whether there was evidence on which the jury could reasonably convict, an application was made to the Court of Appeal for leave to appeal and to have a case stated for the opinion of the Court, pursuant to the Criminal Code, when it was held that, while the proof given that the prisoner was in the vicinity of the house where the crime was committed, the correspondence of the hoof marks of the horse he was driving with the hoof marks observed near the fence and roadway leading to the house, the statement deposed to by the witness Robert Montin as having been made to him by the prisoner, that he was going to do something awful that night, and his fleeing from those who were sent to arrest him, might present no more than a case of suspicion, yet these and other circumstances and the fact of the finding of a letter, property of the prisoner, and in his possession up to 10 o'clock on the night of the murder, beside the body of the murdered woman, rendered it impossible to say that at the close of the case for the Crown, there was not evidence on which the jury might reasonably come to the conclusion that the prisoner was the person by whom the crime was committed.—The judgment of the Court of Appeal dismissing the appeal of the prisoner from the order of Meredith, C.J., remanding him to custody, in *Rex v. Walton*, 6 O. W. R. 905, was delivered by Osler, J.A., who held, in the first place, that the remedy for the illegal arrest and kidnapping of the prisoner in and from a foreign country, is by proceedings at the instance of the government of the foreign country whose laws have been violated or at the suit of the party injured against the trespasser. "If he is found in this country charged with a crime committed against its laws, it is the duty of our Courts to take



care that he shall be amenable to justice, subject of course to the provisions of the extradition laws, if he has been surrendered by the foreign state, and brought here as the result of proceedings duly taken under them." Secondly, whatever might be said as to the regularity and validity of the various proceedings and warrants under which the prisoner was originally taken and held, and even if up to the 13th November his detention was illegal, he was before the police magistrate on that day upon the two informations of 6th November, and there was nothing to affect the validity of the two remands of that day on those charges: *Regina v. Waters*, 12 Cox C. C. 390. These were sufficient for detaining the prisoner though made subsequently to the issue of the writ of habeas corpus: *Hurd on Habeas Corpus*, 2nd ed., p. 251; *Ex p. Dauncey*, 8 Jur. 829; *Re Carmichael*, 1 Can. L. J. N. S. 243. The case was distinguished from *Re Elmy v. Sawyer*, 1 A. & E. 843, because here there was "a new and independent warrant of commitment pending the preliminary investigation." —In *Rex v. Lacelle*, 6 O. W. R. 911, the charge was, under s. 181 of the Criminal Code, that the defendant had seduced and had illicit connection with a girl under 16 years of age and of previously chaste character. Complainant's evidence before the magistrate was that the offence was committed at Ladouceur's hotel in the township of Gloucester on 9th January, 1905, whereas her evidence before the county Judge, before whom the accused had elected to be tried without a jury, under s. 767 of the Code, was, that not only had she had connection with him there on that occasion, but that she had previously had connection with him at Rockcliffe in the same township some two miles distant from Ladouceur's, on the 3rd of the same month, and that this was her first connection with any man. An amendment was thereupon allowed, and, in spite of the objection of defendant's counsel, the privilege of a new election refused. The Judge reserved for the Court of Appeal the two questions: (1) whether he had power to make the amendment; and (2) whether the accused had the right to elect whether he would be tried on the amended

charge by the Judge or by a jury. The judgment of the Court was that both questions must be answered in the affirmative and the conviction quashed. Per Osler, J.A.: "If on the 9th January the girl was not of previously chaste character, that fact was an answer and complete defence to the charge. But when the charge was amended, and the date of the illicit connection shifted to the 3rd January, one of the facts involved in the case was different, and the question was whether the girl had then the status of chastity, and not whether that was her status on the 9th January. Upon the charge as thus amended, the prisoner's defence would necessarily be different, and he might not be prepared with evidence of the girl's unchastity at the earlier date." Cited, *Goodman v. Reginam*, 3 O. R. 18; *Rex v. Carriere*, 6 Can. Crim. Cas. 5.

**Damages.]**—In view of the fact that the evidence shewed that "the moulders and apprentices seduced by defendants were taken away at a time and under circumstances when it was practically impossible to replace them; that a shortage in the number of moulders at work in the foundry entails a lessening in the production of all the departments in which the product of the moulding department forms a basic material; and that the wrongs were committed at a season when it was of the utmost importance to plaintiffs that their shops should be fully manned and capable of serving out their maximum output," Anglin, J., on appeal by defendants and cross-appeal by plaintiffs from the report upon a reference for trial of an action for damages for enticing away and harbouring of plaintiffs' servants by defendants, in *Gurney Foundry Co. v. Western Foundry Co.*, 6 O. W. R. 959, refused to disturb the award of \$2,000 damages, according to it the same consideration as would be accorded to the verdict of a jury, defendants not being able to shew that the referee proceeded on any erroneous principle in arriving at the amount awarded.

**Defamation.]**—The words complained of in *Crate v. McCallum*, 6 O. W. R. 825, charged a criminal offence, and the defendant pleaded not guilty, justification, and that the communication was privileged, and on appeal to a Divisional Court from the judgment of Anglin, J., in favour of the plaintiff, contended (a) that as the words were spoken of plaintiff in connection with the performance of his duty as assessor, no action would lie, special damage not being shewn, unless the plaintiff occupied the office at the time the words were spoken; (b) that it was incompetent for the plaintiff to rely upon the language of the defamatory words themselves for the purpose of shewing malice on the part of the defendant; and (c) that the jury, instead of being instructed that the onus was upon the plaintiff to prove malice, were left, in effect, to find whether the defendant had established that he acted bona fide and without malice. The judgment of the Court dismissing the appeal was delivered by Meredith, C.J., who considered the first two objections unfounded, saying of the first: "The proposition that it is possible with impunity to charge with a criminal offence one who has occupied an official position, the offence being charged to have been committed while acting in his official capacity, simply because the man has ceased at the time the words were spoken to occupy the office and is unable to prove special damage, is an extraordinary one and wholly unsupported either on principle or by authority." And of the second, that, on the later authorities, the Court, in determining whether there was any evidence of malice to go to the jury, had to consider whether there was such excess beyond the absolute exigency of the case, as would warrant the jury in inferring malice. A test of such excess is the relevancy of the charge to the subject matter of discussion at the time. The third objection was also overruled, the Court being of opinion that any error in the Judge's charge was corrected in the supplemental charge made after the objections had been taken by the defendant's counsel.

**Judgment Debtor.]**—Without deciding the question whether or not the Ditzel Metal Co., garnishees, ordered to pay their debt to the plaintiff in *Roaf v. Ditzel*, 6 O. W. R. 931, were “judgment debtors” to the plaintiff, though inclined to take the affirmative view, the Master in Chambers held that one Mallon, who was alleged to be in possession of \$250 which he should have paid over to the company, of which he was a director, was not liable to be examined, under Rules 903 and 904, because “the alleged claim against Mr. Mallon, even if sustainable, was not ‘property exigible under execution.’”

**Master and Servant.]**—In *Basso v. Grand Trunk R. W. Co.*, 6 O. W. R. 893, an action for damages for the death of an employee of defendants occasioned by their negligence, the main question was whether the whistle of defendants’ locomotive was sounded before the train was put in motion. On appeal to the Court of Appeal from the order of a Divisional Court (6 O. W. R. 172), dismissing defendants’ motion to set aside verdict and judgment of Anglin, J., Meredith, J.A., who delivered the judgment of that Court dismissing the appeal, considered that, while the evidence for plaintiff on this point was open to the objection that it was purely negative in character, this objection was met by the fact that “of the 10 witnesses who gave evidence for the defendants, but 4 testified that the whistle was sounded, and they were all members of the train’s crew, nearly all of the others testifying that they heard no signal or warning, and there was the evidence of men other than deceased being thrown down—a probable thing if no warning were given, an improbable one if it were given.” The fact that the witnesses who testified that they did not hear or see any signal were not asked whether they would have heard or seen it if given, was considered unimportant since it could “hardly need evidence that on a summer day, in rural quietude, men working not very many car lengths from the engine could hear the sound of the whistle or bell, the signal intended to protect them

from injury.”——The verdict of \$2,000 in *Belmont v. Smart Manufacturing Co.*, 6 O. W. R. 942, was reduced to \$1,500, the largest sum recoverable under the Workmen’s Compensation Act, by a Divisional Court, on the grounds that the only negligence established by the evidence was that of defendants’ foreman in not obtaining a loose pulling to attach to the shaft of the “rumbler” which caused the injury, that the foreman was a competent man, and that there was no attempt made at the trial to bring home personal negligence to the defendants, so as to establish liability at common law: *Hutchinson v. Newcastle, etc., R. W. Co.*, 5 Ex. 343; *Wigmore v. Jay*, ib. 354; *Lovegrove v. London, etc., R. W. Co.*, ib. 669; *Gallagher v. Piper*, ib. 669.

**Municipal Corporations.]**—On motion to quash a by-law of the town council of Napanee for the establishment of a municipal electric light plant, in *Re Cartwright and Town of Napanee*, 6 O. W. R. 773, it appeared that there were certain imputations connected with the passing of the by-law in question, consisting in the omission of certain requirements of s. 569 (5) of the Consolidated Municipal Act, which brought it within the category of invalid ones which can become validated. In refusing to make the order Meredith, J., considered the following facts: that the by-law in question was opposed really only in the interests of a rival company; that no one was prejudiced by the irregularities; that there was delay in making the application; that extensive operations under the by-law had taken place; and that nothing was to be gained by granting the order, as the ratepayers were almost unanimously in favour of it and it would result in “compelling the respondents to march up the hill merely to march down again at their will.” The words “may quash” in sec. 378 of the Act are merely enabling or creative of the power to quash and not indicative of the permissive or imperative character of the jurisdiction conferred. This jurisdiction ought to be exercised in every case of an illegal by-law which cannot be validated, and, generally speaking, in the case

of irregularities which can be cured, only in case they may have affected the passing of the by-law.—Pursuant to the requirements of 3 Edw. VII. c. 38, s. 1, and 5 Edw. VII. c. 13, s. 25, the defendant corporation in *Marcartney v. County of Haldimand*, 6 O. W. R. 805, passed a by-law to buy a farm; advertised for and received tenders; accepted plaintiff's tender; obtained the approval of the Government; appointed a committee to complete the purchase; prepared a deed which was duly executed by plaintiff and registered by them; and handed a cheque signed by the treasurer, on the order of the warden, to their solicitor, ready for delivery to the plaintiff's solicitor. The new council for 1905 refused to carry out the purchase, and reconveyed the farm to the plaintiff, whereupon he brought action to recover the purchase price. Clute, J., was of opinion that the by-law authorizing the deed executed by the defendants, while not regularly passed, tended to shew that the contract was completed and the land vested in the defendants, and, in view of the provisions of the enactments referred to, and the fact that defendants' committee had reported that the purchase was completed, gave judgment in favour of the plaintiff, notwithstanding the defendants' contentions that the alleged contract was not authorized by by-law and not binding on them, that the committee had no authority to bind the defendants, that the cheque was issued without authority, and that plaintiff's claim was in respect of a debt incurred in 1904, not within the ordinary expenditure, and that no provision was made for and there were no moneys out of which to pay it; holding (after some doubt), on the authority of *Bernardin v. Municipality of North Dufferin*, 19 S. C. R. 581, and *Lawford v. Villeriacy Rural District Council*, [1903] 1 K. B. 772, that the case was within the exception that a corporation is liable on an executed contract, within the purpose for which it was created, and which it has adopted, and of which it has received the benefit, though not executed under its corporate seal, and that the same rule applies to a contract

for the purchase of land; a fair inference from the evidence was that the land was to be paid for out of current revenues, and there was no evidence to shew that the cheque would not have been paid if presented; and the Statute of Frauds was no defence.—The question raised in *United Counties of Northumberland and Durham v. Townships of Hamilton and Haldimand*, 6 O. W. R. 814, was whether certain costs of proceedings to expropriate the Grafton toll road under the Ontario statutes of 1901 and 1902, 1 Edw. VII. c. 33, as amended by 2 Edw. VII. c. 35, should be recouped to them by the defendants. Under the statute the county council “is the sole actor on one side of the arbitration proceedings, as against the road company on the other. Pending the inquiry, the townships had assisted with counsel and witnesses, and for this they made full payment. In giving judgment Boyd, C., said, in part: “I can see no ground upon which to rest such a judgment against the townships. The costs and expenses were incurred by the counties under the mandate of the law, and the law has not provided for unloading these on the townships—who are really no more than interested bystanders. There must be found something in the statutes to implicate the townships in liability for the costs incurred by the county. The townships have paid such outlay as they incurred or sanctioned—but I find no evidence that they instigated or promoted the petitions, or that they sanctioned or are impliedly liable for what was expended by the counties in this abortive arbitration.”—Statements in the affidavit of the mayor of the town of Ingersoll shewing that he had refused to sign both a by-law and contract for the lighting of the town by gas, were held by Meredith, C.J., in *Re Kennedy and Boles*, 6 O. W. R. 836, to be sufficient, on a motion for a summary order of mandamus to the mayor to sign the by-law and contract, to dispense with the necessity of a demand and refusal. Since “the Municipal Act makes necessary to the validity of a by-law that it be signed by the mayor or member of the council who was presiding officer when it was passed, and



provides no machinery for the by-law being signed by anyone else when the mayor or presiding officer refuses to sign," the applicant had no other remedy, and was, therefore, not disentitled to the extraordinary one which he sought.—The action of *Ottawa Electric Co. v. City of Ottawa*, 6 O. W. R. 930, for a declaration that certain by-laws of the defendants authorizing the purchase and sale of electrical energy were ultra vires, and for an injunction and other relief, was dismissed by Boyd, C., on the grounds that the statute on which the city's right was founded (57 V. c. 74), contains evidence in gremio, in the references therein to R. S. O. 1887 c. 191, and the Municipal Act, 1892, c. 42, s. 447 (a), that the powers given "to produce, manufacture, and use and supply to others to be used, electricity," are to be read distinctively; it was in furtherance of the primary object to acquire the plant of a going concern by which electrical power was supplied to the city and the inhabitants—leaving it for the future to determine whether to establish works for the production of electrical power: *The Norwegian Titanic Iron Co.*, 35 Beav. 223, 225; *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. C. 712, 718; *Macdougall v. Jersey Imperial Hotel Co.*, 2 H. & M. 528, 535. The clauses in the Municipal Act, 1903, pleaded, had no application by virtue of s. 566, s.-s. 4 (b), to the city of Ottawa; and, "generally, as to this kind of legislation . . . the powers intrusted to the municipality are not subject to a strict and restrictive construction; *Galloway v. Mayor and Commonalty of London*, L. R. 1 H. L. 35."

**Negligence.]**—The plaintiff in *Preston v. Toronto R. W. Co.*, 6 O. W. R. 787, was riding down Yonge street, Toronto, on his bicycle, behind one of defendants' cars, and was about 15 or 20 feet behind it when the car stopped. He turned to the east, and, before he could get out of its way, was struck by an up-bound car and received injuries for which the action was brought. His explanation was that he looked to the right with the intention of passing the car on that side, but this

was impossible on account of an accumulation of snow. He felt it necessary at once to decide upon some other course, and not seeing any car approaching on the other track, and listening for and not hearing the gong, concluded that no up-bound car was near and that he might with safety proceed along the east track. An appeal by the plaintiff from the judgment of Boyd, C., dismissing the action, was allowed and a new trial ordered by a Divisional Court for reasons set out in the judgment delivered by Mulock, C.J., namely: the fact that there was no statutory duty upon defendants to sound the gong, was not conclusive on the question of negligence; the defendants had not an exclusive use of the streets, and were bound to adopt reasonable precautions to prevent accidents; they had adopted a rule providing for the ringing of the gong when passing another car, which must be considered an admission as to its reasonableness; the plaintiff had put himself in a position of danger, but that was not *per se* negligence; there was evidence from which the jury might have concluded, if the matter had been left to them, that the injury to plaintiff was caused by the omission to ring the gong, and also evidence from which they might have found that the injury was attributable directly to his own negligence.—The plaintiff in *McAuliffe v. County of Welland*, 6 O. W. R. 819, alleged that the defendants in reconstructing a bridge across the Welland river, a navigable stream, left in the channel a number of piles, cut off below the water, so that they could not be seen, and that, in navigating the river, plaintiff's tug "Michael Davitt" ran on these, sustaining the damages sued for. The defence was that the defendants did not leave the piles there; that they were there before the reconstruction and left there by the contractor; that plaintiff's captain should not have tried to run through the north channel (where the piles were); and that the captain had been warned that his channel was not navigable. It appeared from the evidence that the captain, who had formerly known the river, inquired at the custom house as to changes and was informed that there were none, and that,

owing to the wind, he did not hear the warning of the bridge-man that the channel in question was not navigable. It was contended on behalf of defendants that the obstruction was one that should have been removed by the Dominion Government, and that the neglect of the defendants to remove it was mere nonfeasance. Clute, J., however, deemed it unnecessary to decide these questions, because, had the piles been left as they were, no damage would have resulted; but defendants provided in their contract for their removal, and, as a matter of fact, they were cut off 4 feet below the surface with the approval of the defendants' engineer, inspector, and warden, who were present at the time and consulted as to the manner in which they should be removed, being thereby guilty of negligence, through these authorized agents, in carrying out the duty they assumed, and, therefore, liable unless the defence of contributory negligence relieved them. As to this, the Judge, notwithstanding the conflict of evidence, a number of experienced lake captains declaring that they would and a number of others that they would not have done as the captain did, held that the captain was not guilty of negligence in doing what many other skilled captains swore they would have done, there being no boom or buoy to indicate to him that he should not take the channel in question.—The appeal of defendants Ahearn and Soper from the verdict and judgment recorded against them upon a second trial was allowed and the action dismissed by the Court of Appeal in the much litigated case (6 O. L. R. 621, 2 O. W. R. 146, 173, 6 O. L. R. 625, 2 O. W. R. 1022, 34 S. C. R. 698), of *Randall v. Ottawa Electric Co.*, 6 O. W. R. 913, for reasons stated in the judgment of the Court delivered by Osler, J.A., who held that the evidence disclosed no duty on the part of these defendants towards the plaintiff Thomas Randall, as regards the safeguarding of their wires upon the pole upon which he was working when he sustained the injuries for which damages were claimed, for the reason that this pole was the property of the telegraph company, or of that company and the telephone company; and the Ottawa

Electric Co., as an employee of which plaintiff was working at the time of the accident, and the defendants Ahearn and Soper were both destitute of authority or license to use it, "and, while, as regards the servants of that company or of the telephone company, defendants Ahearn and Soper would undoubtedly be liable for negligence in putting up their wires, I am unable to see that any duty existed on their part to others, who were just as much trespassers thereon as themselves." It was not a case where the owner of real property was under a duty to avoid injury to trespassers, because "there is nothing to shew that defendants ought reasonably to have anticipated that plaintiff or the other servants of the electric company would be likely to be upon the pole, or, a fortiori, that they would attempt to make any use of the defendants' wires, which were the only wires thereon from which the electric current for the purposes of illumination could be taken." On the authority of *Lellis v. Lambert*, 24 A. R. 653, 666, *Wilson v. Boulter*, 26 A. R. 184, the wife of Thomas Randall (a co-plaintiff) was held to have no cause of action in a case of this kind.

**Pleading.]**—The defendant's appeal from the order of a local Master in *Imperial Bank of Canada v. Martin*, 6 O. W. R. 485, noted 25 C. L. T. 624, was dismissed by Teetzel, J.: 6 O. W. R. 824.—The defendant in *Muir v. Guinane*, 6 O. W. R. 844, moved to have the amended statement of claim delivered by the plaintiff set aside as being beyond the scope of Rule 244 and as introducing a claim barred by the Statute of Limitations, inasmuch as the claim set up in the writ and original statement of claim was for goods sold to and bills drawn upon defendant by plaintiffs, an incorporated company, whereas the amended statement of claim was in respect of such goods sold by and bills drawn by the firm of "James Muir Co." The Master in Chambers, in refusing the application, stated the effect of the Rule to be "to forbid the setting up in the statement of claim of an entirely distinct and separate cause of action from any mentioned in the

writ; but a further claim may be added if it has a direct relation to the original claim;" and held that the amended statement of claim was not a violation of this principle because the claim had been the same throughout, viz., for certain goods sold to defendant, for which he gave his acceptances; and that there was nothing in such amendment which prevented the defendant setting up any defence which was possible when the writ was issued, or which has arisen since, whether under the Statute of Limitations or otherwise.

**Principal and Agent.]**—The action of *H. W. Kastor & Sons Advertising Co. v. Coleman*, 6 O. W. R. 791, was brought to recover against the owner of the Hotel Brant at Burlington, the price of advertising the hotel in southern newspapers under a contract made by one Truitt, as agent for the owner, and, on appeal to a Divisional Court from the judgment of Street, J., dismissing the action, it was held that the contract in question was within the scope of Truitt's duty and authority, especially as a great deal of advertising was necessary for the success of such a hotel, and the correspondence, prior to his engagement as manager, shewed that advertising of the class sued for was contemplated by the parties. "The literature and letter paper of the hotel set Truitt forth as 'manager,' which would be understood to be agent for the proprietor"—"The ostensible authority of the manager was to pledge the credit of the owner for the necessary advertising—the expressions in the letters do not forbid this manner of advertising by Truitt. As against third persons they are not to be used as limitations of such power, however they may be received as suggestions on the part of Coleman." With respect to a conflict of evidence between Truitt and his wife, who affirmed that this class of advertising was talked of with Coleman, who lived partly at the hotel, and Coleman, who absolutely denied any authority, Boyd, C., who delivered the judgment of the Court, thought that the principle of *Low v. Jackson*, 20 Beav. 539, might apply:

“Where two witnesses of apparently equal credibility contradict each other as to particular statements or conversations, acceptance should be given rather to those who remember what happened than to one who denies, probably because he does not remember.” “Another method of dealing with such conflicts of evidence is supplied in the language of Mr. Baron Parke in an Indian appeal, viz., to consider what facts are beyond dispute and to examine which of the two accounts in conflict best accords with those facts according to the ordinary course of human affairs and the usual habits of life (or business).”—*Mur Usdoolah v. Musumat Buby Inverman*, 1 Moo. Ind. App. 19, 44.

**Promissory Note.**]—The plaintiff's appeal from the judgment of a Divisional Court (8 O. L. R. 261, 3 O. W. R. 758), affirming the judgment of Street, J., at the trial dismissing the action, was allowed by the Court of Appeal in *Bogart v. Robertson*, 6 O. W. R. 896, where one of 5 makers of a promissory note was released by the payee (plaintiff) without any reservation of rights against the other makers, and plaintiff sought to recover against defendant Tench, one of such other makers, on the ground that it was intended that there should be a reservation and that this was recognized by a subsequent instrument under seal to which the maker who had been released was not a party, but defendant Tench was, whereby it was stipulated that the individual liabilities and indebtedness of defendant Tench to plaintiff should not be abandoned, for reasons set forth in the judgment of Moss, C.J.O., who thought that, there being here no intention to extinguish the debt, there was no reason why the principle applied to sureties in cases like *Mayhew v. Crickett*, 2 Swanst. 185, and *Smith v. Winter*, 4 M. & W. 454, should not be applied to a co-debtor. “The proper inference is, that the whole arrangement of which the release of J. E. Souch formed part, was come to and carried out with the knowledge and consent of defendant Tench. That being so, his defence that the giving of the release to J. E. Souch discharged him,

cannot be given effect to." "From the reports of the cases in the books it appears that the form of plea of discharge by a release to a co-debtor contained the allegation that it was given without the knowledge or consent of the defendant:" *Nicholson v. Brock*, 4 A. & E. 675; *North v. Wakefield*, 13 A. & E. 536; *Sydney v. Taylor*, [1893] A. C. 317, at p. 318. "The absence of knowledge or consent seems to be deemed a material element of the defence."

**Railway.]**—Ten years after the defendants' railway was built, the plaintiff's land adjacent to a cutting thereon began to subside, which would not have occurred but for defendants' cutting, and was not caused by the washing or discharge of the natural surface water from plaintiff's land, but was occasioned by the weight of the lands themselves. An action was brought by plaintiff to recover damages in respect of this injury and for a mandatory order compelling defendants to support plaintiff's land from further subsidence. It was contended by defendants that plaintiff's remedy, if any, was under the arbitration provisions of the Railway Act, and that he had no right of action for the injury to his lands. *Anglin, J.*, however, held that the Railway Act did not apply, because the foundation of the proceedings provided for under that Act is the notice to be served on the owner under s. 146, and it is only after the service of such notice, and the taking of the proceedings consequent thereon, that the company are empowered to take, or in any way to injuriously affect by the construction of the railway, lands over, through, or adjacent to which it may be carried, and they are, in the absence of such proceedings, mere trespassers as to such lands; and gave judgment in favour of plaintiff, providing, however, that such mandatory order should not issue for 30 days to enable defendants "to put the matter in train for the assessment of compensation" under the statute: *Hanley v. Toronto, Hamilton, and Buffalo R. W. Co.*, 6 O. W. R. 841.—The actions of *Grand Trunk R. W. Co. v. City of Toronto* and *Canadian Pacific R. W. Co. v. City of Toronto*, 6 O. W. R.

852, were for a declaration that an order of the Railway Committee of the Privy Council of Canada, dated 14th January, 1904, and an order of the Governor-General in council approving thereof, were made without jurisdiction and were invalid, and for an order setting aside the order of the Committee, and for an injunction to restrain its enforcement. Anglin, J., held that the second relief was unnecessary and the third inappropriate. It was contended for plaintiffs that Yonge street, south of the Esplanade, on which the plaintiffs were required to construct a bridge, did not exist. It was held, on the evidence, that Yonge street did extend south of the Esplanade and across the tracks of both plaintiffs, as a "street or other public highway," for reasons, among others, shortly stated as follows. The public had notoriously exercised the right since the Esplanade came into existence nearly 50 years ago; the railways have "recognized the existence of duties towards persons exercising that right such as they owe to travellers on a crossing highway;" the recognition of such street extension in the statutes of 1857 and 1875, and later transactions and statutes; the agreement of 1888 between the Canadian Pacific R. W. Co., the city of Toronto, and others, for the removal of the water front southerly, confirmed by 4 Edw. VII. c. 70, s. 1, s.-s. 1 (O), amounts to a dedication, so far as the legislature had power to do so, of the land coinciding with the prolongation of Yonge street to the new Windmill line, as a public highway; the property in strips constituting the prolongation of streets into Toronto Bay passed as soil ungranted at the time of Confederation to the Dominion of Canada, notwithstanding the grant of water lots in 1840; in 1893 an order in council was passed authorizing a grant described in the admitted documents as the "grant of railway easement over extensions of streets;" in the following year the Crown (Dominion) granted to defendants 16 parcels, being the lands required for such prolongations to be used as public highways, either as water slips, as part of the harbour, or as streets, subject to such



casement; s. 19 of R. S. C. c. 39 afforded the necessary statutory authority to do this, as affecting the public right of navigation; anyway 51 V. c. 53, authorizing the construction of the Don branch, effectually destroyed all rights of navigation over the lands occupied. It was contended that the order of the Railway Committee was beyond its powers on several grounds, all of which were overruled, for reasons stated at length in the carefully written judgment of the learned trial Judge. The obstruction, by the work, of the Yonge street slip was covered by s. 99 of the Railway Act; the requiring both the construction of a bridge and the diversion of Yonge street, in spite of the disjunctive form of the words of s. 187 of the Railway Act, having regard to the fact that expediency or necessity for the public safety is to govern the Committee in the exercise of its powers, and to the wide discretion as to the selection of works and measures best adapted for removing or diminishing danger vested in the Committee by the concluding words defining its powers, were within such powers; the widening of Yonge street was to be deemed a "work or measure," and the Court must assume that it was done in the course of providing for the public safety and not as simply the opening of a new street to serve the convenience of traffic on the Esplanade; the provision for the payment of the cost and damage is clearly within the powers conferred by s. 188; s. 187 gives plaintiffs all powers necessary to compulsorily acquire the 44 feet in question; the provisions of the Windmill line agreement of 1888, however inconsistent with the order of the Railway Committee, cannot hamper its jurisdiction to pronounce such order. It was held that the order of the Governor in council was insufficient, because it was made under s. 187, which confers powers only to "sanction" the order of the Railway Committee, and the order in question went further and purported to change the time within which the work was to be done. The Governor in council has power under s. 21 to make such change, but this power is not to be exercised sua sponte (as here) or otherwise than upon an appeal of a party affected. In view

of the public interests at stake, entry of judgment was deferred for 8 weeks to enable defendants to secure such further order or orders as might comply with the requirements of the Act.

**Security for Costs.]**—An appeal by the plaintiff in *Gribbon v. King and Spohn*, 6 O. W. R. 843, from the order of the Master in Chambers (6 O. W. R. 756, noted 25 C. L. T. 703), was dismissed by Falconbridge, C.J.

**Specific Performance.]**—The action of *Goodman v. Wedlock*, 6 O. W. R. 777, was brought by the assignee of one Jacob Soble, of his interest under an agreement for the purchase of a parcel of land on Richmond street, Toronto, made between the defendant Thomas Wedlock and Soble. The question was raised as to whether the plaintiff was not in default, but the case was disposed of on another ground. The defendants were tenants in common of the lands in question. It was contended for plaintiff that the execution by the defendant Margaret Wedlock of the deed of the property and the delivery of the same to the defendants' solicitors in escrow was the signing of a memorandum in writing sufficient to satisfy the Statute of Frauds. A draft deed had been delivered to plaintiff, who therefore had knowledge of the interest of Margaret Wedlock. It appeared also that defendant Thomas Wedlock had acted in good faith throughout. On consideration of the facts and cases cited, and particularly *Crain v. Rapple*, 20 A. R. 291, Britton, J., held that the contract could not be enforced against defendants or even as to Thomas Wedlock's interest, with an abatement of price—and dismissed the action.

**Stay of Action for Non-payment of Interlocutory Costs.]**—The Master in Chambers refused an order staying the action until security for costs had been given by the plaintiff in *Keogh v. Brady*, 6 O. W. R. 846, on the authority of *Wright v. Wright*, 12 P. R. 42, holding that, while interlocutory motions had been numerous, of which two were carried to a

Divisional Court and dismissed with costs amounting to nearly \$80, for which execution had been issued and returned *nulla bona*, they had been by no means frivolous or vexatious. The peculiar circumstances shewn in *Stewart v. Sullivan*, 11 P. R. 529, have not recurred in subsequent cases.

**Street Railways.]**—A declaration of the rights of the parties, under the agreement between them set forth as a schedule to the Ontario statute 55 V. c. 99, was sought in *City of Toronto v. Toronto R. W. Co.*, 6 O. W. R. 871, particularly with respect to the laying of new tracks (on Avenue road) under s. 14 of the award, conditions, tender, and by-law referred to in and forming part of the agreement, and to the stopping of defendants' cars at certain places where they had refused to stop. Dealing with the first branch of the case, Street, J., thought that the question whether the agreement extended to streets upon land added to the city since 1891, as well as to the city as it then existed, had been decided by the Court of Appeal in a former action between the parties (5 O. W. R. 130), the judgment in which was lately affirmed by the Privy Council, and by a judgment of Anglin, J. (9 O. L. R. 333, 4 O. W. R. 330, 446), since affirmed by the Court of Appeal (6 O. W. R. 677), and that he was bound to follow these decisions and hold with the plaintiffs on this point. He also held that the absence of a by-law under s. 16 of 2 Edw. VII. c. 27 was immaterial, because the defendants, in his opinion, did not come within the provisions of the Act, as it was the fact that the statute by which the annexation was finally completed was passed after the by-law requiring defendants to make the extension in question, since the proclamation of the Lieutenant-Governor annexing the territory was issued on the 3rd March, 1905, to take effect on 10th March, 1905; that in spite of the ruling in *City of Kingston v. Kingston, etc.*, *Street R. W. Co.*, 25 A. R. 462, the Court could decree specific performance of this agreement, by virtue of the provisions of s. 5 of c. 102, 63 V. (O.); that the recommendations of the city engineer

were made as in other matters of his department and not as an arbitrator exercising judicial powers so as to necessitate notice to the parties and a hearing as a condition precedent to his acting; that the person described as "the city engineer" in the Act and agreement is the city engineer for the time being, and not the city engineer who held office when the agreement was made; and that plaintiffs were entitled to enforce s. 14, notwithstanding the option given them by s. 17, upon defendants' default, to grant the right to lay down lines to another person or company. With respect to the second branch of the case, it was held that the regulation of places at which cars should stop to take on and let off passengers was part of the "service" within the meaning of clause 26, and that plaintiffs might therefore, on recommendation of their engineer, and subject to the limitations of clause 39, require the defendants to stop wherever they think proper.

**Summary Judgment.]**—The plaintiff's appeal from the order of the Master in Chambers (6 O. W. R. 741, noted 25 C. L. T. 705) was dismissed by Anglin, J.: *Barry v. Toronto and Niagara Power Co.*, 6 O. W. R. 935.

**Third Party Procedure.]**—Rule 209 directs that a third party notice shall be served within the time limited for the delivery of the defendant's statement of defence, and Rule 213 gives the third party leave, in a proper case, to defend the action. In *Louth v. Riley*, 6 O. W. R. 769, where the defendants had delivered their statement of defence and settled the mode and place of trial, and even entered the case for trial, before giving notice to the third party, Magee, J., following *Parent v. Cook*, 2 O. L. R. 709, affirmed 3 O. L. R. 350, discharged the order giving leave to serve the third party notice and set aside the notice itself and all proceedings thereon.

**Venue.]**—The judgment of a Divisional Court in *Forster v. Hook*, 6 O. W. R. 928, dismissing the appeal of plaintiff from the order of Meredith, C.J. (6 O. W. R. 697, noted 25

C. L. T. 708), affirming an order changing the venue from Toronto to London, was delivered by Anglin, J., who considered that "the discretion exercised by a Judge of the High Court, upon preponderance of convenience, should not be interfered with unless in a clear case, in which it should appear that the discretion had been so exercised as to cause an injustice to the party appealing," and besides in this case there was the possibility that a view by the jury of the premises in London upon which plaintiff was injured might be found desirable, and this it was impossible in advance to determine; and, at the same time, gave expression to the regret of the Court that the Rules (529, clause 2, and 777, clause 1) did not preclude any appeal being entertained from the order of a Judge of the High Court in cases of this kind. A new Rule thus limiting the right of appeal is under consideration.

**Way.]**—The right of way of plaintiffs in Toronto, Hamilton, and Buffalo R. W. Co. v. Hanley, 6 O. W. R. 921, traversed the lands then owned by one Smithson in such a way as to leave the south-easterly portion thereof without access thereto from any highway, and the action was brought for an injunction to restrain defendant, the purchaser from Smithson of part of such lands, from trespassing upon plaintiffs' lands, and defendant alleged that the lands in question, two 50-foot strips leading from the Johnston settlement road and Hamilton road respectively, to plaintiffs' right of way, constituted a public highway, and counterclaimed, in the alternative, for a right of way over same. Anglin, J., held, that the evidence of the temporary use of these lands, as required by s. 183 of the Railway Act, 1888, in the absence of any suggestion in the deed from Smithson, would not amount to a dedication of them as a public highway; but, having regard to the surrounding circumstances, and to the arrangement whereby plaintiffs and Smithson agreed that, instead of the farm crossings to which he would have been entitled, the plaintiffs should erect 4 gates for "entrance to the lands" (of Smithson), and to the

facts that plaintiffs' railway cut off two parcels of them (the south-easterly portion, sold to Reid and Appleget) from any road, and that the gates in the Marshall and Hanley farms (north-westerly portion of Smithson's) as erected by plaintiffs, were not opposite each other, the words quoted must be construed as giving to Smithson and his successors in title, not access from one part of his lands to the other, but a right to use such gates for entrance from the highway to his several parcels of land: *Haggerty v. Lee*, 54 N. J. L. 580. There must be implied the grant by plaintiffs or the reservation by Smithson of rights of way over the strips of land leading from the highways mentioned and granted by Smithson to plaintiffs: *Gale on Easements*, 7th ed., p 464. These rights of way were appurtenant to the lands for the benefit of which they were created. The right of way to the Hanley farm had not been abandoned and was assignable: *Chappell v. New York, New Haven, and Hartford R. R. Co.*, 62 Conn. 195. The deed from Smithson's representatives conveyed it to Hanley.—The legal effect of the words "reserving one rod on the south side of the aforesaid tract of land for a road, which said road is to run in a westerly direction to the creek on said east half lot," in a deed of grant, was held, by a Divisional Court in *Reid v. Goodwin*, 6 O. W. R. 944, on appeal from the County Court of York, to be not a reservation of a right of way, but an exception of the strip mentioned from the grant.

**Will.]**—The general scheme of the will in *Re McCubbin*, 6 O. W. R. 771, construction of which was sought on motion by the executor, was stated in the judgment of Meredith, J., to be to give to the testatrix's two daughters, Elizabeth and Jane, the income of the money—and in sickness, if necessary, part of the principal—until they marry or die; and after such events to give to the son John, if living, one-fourth of what remains; the balance—after deducting "lawful expenses"—to go to all the surviving children in equal shares. The difficulty arose from the concluding words, which were:

"But if John should be removed by death and leave any children, they do not receive the fourth part, they receive only their father's equal share same as the rest of my other children alive," and the question was, whether these words showed an intention that the general rule, that a gift not taking effect in possession immediately on the death of the testatrix, the survivorship would be referred to the period when the fund becomes divisible, should not apply; and it was held that it was not the case, and that the word "surviving" had reference to the time when the fund should become divisible, not to the death of the testatrix.—By the will in *Re Day*, 6 O. W. R. 890, there was a gift of a portion of the income of the realty of the testatrix to her husband and for life, and the remainder of such income was to be divided between two children of the testatrix during the husband's lifetime, and, on his death, the realty was to be sold and the proceeds divided equally between these two children. A Divisional Court allowed the appeal of the beneficiaries mentioned from the order of Falconbridge, C.J., dismissing their application for an order for the determination without administration of the trusts declared under the will, deeming the gift to the children a gift of the beneficial ownership of the fee subject to the charge in favour of the husband, since the word "income" applied to realty means rents and profits, and a gift of rents and profits of realty for life and of the realty in fee gives a fee simple. "All parties having any beneficial interest being sui juris, before the Court, and contented, the case does not fall within the class of cases decided by *Tidd v. Lister*, 5 Madd. 429; *Whiteside v. Gr.* 393; *Orford v. Orford*, 6 O. R. 6."—The question for the determination of the Court in *Re M.*, 6 O. W. R. 891, arose under the following clause: "I empower you and your co-trustees in their discretion to lease, sell, or otherwise dispose of any real estate of which I may die possessed situate in the city of B., and also any of such real estate in B. which is vacant or unproductive of a substantial net profit

ment of taxes, insurance, and charges of management, in case the same is in their judgment not improving or likely to improve in value," and was as to the right of the trustees under the will to sell certain property in the city of B. at an exceptionally good price, the property in question producing a net annual income of barely  $2\frac{1}{2}$  per cent. of such price. Anglin, J., held that, having regard to the circumstances of the case, including the character and surroundings of the property, its prospective, as well as its present value, its safety as a security for the corpus, the net income aforesaid was not, within the meaning of the words as used by the testator, "a substantial net profit."



## CASES FROM WESTERN CANADA.\*

**Appeal.**]—The question in *Munro v. Morrison* (Y. T.), 2 W. L. R. 367, was as to the right of the defendant Hibb to leave to appeal under Rule 512 of the Yukon Ordinances, which provides that “the Court or Judge may, either before or after the expiration of the period, enlarge the time for giving notice.” Judgment was given on the 25th January, 1902, and execution issued against all defendants on the 20th February, 1902. Other proceedings were taken, including the service on all the defendants of a notice of application for payment out of Court; extensions of the time for appealing were, from time to time, secured by the defendant McDonald, owing to the uncertainty arising through a change, by the Dominion Parliament, as to the Court of Appeal for the Yukon, and to the fact that, owing to the season of the year, no one had secured a copy of the Act. Finally the appeal was argued before the Court en banc on the 23rd and 24th April, 1903. The judgment was settled on the 1st August, 1903. Nothing was therefore done until the 8th May, 1905, when the judgment entered allowing the appeal and dismissing the action in the Territorial Court was amended to provide that the action should be dismissed as against McDonald only. Under all the circumstances, Craig, J., considered that the leave should not be granted, because an unreasonably long time had been allowed to elapse. “If a suitor in an independent action learns that the Court of Appeal has given a judgment in favour of an appellant which would have relieved him from a judgment if he had in his own case taken an appeal, in what better position is such a person, or in what worse position is he than a co-defendant who has severed in his defence and who

\*Short notes of the most important cases in Volume II. of the *Western Law Reporter*, No. 5, pp. 301 to 372, inclusive.

has not taken an appeal?" The mistake of defendant's solicitor in advising his client that McDonald's appeal would enure to his benefit is not such a mistake or special circumstance as would justify an extension of the time, especially after so great a lapse.

**Attachment of Debts.]**—Rule 395 of the N. W. T. Judicature Ordinance: "Unless the debt sued for or in respect of which the judgment was recovered has been contracted for board and lodging, the wages or salary of a mechanic, workman, labourer, clerk, or employee shall not be liable to seizure or attachment unless such wages or salary exceeds the rate of \$75 per month, and then only to the extent of the excess." Sub-section (2): "All payments which have been made on account of such wages or salary during any period in which the same are being earned shall be deducted from the above exemption." The proper interpretation was held by Craig, J., in *Meacham v. Nugent* (Y. T.), 2 W. L. R. 301, to be: "Garnishment shall not take effect unless the defendant is working for wages or salary at a higher rate than \$75 per month, and the garnishment will only take effect upon the wages earned at that higher rate or upon the excess earned over \$75 per month. . . . As he earns the wages, and when those wages become a debt due or accruing due from his employer to himself, the excess is garnishable, notwithstanding that he has not earned and has not a debt then owing to him of \$75."

**Bailment.]**—A peculiar case was *Welwyn Farmers' Elevator Co. v. Byrne* (N. W. T.), 2 W. L. R. 333, which was an action for the value of certain wheat which, the plaintiffs alleged, leaked from adjoining bins in plaintiffs' elevator, into the bin where defendant's wheat was stored. Defendant shipped his wheat to Fort William, and on its arrival there was paid for 1,394 bushels and 20 lbs. It appeared that differences between the measurements at Fort William and Welwyn were not infrequent, and the evidence in other respects being unsatisfactory, and it not appearing that there

was any shortage of wheat in the adjoining bins, Wetmore, J., dismissed the plaintiffs' claim. The defendant's counterclaim, in respect of the alleged mixing with his wheat of an inferior wheat, whereby the grade of his wheat was lowered and he received a less price for it, was also dismissed because the evidence did not establish that the grade of his wheat had been affected or any inferior wheat mixed with his.

**Building Contract.]**—A term in the building contract in question in *Waugh v. Grayson* (N. W. T.), 2 W. L. R. 330, that the work should be done to the satisfaction and under the direction of Robert Beard, to be testified by a written certificate under the hand of the said Robert Beard, in the absence of such certificate, was held by Newlands, J., to be a bar to an action by the plaintiff, the contractor. The defendants were held not entitled to counterclaim for general damages on account of defective work which was passed by Mr. Beard and paid for under his certificates, and were held to have waived a claim for \$5 per day, pursuant to the contract, for delay in completion, first, by making payments after the date fixed for completion on Mr. Beard's certificate, and, second, by accepting the house without making any mention of their claim.

**Church.]**—The chief questions raised in the action of *Heine v. Schaffer* (Man.), 2 W. L. R. 310, brought by plaintiffs, three trustees of the Trinity German Lutheran Church, of Winnipeg, on behalf of themselves and all other members of the church, against the defendants, of whom Schaffer and Schwab were also trustees, to restrain them from selling the site of the old church which had been burned, and building "north of the C. P. R. tracks," were two: (1) That notice of the meeting of the congregation of the 12th January, 1905, and of the submission of the matters complained of had not been given according to ss. 22 and 24 of the constitution of the church, which provide that each meeting must be announced at a public service on the last of two successive Sundays preceding it, and that

matters which are to be submitted to the meeting must previously be announced and submitted to the church board for deliberation, and (2) that a number of those present at the meeting who had not signed the membership roll, as required by s. 9, had signed a previous roll, and had, therefore, a right to vote, Mathers, J., overruled the latter objection, holding that, as the opportunity had been given at the meeting to any who had not signed the roll, to do so and vote, no member was excluded from voting except by his own fault. It appeared that the meeting of the 12th January, 1905, was duly announced by the pastor from the pulpit on the two Sundays immediately preceding, and that, at a meeting of the board on the 5th January, 1905, a letter signed by 5 members, containing a notice, *inter alia*, of a motion to be made at the meeting to sell the old site, was read by the pastor, and, after some discussion, was handed to the secretary to be brought up at the congregational meeting. And the question of the new site was also discussed and a resolution passed "that two lots be bought on the north side." The Court held that the former objection also failed, as did the contention of plaintiffs' counsel that the property in question was vested in the trustees on a perpetual trust for the benefit of the members of the congregation, and could not be sold without the consent of all. "A church is a quasi public body, whose business only can be transacted through elected officers, or in general meetings, and, unless the majority ruled, the transaction of business would be impossible."

**Company.]**—In *Snow v. Benson* (N. W. T.), 2 W. L. R. 359, where it was set up that the liability of defendants arose by virtue of s. 65 of the Companies Ordinance, R. O. c. 61, it was held by Wetmore, J., that the conditions to bring the defendants within the section did not exist, because the evidence failed to establish that the directors sued had declared and paid a dividend when the company was insolvent, or declared a dividend the payment of which rendered the company insolvent or impaired the capital stock thereof.

In fact they had not declared a dividend at all. In an action brought on behalf of the company or in a winding-up, these directors might have been compelled to disgorge the assets they had appropriated, but it was not open to plaintiff to proceed under the section in question. The section does not apply either when the plaintiff is a creditor of the company in respect of a judgment for damages recovered after such dividend was paid.

**Contract.**—*Twyford v. York* (N. W. T.) 2 W. L. R. 348, was an action by Charlotte Twyford and Hugh Twyford for damages for breach by defendant of an agreement under seal whereby (1) Charlotte Twyford was to execute and deliver to defendant a bill of sale of 250 fanning mills and a transfer of a half interest in Dominion patent No. 61584, upon delivery by defendant to Hugh Twyford, at Calgary, of 60 head of horses; (2) defendant to assume from and after the 1st October, 1904, the now present liability of plaintiffs in respect of a certain note; and (3) defendant to deliver to Hugh Twyford at Calgary the 60 head of horses on the terms in the agreement set out, and that Hugh Twyford should be a party to the agreement and should accept and pay for these horses. On the 26th November, 1904, judgment was recovered against the plaintiff in respect of the note mentioned. In the circumstances, Scott, J., held, "that the agreement on the part of Charlotte Twyford to give the bill of sale of the fanning mills and assign a half interest in the patent, and the agreement on the part of defendant to deliver the 60 head of horses to Hugh Twyford are dependent agreements, and that the agreement on the part of the defendant to assume the liability of the plaintiffs upon the note, is in no way dependent upon the performance by Charlotte Twyford of her agreement to transfer the mills and the half interest in the patent, and I am of this opinion notwithstanding the fact that the horses were to be delivered by defendant by 30th September, 1904, and that he was to assume her liability on the note from the

following day." The statement of claim disclosed no cause of action on the part of Hugh Twyford. Defendant agreed to assume the liability of both plaintiffs on the note, but Hugh Twyford is not a party to that agreement; defendant's agreement as to that is with Charlotte Twyford alone.

**Jury.]**—On motion by plaintiffs in *Turner v. Van Meter* (N. W. T.), 2 W. L. R. 345, for leave to set the case down for trial, the defendants required that the issues of fact should be tried by a jury. Rule 170 provides that either party shall be entitled to a jury, when, among other circumstances, the action is founded on a contract and the amount claimed or damages sought to be recovered exceed \$1,000. The plaintiffs claimed a declaration that defendant B. A. Van Meter was by his conduct estopped from denying that he was a partner in the firm of Van Meter & Blades at the time the debts due by that firm to the plaintiffs were contracted, and to recover from the defendants Van Meter and defendant Blades the sums of \$973.60 and \$529.80, owing to plaintiffs Whitla & Co. and Wood & Co., respectively, and joined with these claims were claims to have certain conveyances set aside as fraudulent, and that defendant F. C. Van Meter should convey certain lands to the plaintiff Burgess, the assignee for the benefit of creditors of that firm. These latter claims, Scott, J., held not to be such as to entitle the defendants to have them tried by a jury, and ordered that the action be set down for trial, with a direction that these latter issues should be tried without a jury and the other issues with a jury.

**Mechanics' Liens.]**—While a sub-contractor's lien depends upon there being something owing by the owner to the principal contractor, the owner is not either a necessary or proper party to an action brought to enforce such lien when he has, before action brought, sold and transferred the lands in respect of which the lien is claimed: *Mathers, J.*, in *Christie v. McKay* (Man.), 2 W. L. R. 303.—On appeal by the defendant in *Sayward v. Dunsmuir* (B.C.), 2 W. L. R. 319, from a judgment and order on further consideration

made by Harrison, Co. C.J., in a mechanics' lien action, the principal facts were: that defendant by her agent Rogers appointed one Harrison, the lessee of an hotel, the property of the defendant, which had been damaged by fire, her general agent to make the necessary repairs pursuant to a clause in the lease, whereupon Harrison ordered certain material from plaintiff, which was delivered from time to time; shortly after this order was given and after some of the goods had been supplied, but not all, the defendant's agent modified the authority given to Harrison by limiting the cost of the work, but plaintiffs, who had understood that Harrison had authority to act for the defendant, but did not know the source of such authority, had no notice of this limitation, and went on supplying goods. It was held by the full Court that the plaintiff was entitled to succeed, as to his claim for lien, and also against the defendant in personam. If the first appointment had not been a general agency, notice to the plaintiff of its revocation would not have been necessary, but the defendant, having "appointed Harrison as her general agent for the making of these repairs, is estopped from setting up the limitation subsequently placed upon his powers, as against plaintiff, who acted bona fide, and to whom no notice was given of the subsequent limitation." The delivery of material in good faith for the purpose of completing an order previously given, and not colourably to revive the lien, will extend the time for filing the lien in respect of the earlier items.

**Mistake.]**—The plaintiff in *Slowski v. Hopp* (Man.), 2 W. L. R. 363, executed an agreement with defendants to buy from them for \$900, lot 17 on Pritchard avenue, Winnipeg, on which was a cottage, in the belief, not contributed to by defendants and unknown to them, that this lot, which was the second from the corner, extended to the corner, and paid \$300 on account of his purchase money, and, immediately on discovering his mistake, repudiated the agreement and demanded his money back. It appeared that, after discovering his mistake, plaintiff had made payments under the agree-

ment and taken possession and entered into occupation of the property. On the facts, Mathers, J., was of opinion (1) that no hardship amounting to injustice was inflicted on plaintiff so as to bring the case within the rule of *Miller v. Dahl*, 9 Man. L. R. 444, and that the case was within *Tamplin v. James*, 15 Ch. D. 215, and *Goddard v. Jeffries*, 30 W. R. 269; and (2) that plaintiff had by his conduct waived his right to have the agreement rescinded on the ground of mistake.

**Mortgage.]**—The point decided by Mathers, J., in *Campbell v. Imperial Loan Co. (Man.)*, 2 W. L. R. 327, was that, where a mortgagee has parted with the whole or a portion of the lands mortgaged, the purchasers or transferees are necessary parties to an action for redemption by the mortgagor, and the only judgment that can be pronounced, in their absence, is one that provides for a reconveyance subject to their rights.

**Pleading.]**—In granting an application, by way of appeal from an order of the referee, in *Lee v. Gallagher (Man.)*, 2 W. L. R. 305, an action for specific performance, for an order to amend the statement of claim, with leave to join with a claim for the recovery of land against one Langley, who had a house on a portion of the property and claimed the land on which it stood by prescription, a claim for specific performance, or damages by way of compensation for breach of contract, as against the defendants Pepler and Macdonell, Mathers, J., after consideration of the authorities in England and Ontario, on Rules “practically identical” with 258, deduced the following rule,—“Where the plaintiff, without leave, unites with an action for the recovery of land, a cause of action forbidden by Rule 258, the Court will not help him; but if, having properly commenced his action, a plaintiff subsequently applies to amend by adding another cause, the Court will, if it considers the application reasonable, grant the amendment.”

**Specific Performance.]**—Under the circumstances disclosed in *Weidman v. Pelakise (Man.)*, 2 W. L. R. 308, where



one of the persons seeking to enforce the agreement was the only one who was present at the time it was executed who could understand the defendant's language or translate the agreement for him, and the defendant was dissuaded from getting another interpreter by this same plaintiff, Mathers, J., declined to award specific performance of the agreement, holding that, under the circumstances, there was a heavy onus upon the plaintiffs to satisfy the Court that the agreement was freely executed by the defendant after its effect was fully and clearly explained to him—an onus that is not satisfied by the evidence alone of the party seeking its enforcement. Held, also, that the evidence did not shew the plaintiffs to have been ready and willing to purchase on the terms defendant was willing to sell upon, and it was therefore unnecessary to decide whether the case was one for the application of the rule as to the enforcement of agreements with a variation, with respect to which the Court had serious doubts.

**Time.]**—Rule 549 of the Judicature Ordinance contains the following: “If the time for delivering a defence in a cause in which the defendant has appealed has not expired previous to the first day of August, it shall, without any order to that effect, stand extended until the expiration of 5 days after the last day of vacation.” Rule 546 provides: “When any limited time less than 6 days from or after any date or event is appointed or allowed for doing any act or taking any proceeding, the days on which the offices are closed under the provisions of this Ordinance and the Rules of Court shall not be reckoned in the computation of such limited time.” Defendant Warren, in *Handley v. Scott and Warren* (N. W. T.), 2 W. L. R. 341, did not deliver his defence until after the five days had expired, counting the Sunday, and on the 6th day plaintiff signed judgment. On motion by defendant Warren to set aside this judgment and to be let in to defend, it was contended for plaintiff that 6 days from appearance was the “time limited” by Rule 546, and that under Rule 549 no time was “appointed or allowed.” Rule 549 simply gave an extension of time. Wetmore, J., however, was of opinion

that the case came directly within the meaning of Rule 546, and allowed the application.

**Warranty.]**—The defendant in *Cockshutt Plow Co. v. Mills* (N. W. T.), 2 W. L. R. 355, bought from plaintiffs a disc drill under an agreement in writing, subject to an express warranty indorsed thereon. It was attempted by defendant to set up a parol statement by Watt, plaintiffs' agent, that "if the seeder" (meaning the disc drill) "did not suit defendant he could return it and get his notes," but Wetmore, J., held that this could not be treated as a collateral parol warranty, because it was inconsistent with the express written warranty, and an application to amend by setting up that the drill was not reasonably satisfactory for the purpose for which it was purchased, was refused because that would be setting up an implied warranty, and defendant could not set up an implied warranty for the purpose of getting rid of the provisions of the express warranty to the same effect, which provided for the giving by defendant of notice to plaintiffs if the machine did not work well. This notice was not given, and there was no waiver, as in *John Abell Co. v. Long*, 1 W. L. R. 24.

**Writ of Summons.]**—The action of *Hourston v. Spence* (N. W. T.), 2 W. L. R. 343, was brought by the next friend of a lunatic without filing the written authority provided by English Order 16, Rule 20. On application by the defendant to set aside the writ of summons and other proceedings, it was held by Scott, J., that that Rule was in force by virtue of s. 21 of the Judicature Ordinance; that the consent required must be filed before the issue of the writ; that the omission to file it is one that goes to the root of the action; and that the irregularity was one that could not be cured by the substitution of plaintiffs (guardians of the lunatic's estate appointed after the action was commenced) entitled to institute the action. Quære, whether a person of unsound mind, who in the statement of claim is alleged to be such, could sue without a next friend.

## EDITORIAL REVIEW.

**Illegal Trade Combinations.**

There has been a great awakening in the city of Toronto in respect of illegal trade combinations or conspiracies. The sentencing of a great batch of offenders who pleaded guilty was a sensational occurrence which cannot fail to impress the public mind, and the Chancellor spoke on the occasion some words in reference to the duties of lawyers when consulted as to the evasion of laws, which should not be forgotten. The example of Toronto is being followed in other places. We have a law in Canada, and it only needs a vigorous application of it to put an end to certain kinds of offences.

**Lawyers in the new Imperial Government.**

The accession to power of the Liberal party in the Imperial Parliament has, of course, brought about changes in the occupants of the great legal offices. Sir Robert Reid succeeds Lord Halsbury as Lord Chancellor; Lord Justice Walker becomes Lord Chancellor of Ireland; Mr. John Lawson Walton, K.C., is Attorney-General; Mr. William Snowden Robson, K.C., Solicitor-General; and Mr. Thomas Shaw, K.C., Lord Advocate of Scotland. Despite the theory that lawyers do not become statesmen, there are, including the Lord Chancellor, eight lawyers in the Cabinet of nineteen, viz., Mr. Richard Burden Haldane, K.C., Secretary of State for War; Mr. John Morley, Secretary of State for India; Mr. Herbert Henry Asquith, K.C., Chancellor of the Exchequer; Mr. David Lloyd-George, President of the Board of Trade; Mr. Augustine Birrell, K.C., President of the Board of Education; Sir Henry Fowler, Chancellor of the Duchy of Lancashire; and Mr. James Bryce, Chief Secretary for Ireland. In high places in the ministry, but not in the Cabinet,

are, Mr. Leveson William Vernon Harcourt, First Commissioner of Works, and Mr. Edmund Robertson, Financial Secretary to the Treasury. This wholesale importation of men with legal training into high political office is without precedent in England, though in the United States and in the colonies, including our own, lawyers usually take the foremost part in administrative and parliamentary circles. It will be observed that four of the new Cabinet come from active practice at the Bar, viz., Sir Robert Reid, Mr. Asquith, Mr. Haldane, and Mr. Birrell, all King's Counsel, while Mr. Bryce was a practising barrister from 1867 till 1882, when the pressing demands of parliamentary and literary work constrained him to confine himself to the exposition of legal principles as Professor of Civil Law in the University of Oxford. Mr. Morley has, we believe, never been in active practice, but he is a barrister and a Bencher of Lincoln's Inn. Sir Henry Fowler and Mr. Lloyd-George are solicitors. With so much legal talent, it is rather surprising that the office of Secretary for State of the Home Department is filled by a layman, Mr. Herbert Gladstone. The Home Secretary is a kind of appellate court in criminal matters, and familiarity with the theory and practice of the law would doubtless be of advantage. In recent years the position has generally, but not invariably, been held by a member of the legal profession.

#### **Judicial Changes in Britain.**

Several resignations from the Bench have occurred in England and Scotland recently. Lord Lindley has retired from the office of Lord of Appeal in Ordinary, but will still be available for House of Lords cases if he chooses to sit. Lord Justice Mathew has resigned from the Court of Appeal, and Mr. Justice Wills from the High Court. Mr. Atkinson, who was Attorney-General for Ireland in the late administration, has been made a Lord of Appeal in Ordinary, and Mr. Henry Sutton, Junior Counsel for the Treasury, has taken the place of Mr. Justice Wills in the King's Bench Division.

Lord Adam has retired from the Court of Session of Scotland, and has been succeeded by Mr. Charles Kincaid Mackenzie, K.C., Sheriff-Principal of Fife and Kinross. Lord Adam was for thirty years on the Bench, and is in his eighty-second year. Mr. Justice Wills has been a Judge since 1884. He is editor of "Wills on Circumstantial Evidence," and was formerly well known as an Alpine climber.

#### **The Late Sir Richard Couch.**

At a sitting of the Judicial Committee of the Privy Council on the 30th November last Lord Davey and Mr. R. B. Haldane, K.C., paid tributes to the memory of Sir Richard Couch, who died recently. He was a member of the Committee from 1881 until 1901, having previously been Chief Justice of the High Court of Calcutta, and was a very valuable member of the Board, learned both in Indian and English law.

#### **Jobbery in England.**

In England the legal journals sometimes speak out very plainly about appointments to public positions. A recent instance arose out of the appointment of Mr. Henry Sutton, Junior Counsel for the Treasury, or Attorney-General's "devil," to a judgeship. No one was surprised at this, for it is a usual kind of promotion, such men as Hannen, Bowen, A. L. Smith, and R. S. Wright having graduated from that position to the Bench. But Mr. Sutton was succeeded at the Treasury by Mr. S. A. T. Rowlatt, Junior Counsel to the Board of Inland Revenue. This appointment also meets with approval. The successor to Mr. Rowlatt, however, was Mr. William Finlay, the son of Sir R. Finlay, Attorney-General in the late administration, and the *English Law Times* denounces this appointment in the following vigorous terms: "Of this gentleman's ability and qualifications for this important and not unremunerative post we confess our entire ignorance—a lack of knowledge that is shared by the profession generally. But we do contend that to appoint a barrister

of four years and six months' standing to a position of this description can only be described as a job. We are sorry to say that of recent years there has been a growing tendency to fill vacancies, even upon the Bench, without regard to the great responsibilities that rest upon the nominator. Political and domestic considerations are only too often painfully conspicuous, and it is a state of things one can only deeply regret."

#### **The Precedency of the Prime Minister.**

The Speaker of the House of Commons is no longer the first commoner in England. The Premier, being a member of that House, now takes precedence, the King having recognized in an official and visible form the precedence which the appointment to the Premiership must morally carry with it. The matter is one of some legal interest. "It is somewhat curious," says the *London Law Times*, "to note how long the anomalous position held by the Prime Minister has been allowed to continue. By reason of it, a Prime Minister who is also a commoner may, on ceremonial occasions, occupy a less distinguished position than that accorded to many of his colleagues. It would appear that His Majesty desired on some previous occasion to remedy this long-standing anomaly, and has only deferred the Royal Warrant at the express desire of the ex-Premier. As the head of the Cabinet is now a recognized institution, perhaps it is not going too far to suggest that the body over which he presides should itself become a recognized factor in the Constitution. The recognition by Royal Warrant of the title of Prime Minister and the conferring of precedence on its holder indicate the development of the Constitution. Although the gentleman holding the position has been referred to in Parliamentary debate, and, indeed, designated from the Chair, as Prime Minister in the Parliamentary proceedings and journals, his title is that of First Lord of the Treasury."

**An Undesirable Side-Line.**

A curious case, *Re A Solicitor*, came before a Divisional Court in England lately. The respondent had carried on the business of a bookmaker, and in the opinion of the statutory committee of the Law Society, which they inserted in their report, such conduct was unworthy of a member of the profession. They therefore found that the respondent had been guilty of professional misconduct within the meaning of the Solicitors' Act, 1888, as he had sent his circulars to a minor, a married woman, and a bank manager, and the manner in which he distributed his circulars was calculated to incite persons of those classes to indulge in betting, and tended to bring about those evils the legislature had intended to suppress in the case of minors. Although the respondent had not taken out his certificate, the Court held that he must be struck off the rolls, but Lord Alverstone pointed out that if the respondent bona fide abandoned the business he would be able to apply to the Master of the Rolls to be replaced. Although everyone will agree that it is highly undesirable that a solicitor should carry on the business of a bookmaker, at the same time it does not seem that the respondent had been guilty of any breach of the law. Since 1898 he had ceased to practise as a solicitor, and one would have thought that the case would have been met by requiring the respondent to abandon the business before applying for the renewal of his certificate.—(*The London Law Times*.)

**Recent American Decisions.**

*Bank*.—Payment by a savings bank of a forged cheque bearing a signature similar to that of the depositor, to one who presents the depositor's pass book, there being nothing to arouse the suspicion of the teller, or to put him upon inquiry, as to the genuineness of the cheque, is held in *Langdale v. Citizens' Bank (Ga.)*, 69 L. R. A. 341, not to make the bank liable in a suit by the depositor to recover the money so paid, where a rule of the bank provides that payment to a person

presenting a pass book shall be good and valid, unless the pass book has been lost and notice in writing given to the bank before such payment is made. With this case is an extensive note on the subject of liability of savings banks for payments to fraudulent claimants.

*Carriers.*—The right of a steamship company to a limitation of its liability for loss of passengers and baggage through the sinking of its vessel is denied in *Re Pacific Mail Steamship Co.* (C. C. A. 9th C.), 69 L. R. A. 71, where the crew could not understand the language of its officers, and were not drilled in the launching of the boats, because of which the loss occurred, and the statute provides that no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers, and a full crew sufficient at all times to manage the vessel.

A carrier who negligently delays a shipment is held, in *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.* (Minn.), 69 L. R. A. 509, to be liable for the damages, where, because of such delay, the goods are overtaken in transit and damaged by an act of God, even though the act of God could not reasonably have been anticipated.

A railway company which has made an arrangement with a transfer company to furnish at its passenger station all the vehicles necessary for the accommodation of the passengers arriving there on its trains, or on the trains of other railway companies using the station, is held, in *Donovan v. Pennsylvania Co.*, U. S. Advance Sheets 91, to have the right to exclude from the station and depot grounds all other hackmen or cabmen seeking entrance for the purpose of soliciting for themselves the custom or patronage of passengers.

*Damages.*—Mere disappointment and regret are held, in *Hancock v. Western U. Telegraph Co.* (N. C.), 69 L. R. A. 403, not to be included in the rule allowing damages for mental anguish upon failure of a telegraph company promptly to deliver a death message.



The measure of damages for false and fraudulent representations by which a party had been induced to exchange real property for stock in a corporation, but who had affirmed the contract after discovering the deceit, is held, in *Beare v. Wright* (N. D.), 69 L. R. A. 409, to be, in the absence of a claim for special or exemplary damages, the difference in the value between what was received or parted with, as the case may be, and what would have been received or parted with had the representations been true.

*Husband and Wife.*—A conveyance of land from husband to wife in the usual form, for a valuable consideration, though without words disclosing an intent to do so, is held, in *Barnum v. Le Master* (Tenn.), 69 L. R. A. 353, to vest in her a separate estate which she may transfer without his joinder or consent.

That a man is deprived of his curtesy interests in land by conveying it to his wife to her sole, separate, and exclusive use, free and discharged from all his control and liabilities, is held in *Bingham v. Weller* (Tenn.), 69 L. R. A. 370. A note to these cases reviews all the other authorities on effect of conveyance by husband to wife.

*Insurance.*—An agent authorized to issue policies is held, in *Richard v. Springfield F. & M. Ins. Co.* (La.), 69 L. R. A. 278, to bind the company by all waivers, representations, or other acts within the scope or requirements of his business, unless the insured has notice of the limitation of his power.

*Limitation of Actions.*—Giving a note for interest upon a larger note already barred by the statute of limitations, which does not in any way refer to the earlier note, is held, in *Kleis v. McGrath* (Iowa), 69 L. R. A. 260, not to revive it under a statute providing that causes of action founded on contract are revived by an admission in writing, signed by

the party to be charged, that the debt is unpaid, or by a like new promise to pay the same.

*Lottery.*—The fact that each member is entitled to trade out the amount he has paid in, whenever he chooses to withdraw from the club, is held, in *People v. McPhee* (Mich.), 69 L. R. A. 505, not to prevent a suit club, which is a scheme by which a certain number of persons pay a small sum per week and choose by lot each week one of the number who shall receive a suit of clothes worth much more than such weekly payment, upon receipt of which he ceases to be a member of the club, from being a lottery.

*Negligence.*—The owner of a waggon, seated beside the driver, whom he employs, is held, in *Markowitz v. Metropolitan Street R. Co.* (Mo.), 69 L. R. A. 389, to be chargeable with the driver's negligence in attempting to cross a street car track in front of an approaching car which is in plain view.

*Practising Medicine.*—An ophthalmologist, who prefixes to his name the letters "Dr." on his sign, and on notices in which he undertakes to correct certain diseased conditions by the fitting of glasses to the eyes, is held, in *State v. Yegge* (S. D.), 69 L. R. A. 504, to come within the terms of a statute providing that, when a person shall append the title "Dr." in a medical sense to his name, he shall be regarded as practising medicine within the meaning of a statute which requires a license as a condition precedent to doing so.

*Statute of Frauds.*—That the statute of frauds is satisfied and specific performance of a contract may be decreed, is held, in *Charlton v. Columbia Real Estate Co.* (N. J. Err. & App.), 69 L. R. A. 394, where a signed, but undelivered, lease, taken in connection with a previously signed memorandum in writing or an oral agreement for a lease, shews a complete agreement on the terms of the lease.

**Will.**—Where a will, the body of which is written on horizontal lines on several pages of foolscap paper, so that all its items and provisions are in consecutive order to the end of the last page, under which the testator's signature appears, but there is also written in the margin of the last page to the left of, and separated from, the body of the instrument, a dispositive clause extending lengthwise of the page from near the bottom to near the top, and in no manner connected with the body of the instrument by any words or marks to indicate where the marginal matter is to be read in relation to the other provisions, and it is established by testimony that the marginal matter was written after all the other provisions, at the request of the testator, and before he attached his signature under the body of the will,—it is held, in *Irwin v. Jacque*: (Ohio), 69 L. R. A. 422, that the will is not signed at its end, as required by statute, and is invalid for that reason.

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## BOOK NOTICES.

**Porter on Principal and Agent:** A Manual of the Law of Principal and Agent. By James Biggs Porter, of the Inner Temple and South-Eastern Circuit, Barrister-at-Law; author of "Porter's Law of Insurance." London: Stevens and Haynes: 1905.

The author in the preface to his book states the scope thereof as follows: "I have not attempted to deal exhaustively with any branch of the large and multifarious subject of principal and agent, but only to write a brief manual, for such ordinary use as might not require reference to the comprehensive and learned works of the Hon. Mr. Justice Story, His Honour Judge Evans, and others. If I have succeeded in compiling a book which shall prove of assistance to the lawyer, in the more familiar and frequent cases which come before him, my purpose will have been accomplished." The author in his preface does not promise us much, and he does not give us any more than he promises.

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**Holmested's Married Women's Property Act of Ontario—**(R. S. O. 1897 c. 163), with a Commentary, by George Smith Holmested, K.C., Senior Registrar of the High Court of Justice for Ontario. Toronto: The Carswell Company, Limited: 1905.

The substance of this short treatise appeared in an article in this journal last year. An index, table of cases, &c., have been added. The author's modest hope that it may prove useful to the members of the legal profession will, we think, be fully realized. The method of arrangement of the material is excellent. Great industry is displayed in the collection of all the available authorities, and the author's notes upon sections of the statute not elucidated by judicial opinion are luminous.

## CURRENT PERIODICALS.

**The South African Law Journal** for 15th November, 1905 (Part IV., Vol. XXII.), contains, among other articles, an interesting one by G. C. F. Rorke on "Divorce in the Transvaal."

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**The Madras Law Journal** for August and September, 1905 (Nos. 8 and 9, Vol. XV.)

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**The Calcutta Weekly Notes** for 13th November, 1905 (No. 1, Vol. X.)

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**The Bombay Law Reporter** for 31st October and 15th November, 1905 (Nos. 20 and 21, Vol. VII.).

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## Supreme Court of Canada.

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QUEBEC.]

[27TH NOVEMBER, 1905.]

### CITY OF SOREL v. QUEBEC SOUTHERN R. W. CO.

*Municipal by-law—Railway aid—Condition precedent—Part performance—Assignment of obligation—Notice—Signification—Art. 1571, C. C.*

An action for the annulment of a municipal by-law will lie, although the obligation thereby incurred be conditional, and the condition has not been and may never be fulfilled.

Where a resolutive condition precedent to payment of a bonus to a railway company, under a municipal by-law in aid of construction and operation of works, has not been fulfilled within the time limited on pain of forfeiture, an action will lie for the annulment of the by-law at any time after default, notwithstanding that there may have been part performance of the obligation undertaken by the railway company, and that a portion of the bonus has been advanced to the company by the municipality.

In an action against an assignee for a declaration that an obligation has lapsed and ceased to be exigible on account of default in the fulfilment of a resolutive condition, exception cannot be taken on the ground that there has been no signification of the assignment, as provided by Art. 1571 of the Civil Code of Lower Canada. The debtor may accept the assignee as creditor, and the institution of the action is sufficient notice of such acceptance.

*Bank of Toronto v. St. Lawrence Fire Insurance Co.*, [1903] A. C. 59, followed.

Judgment of the Court below reversed.

*Beaudin*, K.C., and *Belcourt*, K.C., for the appellants.

*Beique*, K.C., and *Robertson*, for the respondents.

### GRAND TRUNK R. W. CO. v. HUARD.

*Negligence — Railway — Collision—Traffic agreement—Negligence of employee—Joint employment.*

Where injuries resulted from a collision between two Intercolonial Railway trains negligently permitted to run in opposite directions on a single track of a portion of the Grand Trunk Railway, operated under the joint traffic agreement ratified by 62 & 63 V. c. 8 (D.), the railway company were held liable for the carelessness of the train despatcher engaged by the company and under their control and directions, notwithstanding that he was declared by the agreement to be in the joint employment of the Crown and the railway company, and that the Crown was thereby obliged to pay a portion of his salary; *TASCHEREAU, C.J.C., dubitante.*

Judgment of the Court below reversed.

*Lafleur, K.C., and Beckett, for the appellant.*

*Laflamme and W. G. Mitchell, for the respondent.*

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[29TH NOVEMBER, 1905.]

### GRAND TRUNK R. W. CO. v. PERRAULT.

*Railway—Farm crossings—Board of Railway Commissioners—Jurisdiction—Appeal.*

Orders directing the establishment of farm crossings over railways subject to the Railway Act, 1903, are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada.

The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company, cannot be enforced under the provisions of 16 V. c. 37 (Can.) incorporating the Grand Trunk Railway Company of Canada.

An application to have the appeal quashed, on the grounds that the cost of establishing the crossing demanded, together with the damages sought to be recovered by the plaintiff, would amount to less than \$2,000, and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the Province of Quebec, was dismissed.

Judgment of the Court below reversed.

*Lafleur*, K.C., and *P. H. Colé*, K.C. (*Beckett*, with them), for the appellants.

*Beaudin*, K.C., and *J. E. Perrault*, for the respondent.

BRITISH COLUMBIA.]

[27TH NOVEMBER, 1905.]

### CLARK v. DOCKSTEADER.

*Mining law — Staking claim — Initial post — Occupied ground — Curative provision of statute.*

In staking out a claim under the Mineral Acts of British Columbia, the fact that initial post No. 1 is placed on ground previously granted by the Crown under these Acts does not necessarily invalidate the claim, and s.-s. (g) of s. 4 of 61 V. c. 33, amending the Mineral Act, R. S. B. C. c. 135, may be relied on to cure the defect.

*Madden v. Connell*, 30 S. C. R. 109, distinguished.

Judgment appealed from, 11 B. C. R. 37, affirmed; IDINGTON, J., dissenting.

NORTH-WEST TERRITORIES.]

[27TH NOVEMBER, 1905.]

### ANDREAS v. CANADIAN PACIFIC R. W. CO.

*Railway — Injury to person at highway crossing — Negligence — Finding of jury — Evidence.*

A., as administratrix, brought an action against the defendants to recover compensation for the death of her husband by negligence, and alleged in her declaration that the



negligence consisted in running a train at a greater speed than six miles an hour through a thickly peopled district, and in failing to give the statutory warning on approaching the crossing where the accident happened. At the trial questions were submitted to the jury, who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality, and that the death of deceased was caused by neglect or omission of the company in failing to reduce speed, as provided by the Railway Act. A verdict was entered for the plaintiff, and, on motion to the Court *en banc* to have it set aside and judgment entered for the defendants, a new trial was ordered, on the ground that questions as to the bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored, and the defendants, by cross-appeal, asked for judgment.

*Held*, IDINGTON, J., dissenting, that by the above findings of the jury the defendants were exonerated from liability on the other grounds of negligence charged, as to which they had been properly directed by the Judge, and the new trial was improperly granted on the ground mentioned.

*Held*, also, that, though there was no express finding that the place at which the accident happened was a thickly peopled portion of the district, it was necessarily imported in the findings given above; that this fact had to be proved by the plaintiff, and there was no evidence to support it; and that, as the evidence shewed it was not a thickly peopled portion, the plaintiff could not recover, and the defendants should have judgment on their cross-appeal.

Appeal dismissed with costs and cross-appeal allowed with costs.

*Ford Jones*, for the appellant.

*G. T. Blackstock*, K.C., for the respondents.

## CANADIAN PACIFIC R. W. CO. v. EGGLESTON.

*Railway—Straying animals—Negligence—Duty to trespassers.*

A railway company is not charged with any duty in respect to avoiding injury to animals wrongfully upon its line of railway until such time as their presence is discovered; IDINGTON, J., dissenting, though concurring in the judgment on other grounds.

Judgment of the Court below, 1 W. L. R. 356, reversed.

*G. T. Blackstock*, K.C., for the appellants.

*C. deW. MacDonald*, for the respondent.

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## PLISSON v. DUNCAN.

*Receiver—Management of business—Supervision and control—Laches.*

The receiver of a partnership, who is directed by the Court to manage the business until it can be sold, should exercise the same reasonable care, oversight, and control over it as an ordinary man would give to his own business, and if he fails to do so he must make good any loss resulting from his negligence.

The fact that the receiver is the sheriff of the district does not absolve him from this obligation, though the parties consented to his appointment knowing that he would not be able to manage the business in person.

TASCHEREAU, C.J.C., and MACLENNAN, J., dissented, taking a different view of the evidence.

Judgment of the Court below, *Plisson v. Diemert*, 1 W. L. R. 359, reversed.

*J. S. Ewart*, K.C., for the appellant.

*F. H. Chrysler*, K.C., for the respondent.

## Judicial Committee of the Privy Council.

[21ST DECEMBER, 1905.]

### THE "KITTY D." v. THE KING.

*Ship—Foreign vessel—Illegal fishing—Seizure of vessel—Evidence of vessel's position.*

An appeal, by special leave, from a judgment of the majority of the Supreme Court of Canada (Rex v. The "Kitty D.," 24 Occ. N. 261, 34 S. C. R. 673), reversing a decision of HODGINS, *Loc. J.* for the Toronto Admiralty District of the Exchequer Court of Canada (2 O. W. R. 1065).

The arguments were heard on the 20th, 21st, 24th, and 27th July, before a Board composed of the Earl of Halsbury (then Lord Chancellor), Lord Macnaghten, Lord Davey, Lord James of Hereford, Lord Robertson, and Sir Arthur Wilson.

*R. B. Haldane*, K.C., and *W. M. German*, K.C. (of the Ontario Bar), for the appellants.

*E. L. Newcombe*, K.C. (of the Ontario Bar), and *A. D. Batson*, for the Crown.

The judgment of the Board was delivered by

THE EARL OF HALSBURY:—In this case, to quote the language of Mr. Justice Davies, the question for determination is "solely one of fact." A vessel called the *Kitty D.*, seized by the Canadian government cruiser *Petrel* on the 3rd July, 1903, for fishing in Canadian waters, appeals against the judgment of the Supreme Court of Canada, which reversed the judgment of Mr. Justice Hodgins, who had tried the case, and had found in favour of the *Kitty D.* that she was in United States

waters when she was fishing. The fishing was being conducted with nets of a very considerable size, and their site was marked by a buoy. If the exact situation of the nets could be ascertained, all difficulty as to where the Kitty D. was engaged in the operation of fishing would disappear.

On the 27th July Captain Howison, of the United States Navy, proceeded to investigate the circumstances of the seizure. He found the nets and the buoy. He took off two corks with the initials R. and D. marked upon them. He logged the distance from Dunkirk and found it to be nine and a half statute miles. If this distance is accurately stated, and the nets were the same nets, and had not been moved from their position on the 3rd July, there can be no doubt that the Kitty D. was fishing in United States waters, and that the judgment of the learned Judge who tried the case ought to be affirmed. It has not been suggested that Captain Howison has made any error in his measurements; but two points were raised, not at the trial, but for the first time in the appellate Court: first, that the nets are not sufficiently identified, and, secondly, also for the first time in the appellate Court, that, if they are the same nets, they had been removed from the original place of the fishing to the place where Captain Howison found them. It is obvious that, if either of these two suggestions is well founded, the witnesses who established the identity of the nets and negatived their having been removed, must have been guilty of wilful falsehood. No mistake is possible under the circumstances. The witnesses were either telling the truth or they were parties to a scheme of falsehood and fraud. No wonder that the learned Chief Justice of the Supreme Court protested that it was impossible to reverse the finding of fact of the Court below without disbelieving the evidence of witnesses whom the learned Judge had heard and believed.

It is difficult to understand what Mr. Justice Davies means when he says that the learned Judge who tried

the cause did not base his conclusions "upon any questions arising out of the demeanour or credibility of witnesses, matters which would be peculiarly within his province and with a decision upon which an appeal court would not interfere." To act upon either of the suggestions above referred to would be in truth to decide the case without hearing it. No such question appears to have been entertained at the trial; and their Lordships entirely concur in the view of the Chief Justice that it would be impossible to enter judgment, as the Supreme Court appears to have done, upon an hypothesis of fact never suggested at the trial.

Independently of this consideration, their Lordships think that sufficient weight has not been given to the cogent and careful reasoning of the learned Judge who tried the cause. The problem of marking the exact spot where the seizure had taken place, when there were no landmarks and no points from which the observations could be taken, was in itself a difficult one. No mark or boundary distinguishes Canadian from United States waters. The distance from one shore to the other is proved to be  $22\frac{1}{2}$  miles; and the mode by which it is sought to establish that the *Kitty D.* was fishing in Canadian waters is by calculating by time and distance from the point of the Petrel's departure—that is to say, from about 32 miles along the lake to the point of seizure, the calculation being derived from the ship's log and the course marked in it.

There could be no more cogent enumeration of the sources of error than that given by Mr. Justice Davies himself, although he somewhat overstates the precautions taken against the errors incident to such a problem. He says: "The direct distance across the lake at the point of seizure is  $22\frac{1}{2}$  miles; and the boundary line running through the middle of the lake would be  $11\frac{1}{2}$  miles from the Canadian shore. At the time and place of seizure there was no land in sight, and it was therefore necessary to establish the position of the cruiser by reference to the courses

and distances which she had sailed from the land. The Petrel had sailed from Port Dover on the morning of the 3rd July, and had taken her usual course towards the boundary, S. E. by S.  $\frac{1}{4}$  S., passing Long Point light at a distance of about half a mile, and, with the light bearing directly abeam, had set her patent Negus log to indicate the distance run from that point. It is not disputed that the Negus log is one of the most approved logs known to mariners for the purpose of registering distances sailed. All these patent logs have to be corrected from experience. The Petrel's log had been carefully tested and corrected, and found by actual experience and measurement to over-register  $2\frac{1}{4}$  knots in every 40 knots. Likewise her compass had been carefully tested and corrected for deviation, and the variation in the locality of course was known. In fact the Petrel's compass carried a quarter of a point westerly deviation, and the variation was 3.30 deg. The Petrel, then, according to her officers, having set her log with Long Point light abeam, on her compass course S. E. by S.  $\frac{1}{4}$  S., continued that course until her log registered 5 knots, which brought her  $1\frac{1}{4}$  mile to the north of the boundary line. At this point she turned to run down eastwardly parallel with the line within Canadian waters, and her compass course was, as usual from there, E. by N.  $\frac{1}{2}$  N., which course she continued until her log registered 27 knots from the turn, making in all 32 knots from Long Point light."

It may be conceded that, if every part of these considerations could be accepted as precisely accurate, the conclusion arrived at would justly follow. But the learned Judge who tried the cause justly pointed out that no one of the assumptions referred to could be relied on for accuracy. It is admitted that the log of the Petrel is inaccurate. What the learned Judge points out is that "the change of a quarter of a point in a compass would make a difference of a mile and a half right or left in the vessel's course over a distance of some 30 miles." The variation and

deviation of the compass and the fact that the wheel was in the hands of two inexperienced persons are circumstances which render it impossible to treat the conclusion arrived at as one arrived at with complete certainty.

The learned Judges in the Supreme Court appear to have supposed from an observation in the judgment of Mr. Justice Hodgins, that he was under the impression that the sailor steering on board the *Petrel* was himself expected to make allowance for errors in the compass and the log. Their Lordships think that this suggestion does scanty justice to the intelligence or knowledge of Mr. Justice Hodgins. Mr. Justice Davies suggests that the eyes of one of the captain's officers were perpetually on the steerer's conduct. But the condition of the log, or of the notes which form materials from which the log should be composed, certainly do not lead to a conviction of that precise accuracy. It comes out incidentally that in looking over the log-book the letter W. was added to describe the course of the vessel some days after the transaction to which that portion of the log referred—probably with perfect honesty—but it certainly does not suggest that scientific precision upon which Mr. Justice Nesbitt seems to rely for his judgment. All that the learned Judge at the trial meant was that the steering was not as accurate as if the vessel had been steered by experienced seamen, and it is to be observed that Captain Howison seems to share the learned Judge's view of the error that might arise from loose steering.

It appears to be assumed by the Supreme Court that Mr. Justice Hodgins made a grave mistake as to the alleged course of the *Petrel*. Even if that mistake had been made, it does not seem to interfere with the learned Judge's reasoning as to the sources of error which would prevent the calculations on board the *Petrel* from being a sufficiently certain guide. But it is obvious to remark that it would have been easy to apply to the learned Judge to know whether he had in fact made the mistake attributed to him, rather than to leave it to the hazardous conjecture that he was misled by a printer's or shorthand writer's blunder.

- In the uncertain and unsatisfactory state of the evidence, it is impossible not to observe that if, upon the seizure, the Petrel had carefully logged the distance to the shore, no doubt could have remained as to whether the place of seizure was within Canadian waters. It may be that the excuses given for not doing so are valid ones, but an excuse for not having evidence will not supply the place of the evidence itself.

Their Lordships will therefore humbly advise His Majesty that the judgment of the Supreme Court should be reversed with costs, and the judgment of Mr. Justice Hodgins restored. The respondent will pay the costs of the appeal.

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# THE CANADIAN LAW TIMES.

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FEBRUARY, 1906.

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## ON RESTRICTING WILLS.

**I**N the order for the visitation of the sick in the Book of Common Prayer is this direction: "And if he hath not before disposed of his goods, let him then be admonished to make his will, and to declare his debts. what he oweth and what is owing unto him; for the better discharging of his conscience and the quietness of his executors. But men should often be put in remembrance to take order for the settling of their temporal estates, whilst they are in health."

I can only remember once, and that was a long time ago, hearing a sermon by a then elderly clergyman enforcing this last direction. But recently I have seen and heard an old time application of the paragraph first quoted, when attending a production of the old morality play of "Everyman." When I saw the repenting man, with Death waiting for him, seize the pen and write his will, I was struck with the necessity of the passing of the Statutes of Mortmain.

I understood better than before how the noble buildings and the riches of the religious orders in England and the south and east of Scotland were amassed, and the gradual growth of lay feeling which at the end of the Tudor period destroyed, despoiled, and swept them away.

Those statutes and the other barriers which had been erected by our predecessors to prevent the hasty making and

secret execution of wills, and to restrain devises and bequests to objects other than family advancement, have during the last half century been greatly broken. The swing of the mental pendulum has been to look on them as foolish, and to relax and probably soon abrogate them.

Possibly I may be wrong in this, but my experience has been all one way, and that leads me to think that restrictions should be increased in the cases of sick and aged persons.

The primary meaning of *mens sana in corpore sano* is obvious, but science teaches that in an unsound body a hale mind will not be found.

The experience of all men in practice enforces the propriety and also the need of the repetition of the direction that all men should make their wills while in health, and also repeat the doing so as to make the disposition suitable to the means and condition at all periods of life. I think that our uniform experience is the appearance of a client with a look of preternatural solemnity, who states his determination to have his will drawn. It reminds one of a young friend convalescing in a dull and dreary boarding house, who was necessarily left alone by his busy acquaintances during the day. His medical man, finding him moping, said that he would ask the curate to look in and talk to him. With an anxious look the patient exclaimed, "Oh, Doctor! am I so bad as that?"

A similar feeling exists as to will-making. Instead of treating it as reasonable as ordering a needed suit of clothes, most people seem to treat the signing of a will as the end of life, and how often we find the client parcelling out his means down to the money in the bank at the moment, instead of providing in general terms for what may be a far off event.

It seems a contradiction that I should wish to restrict wills, and at the same time emphasize the desirability of making more of them. *Experientia docet stultas*. Early in my legal

life I was led to doubt the propriety of admitting to probate any testament made during physical or mental weakness, and perhaps it would be better to refer to a few examples than to quote cases from the reports.

An Englishman, a Norfolk man, had come to Upper Canada in the twenties; he worked hard and prospered, married and had an old fashioned family. In the later fifties, in the changes and chances of this mortal life, he found himself fairly well off, but a widower with one surviving delicate daughter. Then he bethought himself of revisiting his native land, believing that the change and the air of his boyhood home would restore the failing health of his last surviving child. Travelling was a very different thing in those days to what it is now. The home had to be broken up, and there was much to arrange. Among other things he did, he made a new will. By this instrument he provided that in the event of his daughter's death (which soon happened) the bulk of his estate should be divided among his friends, and especially he remembered two life-long friends who had aided him in critical times and sympathized in his domestic afflictions.

The returned emigrant fell into declining health soon after his daughter's death, and passed away after some months of increasing weakness. When he died it was found that the will made in Canada was revoked by a subsequent one which was proved in England. By it his estate was divided among the new found relations, cousins A, B, C, and so on. The old friends had been remembered by small legacies, and the disappointment was bitter. But they realized that extreme physical weakness had pretty well obliterated memory, although the deceased might have been of sound mind so far as his weakened faculties permitted; the strength to withstand pressure was gone, and it was more than doubtful whether the deceased was of sound (that is perfect) mind, memory, and understanding, as the law intends. But like many other kinds and classes of cases, where was the evidence?

Another case, one which illustrates the pressure to which infirm or elderly people may be exposed, occurred some years ago, in which, if the evidence had been given as it was asserted to exist, it would have shewn that there are other influences sometimes used stronger than the presence and importunities of those round a bed-side.

Some years ago an elderly lady became infirm and was kept by her attendants in great seclusion, and her friends and relatives never saw her alone. After her death codicils to a former carefully prepared will in favour of those round her were produced. Legal proceedings were begun, but a settlement was come to. One got a glimpse, however, of the pressure which can be brought to bear on dependent invalids. There is little use citing will cases; they all differ, they are not like actions on promissory notes. Still the mass of them which turn on pressure shew those present favoured, those absent practically ignored.

For a moment I might be permitted to refer to another cause for doubting wills made during sickness. Medical men of experience know that frequently patients apparently *compos mentis* are ignorant of what is going on, or their judgment is warped by the phantom fancies of fever. Many years ago I was called on to see an old friend who was confined to bed. His medical attendants expected delirium and wished that his affairs should be put in order. I found him very cheerful, talked about his will, the money in the house and at the bank, and gossipped about his affairs. I certainly thought him quite competent to have made a will. The only disturbing feature was one of positive dislike to a poor family whom he had befriended. A loan he had made them he wished called in at once. A few weeks after, upon his recovery, I referred to this matter. He was greatly surprised and was distressed to find that he had expressed such sentiments, as instead of pressing for payment he would have helped these poor people. He had no recollection of my

visit or of anything connected with it. A recent personal experience convinces me that this feature of disease is by no means uncommon and increases my distrust of sick-bed wills.

Dr. William Osler, in "Science and Immortality," asserts: "Within the lifetime of some of us science—physical, chemical, and biological—has changed the aspect of the world, changed it more effectually and more permanently than all the efforts of man in all preceding generations." It might be possible to substitute some inquiry more scientific than reference to old traditions or the possible horror of a jury.

A standard work defines an insane delusion as a persistent and incorrigible belief that things are real which exist in the imagination, and which no rational person can conceive the patient if sane would have believed.

In the province of Quebec the wills of those persons whose weakness of mind does not allow them to comprehend the effect and consequences of the act are declared null.

In Ontario it has been held that mere physical weakness, however great, without proof of mental incapacity, was insufficient to set aside a will; and in another case, where the testator was so weak in his last illness that his directions were given at intervals and were then difficult to understand, the will was yet upheld.

As a matter of precaution, the will should be carefully and fully read over before the testator and the two attesting witnesses in all such cases.

I come to a most serious matter, the weakness of age. We don't all fail at the same age; some are in their dotage in their fifties, others never reach that stage, but their grasp of affairs necessarily contracts. We establish an arbitrary age limit at the beginning of life—why not one at the end? Injustice may be done in both cases, in the latter case, however, by preventing wills being made.

It is one thing to say matters might be mended, another to point out the way. The wisdom of our ancestors

evolved a safeguard in having three instead of two indifferent witnesses. I doubt if increase in numbers would improve matters, but I suggest what can easily be done by the practice in Surrogate Courts, that where a will shews evidence of haste or is made shortly before death, careful inquiry should be made and the evidence of the doctors attending the deceased given under oath, so that all human means are resorted to to prevent injustice. Parentless grandchildren, where there are first and second families, may be better off than sometimes happens.

Henry More, the platonist, sums it up thus: "If we do but observe the great difference of our intellectual operations in infancy and dotage, from what they are when we are in the prime of our years, and how that our wit grows up by degrees, flourishes for a time, and at last decays, keeping the same pace with the changes that age and years bring into our body."

Our ancestors believed in mortmain laws, but, as I said, they are being dispensed with. Partly the change may be caused by the decay of faith, the doubts as to immortality and as to future punishment, the doubts as to the usefulness or the need of paying an accustomed toll to the bridge builders who for so many generations have assisted the soul on its flight in the unseen world.

The money is paid, however, and will continue to be so, so long as the spirit of man is governed by fear or hope of the unknown future.

The fashion at present is the endowment or aid of colleges or hospitals, and there will always exist a tendency to gratify post mortem vanity at the expense of children or dependents.

In this connection one is reminded at the present time of the influence of community life on the mind of man. The predecessor of Sir Henry Campbell Bannerman in the affections of the Stirling electors was Laurence Oliphant,

one of the most brilliant men of his day, who abandoned a great career to become an inmate of a community in the States.

Such things suggest to me the wisdom of the practice by which the Emperor of Germany as *pater patriæ* takes possession of estates devised for uses pious, charitable, philanthropic, or otherwise, and has the whole matter looked into so that justice is first of all done to the family and secondly to testatorial wishes.

The adoption of some similar practice is, I see, advocated in at least two Australian States. It is but right for another reason. The necessities of governments are constantly growing, and now considerable charitable doles are compulsorily made through provincial laws, and as these resources decline and needs increase we must expect still larger benevolences of this character.

As a last word I might state that my own belief is not that "the crumbling creeds, like cliffs washed down by water, change and pass," but that though the outward form may change the rock remains. So long as man is man we shall have Agapemones, Faith cures, Healing cures, Mormonism, and Communities of every form, from the most bestial to the noblest developments of the human soul. But I believe that all who desire to aid these should do so during their mortal lives and not at the expense of others by their last wills and testaments.

Toronto.

GEO. MARTIN RAE.

## CLOG ON THE EQUITY OF REDEMPTION.

Biggs v. Hoddinott, [1898] 2 Ch. 307. A mortgage may stipulate for a collateral advantage at the time and as a term of the advance, provided the equity of redemption is not thereby fettered, and the bargain is a fair and reasonable one, entered into between the parties while on equal terms, without any improper pressure, unfair dealing, or undue influence.

The above is part of the head-note of the case. It was one between a brewer and an hotel proprietor; the latter covenanted to deal exclusively with the brewer during the continuance of the security. At p. 314 Romer, J., says: "On a mortgage you cannot, by contract between the mortgagor and mortgagee, clog, as it is termed, the equity of redemption so as to prevent the mortgagor from redeeming on payment of principal, interest, and costs. . . . Does that principle apply to the case before me so as to prevent this covenant by the mortgagors from being enforced against them? I am clearly of opinion that it does not. There is nothing in this covenant which clogs the equity of redemption. The mortgagors' right to redeem under the mortgage deed stands exactly the same whether this covenant to take beer from the brewer, the mortgagee, is in the deed or not. The mortgagee by virtue or in respect of that covenant has no right to stop or check redemption. He could not stop redemption because there had been any breach of the covenant. There is no charge upon the mortgaged premises in favour of the mortgagee for any sums which might become due to him under or by virtue or by reason of any breach of that covenant by the mortgagors: . . . But then it is said on behalf of the mortgagors that there is a much larger principle which would prevent this covenant from being held



binding on them, and they say that the principle is stated in *Jennings v. Ward*, 2 Vern. 520, which is a well known authority, where the Master of the Rolls undoubtedly said that a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." He then distinguishes that case from the one before him (*Biggs v. Hoddinott*).

In *Santley v. Wilde*, [1899] 2 Ch. 474, it was held that a mortgagee may stipulate in his mortgage deed for a collateral advantage for himself beyond the repayment of the sum advanced and interest, and may enforce the bargain against his mortgagor, provided it is not unconscionable or oppressive. The mortgage in this case provided for one-third of the profits of a theatre, in addition to principal and interest. Lindley, M.R., said: "The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given . . . and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. . . . Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is therefore void. It follows from this, that 'once a mortgage always a mortgage.' . . . A 'clog' or 'fetter' is something which is inconsistent with the idea of 'security,' a clog or fetter is in the nature of a repugnant condition." He then argues that the shaky prospect of payment justified the contract, and that it was not unfair.

The later cases will shew that, while the House of Lords agreed with law as laid down by Lord Lindley, they did not think the facts of *Santley v. Wilde* justified the decision.

*Noakes v. Rice*, [1902] A. C. 24. This was another case of an agreement to buy liquors from the mortgagee, whether the loan existed or not. The Lord Chancellor referred to the

difference of judicial opinion. He then approves of some of the remarks I have quoted from the judgment of Lindley, M.R., in *Santley v. Wilde*, and goes on: "It is more a difference in viewing the facts." He then refers to the Irish case of *Browne v. Ryan*, [1901] 2 I. R. 653:—"Fitzgibbon, L.J., in his judgment, and also Holmes, L.J., in referring to the case which I have just cited (*Santley v. Wilde*), appears to consider that that case is inconsistent with the rule which they themselves lay down. I confess I am unable to find any inconsistency. It may be that my noble and learned friend Lord Lindley took a different view of the facts in the case to which he was then referring from that which they would have taken, but that is not a difference in the law; and in this case it appears to me, as in the case argued in the Court of Appeal in Ireland, it is almost impossible, if the rule laid down by Lord Lindley there is the rule upon which the Courts must act, to deny that there is here a fetter or clog, or whatever figurative word may be used, to prevent that which, according to the known state of the law, is to be enforced, namely, that the person who has pledged his estate for the payment of a debt shall, upon redemption, be entitled to have that estate back again unfettered and unclogged by anything that shall prevent his exercising the right which the law insists upon his being permitted to have." Lord Macnaghten says: "Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. It follows as a necessary consequence that, when the money secured by a mortgage of land is paid off, the land itself and the owner of the land in the use and enjoyment of it must be as free and unfettered to all intents and purposes as if the land had never been the subject of the security. . . . Since the argument my attention has been called to the case of *Browne v. Ryan*, recently decided by the Court of Appeal in Ireland. There a farmer mortgaged his holding to secure £200 and interest; and, as part of the mortgage transaction, it was stipulated that the mort-

gagor should sell his holding within twelve months, employ the mortgagee as the auctioneer at a certain commission, and pay him the like commission if the conduct of the sale was given to any one else. The Court of Appeal held, and in my judgment, rightly held, that the stipulation had no effect after redemption. The judgments of the learned Judges in the Court of Appeal seem to me, if I may venture to say so, to contain a very clear exposition of the law. They had occasion to consider the judgment of the English Court of Appeal in *Santley v. Wilde*, and they expressed their disapproval of the conclusion at which the English Court arrived. My Lords, speaking for myself, with all deference to my noble and learned friend opposite, Lord Lindley, I cannot help sharing that view. I do not in the least dissent from the propositions laid down by my noble and learned friend, taking them separately. But the transaction in that case seems to me to have been nothing more than an ordinary mortgage to secure an advance of money, with a superadded obligation offending against the settled principles of equity, in that it rendered redemption impossible. It seems to me to be contrary to principle that a mortgagee should stipulate with his mortgagor that after full payment of principal, interest, and costs, he should continue to receive, for a definite or indefinite period, a share of the rents and profits of the mortgaged property as the result of an obligation arising from the contract made when the mortgage was created. Nor can I agree with the President of the Probate Division, who appears to have thought that *Santley v. Wilde* was covered by the decision in *Biggs v. Hoddinott*, a decision to which, as it seems to me, no objection can be taken." Lord Davey at p. 33 said: "The second doctrine to which I refer, namely, that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract, was established long ago when the usury laws were in force. The Court of Equity went beyond the usury laws, and set its face against every transaction which tended to usury. . . . The abolition

of the usury laws has made an alteration in the view the Court should take on this subject, and I agree that a collateral advantage may now be stipulated for by a mortgagee, provided that no unfair advantage be taken by the mortgagee which would render it void or voidable, according to the general principles of equity, and provided that it does not offend against the third doctrine. . . . The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form: once a mortgage always a mortgage and nothing but a mortgage. The meaning of that is, that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest, and costs, from getting back his mortgaged property in the condition in which he parted with it. . . . I confess I should have decided *Santley v. Wilde* differently from the Court of Appeal. After the payment of principal and interest, and everything which had become payable up to the date of redemption, the property in that case remained charged with the payment to the mortgagee of one-third share of the profits, and the stipulation to that effect should, I think, have been a clog or fetter on the right to redeem. The principle is this—that a mortgage must not be converted into something else; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on payment off of the loan. . . . I apprehend a man could not stipulate for the continuance of payment of interest after the principal is paid.”

*Bradley v. Carritt*, [1903] A. C. 253, was a case of a loan on mortgage with an agreement that always thereafter the mortgagee should have the sale of the company's tea. Lord Macnaghten, speaking of *Santley v. Wilde*, and disagreeing with it, says: “Now that the usury laws have been repealed, there cannot, I think, be any objection to such a stipulation (share in the profits of a theatre in addition to principal and interest), provided it comes to an end when the mortgagee

is paid principal, interest, and costs. . . . But it may be said with equal truth that, putting aside the case of *Santley v. Wilde*, there is no case to be found in the books from the earliest times to the present day in which a mortgagee after redemption ever attempted to keep on foot the benefit of any collateral stipulation which was part and parcel of the mortgage transaction. . . . At the outset they were met by a passage in a former judgment of Rigby, L.J. 'The property,' said Rigby, L.J., in *Noakes v. Rice*, 'which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not, either expressly or by implication, reserve to himself any hold upon the property after the time of redemption has arrived and the right of redemption has been put in force.' . . . As to the last reason, I must say, speaking for myself, that I am not sure that it would be a great misfortune if the operation of every decision were to be confined to the matter decided and the principles on which the decision rests." He then decided that the commission on sales of tea was void. Lord Shand, with Lord Lindley, differed from the judgment of the House, saying: "I agree with Lord Lindley in holding that this is not a case of that class, and that where, as here, redemption can be fully obtained by repayment of the loan and interest, a separate obligation for a different or collateral advantage to the lender is valid and enforceable. . . . The only case to which I think it necessary to refer is that of *Browne v. Ryan*, one of that very class which, as the Lord Chancellor says, may be said to come very near the line. In that case the mortgagee sought damages for the breach of a contract depriving the mortgagor of his property even after its redemption by him, thus leaving a fetter on the subject of the security."

Lord Davey: "The principle, as it appears to me, is that on payment of the principal, interest, and costs, together with any bonus or anything in the nature of a bonus which has been properly stipulated for, and has become payable, the

mortgage contract comes to an end, and the mortgagor is entitled to get back his property unaltered in character, condition, and incidents, and is henceforth relieved from the burden imposed upon him by the contract. . . . I am really at a loss to understand how, consistently with the equitable doctrine, a mortgagee can insist on retaining the benefit of a covenant in the mortgage contract materially affecting the enjoyment of the mortgaged property after the principal, interest, and costs, and everything which has become payable before redemption, has been paid. . . . All that I understand to have been decided by *Biggs v. Hoddinott* is, first, that a stipulation for the continuance of a loan for five years was valid, and, secondly, that a covenant to take beer from the mortgagee, limited to the continuance of the security, did not clog the equity of redemption, and was enforceable by injunction."

In *Mainland v. Upjohn*, 41 Ch. D. 126, where a bonus in addition to the payment of principal and interest was allowed, Kay, J., thought that while the bonus was not allowed under the old case in *Vernon*, it was on account of its being considered an invasion of the usury laws since repealed, but that there was something more in those cases, namely, an equitable principle against unconscientious agreements; and Barker, J., in *Buchanan v. Harvie*, 3 N. B. Eq. 61, thought that some fraud or unfair dealing must be shewn to avail of this latter defence.

*Jarrah Timber and Wood Paving Corporation v. Samuel*, [1903] 2 Ch. 1, was the case of a mortgage of stock with an agreement that the lender should have the option of purchasing the whole or any part of debenture stock at forty per cent. at any time within twelve months. This was held a clog upon the equity of redemption. Collins, M.R.: "For what is the effect of the stipulation? It is that the mortgagors, on repaying their £50,000 debt, do not get back the thing which they mortgaged unimpaired, unfettered, and

free from condition, but get it back with a superadded condition binding upon them, at all events to the extent of making them liable for damages if they do not perform it, and possibly—though I do not decide the point—subject to other remedies against them. They get back the thing mortgaged subject to the condition of handing it back to the mortgagee if they carry out their engagement with him, or, if they do not, paying damages to him for not doing so. On the authorities, is that a clog on the equity of redemption? I think this case clearly comes within the decision of the House of Lords upon this point: *Noakes v. Rice*.” This case, under the name of *Samuel v. Jarrah Timber and Wood Paving Corporation*, was affirmed by the House of Lords, [1904] A. C. 323.

In *Buchanan v. Harvie*, 3 N. B. Eq. 61, the plaintiff advanced £3,500 upon mortgage with agreement to repay £6,000 and transfer £5,000 par stock in a company to be formed by borrower to work salt springs upon the property mortgaged. The defendant contended upon foreclosure proceedings that the plaintiff could only recover £3,500 and interest, as the other stipulations in the mortgage were a clog on the equity of redemption and void. Judgment was given for the plaintiff.

The result seems to be:—

1st. A bonus will be allowed in addition to principal, interest, and costs: *Mainland v. Upjohn*, *supra*.

2nd. Any other collateral advantage that ends with payment of the mortgage: *Biggs v. Hoddinott*, *supra*.

3rd. When the mortgage is paid, the mortgagor must get back his property free of all incumbrances or liens: *Browne v. Ryan*, *supra*.

Illustrations:

Agreement to buy liquors from mortgagee during continuance of mortgage. Good: *Biggs v. Hoddinott*, *supra*.

Same agreement to continue after mortgage is paid. Bad: Noakes v. Rice, *supra*.

Agreement to pay one-third profits of a theatre after loan paid. Bad: Santley v. Wilde, *supra*, as dealt with in remarks in later cases.

Agreement to allow mortgagee to sell by auction on commission property mortgaged within term of loan. Bad: Browne v. Ryan, *supra*.

Agreement to sell teas of mortgagor after loan paid. Bad: Bradley v. Carritt, *supra*.

Option to purchase debentures at 40 per cent. during twelve months of loan. Bad: Jarrah Timber, etc., Corporation v. Samuel, *supra*.

Loan of £700 and agreement to pay £1,000. Good: Potter v. Edwards, 26 L. J. Ch. 468.

To give bonus and stock in a company to be formed to work mortgaged property (salt springs) in addition to loan. Good: Buchanan v. Harvie, *supra*.

St. John, N.B.

EDMUND G. KAYE.

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## RECENT CASES FROM THE TIMES REPORTS.\*

**Building Scheme.]**—Where land is laid out according to a building scheme, a conveyance of certain lots with a plan annexed shewing them as having adjacent vacant spaces, does not in itself, it is decided in *Whitehouse v. Hugh*, 22 T. L. R. 89, amount to a representation by the vendor to the purchaser that these spaces shall be kept vacant, and the purchaser cannot complain if the vendor subsequently sells the vacant spaces for building lots. It is also decided that a reservation by the vendor in his conveyance of the power to vary plans and conditions becomes part of the contract, and may be acted on by him at his discretion.

**Company.]**—The result of the judgment of the Judicial Committee upon the somewhat complicated state of facts dealt with in *Chapman v. Great Central Freehold Mines*, 22 T. L. R. 90, seems to be that where, acting in good faith, one company sells a property to another in consideration of paid-up shares in the latter company, the two companies may thereafter acting in concert give to a person subscribing for and paying cash for shares in the purchasing company, some of the paid-up shares previously transferred to the vendor company as consideration for the property. While the subscriber thus gets in reality shares at less than par, he does technically pay in full for those he subscribes for, and therefore there is no offending against the rule prohibiting the issue of shares at a discount.—The judgment in *In re Glasdir Copper Mines*, 21 T. L. R. 354, noted 25 C. L. T. 269, has been affirmed by the Court of Appeal: 22 T. L. R. 100; the point being that advances made by debenture holders after a receiver had been appointed did not take priority

\* Including the cases in No. 8, Vol. 22, to the 19th January, 1906.

of repayment over the expenses of the receiver himself.—The House of Lords in *Calthorpe v. Trechmann*, 22 T. L. R. 149, and *Macleay v. Tait*, 22 T. L. R. 149, in reversing the judgments of the Court of Appeal (20 T. L. R. 710, 25 C. L. T. 329), deal with the difficult question of how far a plaintiff alleging fraudulent omission of a contract from a prospectus must prove that had it not been for the omission he would not have taken the shares, and therefore would not have suffered loss. While the language of the Act (Companies Act, 1867, s. 38) is wide enough to give a right of action upon mere proof that a contract has not been mentioned, the House of Lords hold that there must be proof that the shares were taken on the faith of there being no such contract as that omitted to be disclosed, and that if the contract had been disclosed the shares would not have been taken. Forgetfulness will not excuse a director who did in fact once know of a contract which is not mentioned, but a director who never knew of the contract the omission of which is complained of, will not be liable. See R. S. O. 1897 c. 216.

**Contempt of Court.]**—It is decided in *Rex v. Davies*, 22 T. L. R. 97, that proceedings to attach for contempt of Court may be taken in the High Court against a person publishing improper comments upon a case pending before a magistrate, and of such a nature as in the event of commitment to be triable at the sessions. The case is in many respects a sequel to that of *Rex v. Parke*, 19 T. L. R. 627. The object of such proceedings is to prevent undue interference with the administration of justice, not to vindicate the dignity of any particular Court or Judge.

**Copyright.]**—*Macmillan v. Dent*, 22 T. L. R. 117, derives much of its interest from the fact that it is concerned with the copyright in sixteen letters written by Charles Lamb between the years 1798 and 1810, but not published till after

his death. It decides that under such circumstances the copyright belongs to the person who owns the manuscript of the letters and not to the representatives of the writer thereof, and that the copyright may be assigned irrespective of the ownership of the letters themselves, which may be dealt with if desired in a distinct chain of title.

**Domicil.]**—In *Huntly v. Gaskell*, 22 T. L. R. 144, the House of Lords point out that in determining whether there has been a change of domicil by choice, residence counts for little; to lose the domicil of origin and acquire a new domicil of choice there must be a fixed determination in a person to strip himself of his nationality.

**Estoppel.]**—*Comitti and Son v. Maher*, 22 T. L. R. 121, is a decision which may perhaps be of some practical use. Executions had on several occasions been issued against goods which had been included in a chattel mortgage made by the defendant in favour of the plaintiffs, and on each occasion the plaintiffs with the defendant's concurrence set up the chattel mortgage title and defeated the executions. It was held that the defendant in an action against him to enforce the chattel mortgage could not set up the defence that it was invalid. While sustainable on the ground of estoppel within the second rule in *Carr v. London and North Western R. W. Co.*, L. R. 10 C. P. at p. 317, the decision was also put on "the broader principle that a man is not entitled at once to affirm and disaffirm a certain state of facts. . . . He cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage."

**Evidence.]**—In *Van Diemen's Land Co. v. Marine Board of Table Cape*, 22 T. L. R. 114, it is decided that evidence

of acts of user was admissible in deciding whether certain land was or was not intended to have been included in a Crown grant, which contained a recital that the land intended to be granted had been theretofore taken possession of by the grantees.

**Limitation of Actions.]**—The principle of the decision in *Hervey v. Wynn*, 22 T. L. R. 93, is applicable under the Ontario Real Property Limitations Act, though the result on the facts might, having regard to the difference between the English authorities and the Ontario cases as to the life of a mortgage covenant, have to be modified, or at least the dates more carefully considered. A mortgage was made in 1875, and in 1879 a deed of further charge to secure a further advance, the mortgage being then overdue and the deed of further charge containing a covenant to pay upon receipt of the notice provided for in the mortgage, in effect therefore upon demand. No payments were made by the mortgagor, and in 1899, when both the personal remedy and the remedy against the land were gone, the mortgagor made a statutory declaration in lunacy proceedings concerning the mortgagee, giving the particulars of the loans. It was held that this declaration did not avail to prevent the bar of the statute, because: (a) it was just as consistent with repudiation of liability as with acknowledgment; (b) it was not made to the mortgagee or his agent; and (c) the right had been lost before it was made.

**Master and Servant.]**—In *Clouston & Co. v. Corry*, 22 T. L. R. 107, the important ruling is made by the Judicial Committee that in an action for wrongful dismissal tried with a jury the question whether the dismissal is justifiable is, no matter how clear the evidence, for the jury. "The sufficiency of the justification depends upon the extent of the misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. It is for

the presiding Judge to say whether there is any evidence to submit to the jury in support of the allegation of justifiable dismissal. If no such evidence has in his opinion been given, he should not submit any issue in respect of such allegations. The Judge may also direct, guide, and assist the jury. He may direct by informing them of the nature of the acts which as a matter of law will justify dismissal. He may guide them by calling their attention to the facts material to the determination of the issues raised, and he may assist them in a manner and to an extent there is no reason to define."

**Nuisance.]**—The judgment in *Rushmer v. Polsue and Alfieri*, 21 T. T. R. 183, noted 25 C. L. T. 135, as to nuisance by noise and vibration, has been affirmed by the Court of Appeal: 22 T. L. R. 139; the judgments being of considerable interest on the question of the standard of comfort a plaintiff in a case of alleged nuisance has the right to contend for, and the principle being clearly held to be that that standard in regard to freedom from smoke, smell, and noise, must vary with the locality in which the complainant dwells. The defendant's operations must be regarded not in the abstract, but in connection with all the circumstances of the locality, and in particular with reference to the trades carried on there, and there must be a substantial increase in discomfort to justify the Court in interfering.

**Principal and Surety.]**—*Rickaby v. Lewis*, 22 T. L. R. 130, is a good example of the strictness with which contracts of suretyship are construed. A debtor promised to repay an advance within three months of the receipt by him of a written notice requiring payment, and the defendant agreed "to guarantee you the repayment of the amount advanced by you to my husband as per the agreement." It was held that notice requiring payment was a condition precedent to liability on the part of the surety, and that the fact of the

debtor's death made no difference, and did not relieve the creditor from the duty of giving notice, which could however be given to the debtor's executors or administrators. And compare the harder case of *Port Elgin Public School Board v. Eby*, 26 O. R. 73.

**Solicitor.]**—The points dealt with in *In re Grant, Bulcraig, & Co.*, 22 T. L. R. 96, were important chiefly because upon their decision depended the incidence of the costs of the solicitor and client taxation in which they were raised. While under the Ontario practice, with the discretionary power as to such costs, similar points would not have such serious results, two of the three rulings are yet worth noting. (1) The taxing officer cannot allow an improper item which is in the bill as a mode of compensation for a proper item omitted by mistake. (2) An error in addition may be corrected, that being matter of arithmetic, not of taxation.—*In re Reed*, 22 T. L. R. 127, shews the wide extent of the disciplinary jurisdiction of the Court. A solicitor who was not in active practice and had not taken out his certificate was nevertheless struck off the rolls, because he was doing business as a bookmaker.

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## THE LATEST ONTARIO DECISIONS.\*

**Administration Order.]** — Administration actions were formerly very common, and very expensive. Then came the law reformer, with his summary application for an administration order and commission on the value of the estate in lieu of costs. That, too, is now considered too expensive. The executor or administrator disposes of the estate under the powers given by the Devolution of Estates Act, with the privity and consent of the official guardian when necessary, and applies summarily to the Court upon originating notice when questions of law arise. The summary administration procedure may still be, but is seldom in practice, resorted to; and in a recent case, where an administration order was obtained, the Chief Justice of the Common Pleas, upon an application for the usual order for distribution after sale of the estate and payment into Court of the proceeds, was seriously minded to refuse to make the order, to mark his disapproval of proceedings being taken in the High Court. The whole estate administered consisted of a village lot, sold for \$250, and nearly \$140 was allowed to the solicitors for commission and disbursements. There were special circumstances, however, which in some measure justified the expense of the proceedings, and the order was rather reluctantly granted: *Artress v. Thompson*, 7 O. W. R. 31.

**Appeal to Privy Council.]**—Upon an application by the plaintiffs in *City of Toronto v. Toronto Electric Light Co.*, 7 O. W. R. 119, to allow the security upon a proposed appeal to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal, 6 O. W. R. 443, the Court

\*Short notes of the most important cases in volume VI. of the *Ontario Weekly Reporter*, No. 25, p. 961 to end of volume; and in volume VII., Nos. 1, 2, 3, pp. 1 to 136, inclusive.

of Appeal pointed out that its jurisdiction was confined to allowing or refusing to allow the security; that it could not grant effective leave to appeal, if the amount involved did not warrant an appeal; and that if, in its opinion, the case was not within the Act, the security ought not to be allowed. The sole matter in controversy in the case in hand being whether the Toronto Electric Light Company had forfeited their rights by amalgamation with their co-defendants, there was nothing to shew that such a matter was or could be of value to the plaintiffs of more than \$4,000, or of any sum or value capable of being ascertained or defined; and the motion was refused.

**Assessment and Taxes.]**—After delivery of judgment in *Beatty v. McConnell* (6 O. W. R. 882), it was made to appear to Street, J., that, in delivering such judgment, he had overlooked one branch of the plaintiffs' argument not governed by the point on which the judgment turned, and he thereupon gave a supplementary judgment, 7 O. W. R. 11, in which he upheld the plaintiffs' contention that the tax deed, not having been registered within 18 months after the sale, as required by s. 184 of c. 193, R. S. O. 1887, applicable to Algoma by s. 31 of c. 23, R. S. O. 1887, overruling the defendants' contention that the expression "18 months after the sale" meant 18 months after the making of the tax deed, had not priority over a purchaser in good faith who had registered his deed prior to the resignation of the tax deed. The result was not affected, it appearing, in the opinion of the Court, that the plaintiff was not such a purchaser.

**Company.]**—The defendants' appeal from the judgment of Anglin, J., in *Gold Leaf Mining Co. v. Clark*, 5 O. W. R. 6, in favour of the plaintiffs for \$5,000, for damages for breach of an agreement by the defendants to sell 100,000 of the plaintiffs' shares (par value \$1) for 5 cents each, was allowed by the Court of Appeal (6 O. W. R. 1035), upon the ground



that the plaintiffs, a mining company, had not put themselves in a position to carry out their part of the agreement by passing the by-law prescribed by s. 5 of R. S. O. 1897 c. 197. The damages allowed were also under the circumstances of the case deemed excessive.—The appeal by the liquidator from an order of Anglin, J., 4 O. W. R. 535, allowing the appeal of King and Johnston from the report of the local Master at Ottawa placing them on the list of contributories, was dismissed by the Court of Appeal in *Re Wakefield Mica Co., King's and Johnston's Cases*, 7 O. W. R. 104, and the order appealed from supported on the ground that the subscriptions for stock and issue of stock certificates were mere nullities, being the act of a body irregularly and improperly elected as a board of directors on the 13th June, 1903, whereas the letters of incorporation bore date the 22nd of the same month. The transaction was that King and Johnston being creditors of Johnston, Willetts, & Co., the latter proposed to form a company and transfer to it their property, taking paid-up shares in the company in payment therefor, a proportion of which were to be handed to King and Johnston in satisfaction of this debt; and so King and Johnston could not be held as subscribers through the agency of the actual signatories, because they never intended to subscribe and never authorized any person to subscribe for them, and, in any event, the subscriptions were signed in the names of the alleged agents, and the latter were therefore the only persons whom the company or appellant could regard as subscribers, and the shares were issued as paid-up shares and King and Johnston never intended to take any other.—In *Chubbuck's and Holland's cases*, 7 O. W. R. 108, the Master had refused to place Chubbuck and Holland on the list of contributories, and Anglin, J., on appeal affirmed the Master's ruling (4 O. W. R. 535), and the liquidator's appeal to the Court of Appeal was dismissed on the ground that Chubbuck and Holland had fully performed their part of an agreement by which they were to receive 250 paid-up shares;

and the property which the company had acquired as the consideration for the shares had been sold in the liquidation proceedings for the benefit of the creditors, and it was beyond the power of the company or the liquidator to restore the parties to their former position.—In dismissing the plaintiffs' appeal from the judgment of Teetzel, J., in *Bank of Hamilton v. Johnston*, 7 O. W. R. 111, the Court of Appeal held that entries of the defendant's name in the books required to be kept by the Companies Act after the commencement of the action, and probably with a view to the preparation of the certificates used as evidence at the trial, indicated that there was no allotment by the company up to the date of such entries; the defendant's application of the 30th May, 1902, contained an offer and agreement to take 30 shares of preference stock upon certain terms, but the company could not adopt it in part and reject the remainder unless they first succeeded in obtaining defendant's assent to the variation, and there was no such assent; the agreement was one for the acquisition of shares by the defendant at a discount, and there was no by-law authorizing a sale of the shares at a discount, and plaintiffs had neither offered nor shewn themselves in a position to comply with the terms of the agreement in this respect; W. A. Johnston was the agent of the company in procuring the agreement, and had assumed to accept the offer in the terms in which it was made, and defendant was justified in believing, in the absence of evidence to the contrary, that the company was accepting his offer as made; and he only attended the meetings on 30th May, 1902, and in respect to them he must be taken to have attended only as a shareholder upon the terms of his offer, and, as between him and the company, whose assignees the plaintiffs are, it cannot be said that his doing so operated in any way to the prejudice of the company, or induced them to take a position or engage in acts which otherwise they would not have done. In other words, there was no estoppel.

**Contempt of Court.]**—The Court has no jurisdiction, by the issue of process for contempt of Court in conspiring in Ontario to procure the destruction of a document in question in an action pending in Ontario, to bring before it an offender without Ontario: a Divisional Court in *Re Place*, 7 O. W. R. 56.

**Contract.]**—The plaintiffs' appeal from the judgment of Teetzel, J., in *Henning v. Toronto R. W. Co.*, 5 O. W. R. 227, noted 25 C. L. T. 139, was dismissed by the Court of Appeal: 7 O. W. R. 1.

**Costs.]**—Taxation of the plaintiff's costs in *Robinson v. England*, 7 O. W. R. 47, was closed and the taxing officer's certificate issued without the filing of any objections as provided by Rules 1182 and 1183. On motion by the plaintiff for leave to appeal and for an order varying the taxation, *Magee, J.*, held that neither could be granted, but, it appearing that there was the intention to appeal at the time, and that the slip which occurred was owing to oversight, at the moment, of the requirement of the Rules, and was made known within a few hours, and request made for its rectification, that, the plaintiff having included in his notice of motion an application for such order as might be just, following *In re Furber*, [1898] 2 Ch. 538, an order should go to set aside and discharge the certificate of taxation, and directing that a new certificate be not signed for five days. This order was affirmed by a Divisional Court: 7 O. W. R. 130.

**Covenant.]**—In *Hime v. Lovegrove*, 7 O. W. R. 4, the plaintiffs' appeal from the judgment of Street, J. (5 O. W. R. 706, 9 O. L. R. 607, noted 25 C. L. T. 344), was dismissed by the Court of Appeal.

**Criminal Law.]**—A conviction for keeping a disorderly house, bawdy house, or house of ill-fame, following the words of s. 207 (j) of the Criminal Code, is good notwithstanding

that it does not state that the defendant was a loose, idle, or disorderly person or a vagrant: *Rex v. Leconte*, 6 O. W. R. 970; in which a Divisional Court preferred the British Columbia decision in *The King v. McCormack*, 7 Can. Crim. Cas. 135, to the New Brunswick case of *The King v. Keeping*, 4 Can. Crim. Cas. 494, another triumph for the progressive west over the effete east.—Two questions were stated by Meredith, J., on a case reserved for the opinion of the Court of Appeal, in *Rex v. Quinn*, 6 O. W. R. 1011: (1) Whether there was error in the ruling that the plea of “*autrefois acquit*” was not supported by the evidence; and, if so, whether the Court of Appeal had power, and ought, because of such error, to quash the conviction, or acquit the prisoner, or grant a new trial. (2) Whether, assuming such ruling to have been right, the trial Judge had power, and ought, because of the other trial and acquittal, to have discharged the prisoner or have required the jury to find a verdict of “not guilty” and then have discharged him; and, if so, what, if any, relief the Court of Appeal could, against the will of the Crown, give. The defendant had been acquitted on a charge of personation in having applied for a ballot and voting for Frederick Palmer at a Dominion election on 3rd November, 1904, and the plea of “*autrefois acquit*” was to a charge of perjury, on the same occasion, the oath having been administered at the poll. Maclaren, J.A. (Moss, C.J.O., and Garrow, J.A., concurring), held, in answer to the first question, that there was no error in the ruling of the trial Judge, the plea not being made out because it could not be said that the second offence included the first, and while in proving the second it would be necessary to give evidence of the first, it would be merely introductory or preliminary. If the charge of perjury had been tried first and had failed for any cause, the jury could not on an indictment or count for that offence bring in a verdict of “guilty of personation.” But held, in answer to the second question (Osler, J.A., and Teetzel J., dissenting on this point), that the case was one for the application

of the maxim, *nemo debet bis vexari pro una et eadem causa*; that the principle of *res judicata* applies equally to an acquittal as to a conviction; and that the Judge should, because of the first trial and acquittal, have directed the jury to find a verdict of not guilty, and then have discharged the accused.

—The Court of Appeal held (Maclaren, J.A., dissenting), in *Rex v. Hendrie*, 6 O. W. R. 1015, that the knowledge by the defendant of, and his acquiescence, as president and director of the Ontario Jockey Club, in, an arrangement by the latter to lease or sell to one Haskin the sole and exclusive right to take and receive, in a specified enclosure on the grounds of the Woodbine race-course, bets from the general public, were not sufficient, without shewing that the defendant promoted the action of the corporation or did more than acquiesce, to establish that the defendant was a party to the offence charged under s. 61 of the Criminal Code. The defendant was charged under s. 198, and he was clearly not the keeper of a common betting house as defined by s. 197.—An indictment charging “that the defendants on the 4th **January**, 1905, and on other days and times before that date, at the city of Toronto, did unlawfully conspire and agree together and with each other to effect the cure of Wallace Goodfellow of a then sickness endangering life, by unlawful and improper means, thereby causing the death of the said Wallace Goodfellow,” was held by the Court of Appeal, in *Rex v. Goodfellow*, 7 O. W. R. 92, to have been properly quashed by the trial Judge. Another count in the indictment against the defendants was for “unlawfully conspiring and agreeing together and with each other to deprive Wallace Goodfellow of the necessities of life, to wit, proper medical care and nursing, whereby his death was caused, contrary to the Criminal Code,” upon which defendants had been convicted, was also held to be bad, none of the defendants having been alleged to have occupied any position in relation to the deceased which involved any legal duty on the part of them or any of them towards him, which they conspired to omit or neglect.

“One is not guilty of any legal wrong in omitting to supply that which he is under no legal obligation to supply.” “In a case of conspiracy to do that which was not a crime or to do a wrong which is not well known as being the subject of a criminal conspiracy, the facts should be set out with such particularity that it may appear whether or not the conspiracy charged is really an indictable offence.” “If it even meant that the accused conspired to deprive the man of ‘medical care and nursing’ . . . and if the indictment had been drawn accordingly, with a proper and sufficient statement of the facts, it might have been good as an indictment for manslaughter, or for a lesser crime of the like character, covered by s. 208 of the Criminal Code, according to the facts alleged, but not as an indictment for conspiracy.”

**Damages.]**—Evidence having been admitted without objection in support of the following clause in a statement of claim, “The plaintiff William Banks by reason of the injuries to the plaintiff Ralph (Banks) was put to great expense and otherwise damnified,” and the Judge having directed the jury, also without objection, that such expenses might be allowed, and the objection not being raised in the Divisional Court or appearing in the reasons for appeal, the Court of Appeal, on appeal by the defendants from the order of a Divisional Court reversing the judgment of nonsuit at the trial, and directing judgment to be entered for the plaintiff Ralph Banks for \$700 and for his father William Banks for \$300, in *Banks v. Shedden Forwarding Co.*, 7 O. W. R. 88, held that the objection was too late and ought not to be entertained; and that the father was entitled, apart from the relationship of master and servant, to recover such expenses. Per Garrow, J.A.: “The infant plaintiff at the time of the injury was 7 years old, and resided at home with and under the charge of his father, the plaintiff William Banks, who was therefore obliged, under ss. 209 and 210 of the Criminal Code, to supply him with the necessaries of life, including medical attendance: see *Rex v. Lewis*, 6 O. L. R. 132,

2 O. W. R. 566. And if the burden of that duty was increased by the wrongful act of the defendants or for which they are responsible, I see no valid reason and I know of no authority why the father should not recover as damages the amount of such increase."

**Discovery.]**—To a claim for damages for publication of a circular by the defendants, one of the statements in which was, "We are advised that the Massey-Harris Co. have decided to discontinue their separator business," the defendant in *Massey-Harris Co. v. DeLaval Separator Co.*, 7 O. W. R. 59, pleaded that the circular in question was published without notice and in the bona fide belief that it was true, and that it was a privileged communication made with an interest and under a duty to make the same and sent in the ordinary course of business to the agents of the company who were connected with the business of the company. On an application to compel defendants' manager to attend for examination and for discovery and make disclosure of certain papers then held by him, Mabee, J., held that in the circumstances of the case, and without attempting to determine the question of the authority of *White v. Credit Agric. de France*, 12 O. W. R. 1, the defendants must give the names of the persons from whom they allege they received the information, and the persons to whom they intended abiding the same, and the persons to whom the circular was sent. *White v. Credit Agric. de France*, 12 O. W. R. 1, Q. B. D. at p. 448. The rule of non-disclosure of a witness's name does not avail defendants: *White v. Credit Agric. de France*.

**Division Courts.]**—The Court Judge for the County of York, in the judgment summons, was held to be a Court Judge for the County of York, in the judgment summons, *Edwards*, 7 O. W. R. 211, but in the nature of a Court Judge for the County of York, that, as a consequence, the Court Judge for the County of York, in the judgment summons, was held to be a Court Judge for the County of York, in the judgment summons.

woman and the judgment in respect of a debt incurred after marriage, such order cannot be made against her. Any departure from the ruling in *Re McLeod v. Emigh*, 12 P. R. 450, and other cases based on *Ex p. Dakins*, 16 C. B. 77, will be found to be cases in the High Court or the County Court. This is not a case of the exercise of inherent jurisdiction as suggested by Bicknell, pp. 420, 502, but of the jurisdiction created by the statute.

**Drainage.**]—It was held by the Court of Appeal in *Re McClure and Township of Brooke*, 6 O. W. R. 1021, in dismissing an appeal by the defendants from the Drainage Referee's report setting aside the defendants' by-law to raise \$1,225 by levy upon certain lands and roads to pay certain damages and costs awarded against the defendants in a proceeding for damages occasioned to lands through a defective drainage system, that s. 95 of the Drainage Act does not render liable to an assessment to pay damages and costs occasioned before the by-law was passed, or the work done for which it provided, lands assessed for benefit for work done under a by-law.

**Evidence.**]—In *Northern Navigation Co. v. Long*, 6 O. W. R. 982, a question of importance affecting the credibility of a witness was raised at the trial. The plaintiffs' case was rested largely on the testimony of a person who had been in their employment as bookkeeper, and who, before the action was begun, gave them information supporting the charge upon which the action was based, that their president had made false statements of earnings to the directors, upon the faith of which dividends had been improperly paid. When this information was received, before the action was actually in contemplation, and the president being still alive, the solicitors for the plaintiffs procured the bookkeeper to make a statutory declaration affirming the truth of the information he had given. His evidence at the trial agreed with the declaration. It was argued on behalf of the defendants, the



executors of the then deceased president, that the witness was in vinculis, and was not free to vary from his declaration except at the risk of a prosecution for perjury. This contention was founded on the remarks of Lord Langdale, M.R., in *Harvey v. Mount*, 8 Beav. 439, 454, and of Strong, C.J., in the *Welland Election Case*, 20 S. C. R. 392. "These cases, perhaps," said Street, J., "can scarcely be taken as on all fours with the present, for the reason that when the statutory declaration of Macdonald was taken, no action was begun, nor, so far as appears, was the necessity for bringing an action contemplated. At the same time, however, I am bound to say that a simple signed statement would have been quite as effectual for any conceivable purpose, more so for most purposes, and would not have been open to the objections which have been very fairly taken here; and the taking of statutory declarations, under any similar circumstances, is certainly not a practice which should be followed. See also the *South Oxford Case*, 1 O. W. R. 795." In spite of the objection, credit was given to the witness in weighing his testimony.—In *Horlick v. Eschweiler*, 7 O. W. R. 43, the defendants' appeal from a report upon a reference to take accounts, based on the Master's refusal during the reference, upon the defendants' application, to issue a commission to cross-examine the plaintiffs upon their affidavits filed with him in proof of their accounts upon which he was adjudicating, there being filed, in addition to these affidavits, which were filed by consent (the plaintiffs residing out of the jurisdiction), the evidence of the plaintiffs taken upon commission for the purposes of the trial, the Master deeming the commission unnecessary in view of the evidence already in, was allowed by Teetzel, J., who, following *Townsend v. Hunter*, 3 C. L. T. 319, considered that the Master had no discretion to refuse a commission to cross-examine the deponent on his affidavit verifying the mortgage account. *Plenderleith v. Parsons*, 6 O. W. R. 145, was distinguished.

**Extradition.]**—On appeal from an order refusing to discharge the appellant on a writ of habeas corpus, and remanding him to custody under a warrant of extradition to the State of Illinois to answer to a charge of forgery of certain tickets of admission to an entertainment, the Court of Appeal in *Re Harsha*, 7 O. W. R. 97, discharged the prisoner, for reasons disclosed in the judgment of Osler, J.A., who said in part: “The accused is entitled to insist that the charge shall be made out—a *prima facie* case is no doubt sufficient—but made out by proper evidence; and here, in my opinion, it fails because that has not been done. Much of what is stated in the depositions is hearsay, and of course quite inadmissible: *Re Parker*, 9 P. R. 332; but the plain defect in the proceedings is, that neither a genuine ticket nor one of those with the forging of which the prisoner is charged was produced to either of the deponents on making his deposition, or was verified or identified by any of them, or otherwise produced or identified before the extradition Judge.” “The grave irregularity of the proceedings before the extradition Judge ought not to be overlooked. His warrant for the apprehension of the accused seems to have been issued without any information or complaint taken in this country, or a foreign warrant, duly authenticated, having been before him. Either of these simple preliminaries would have been sufficient, but both were omitted.”

**Fraud and Misrepresentation.]**—The action of *Northern Navigation Co. v. Long*, 6 O. W. R. 982, was brought to recover against the executors of J. J. Long, deceased, damages suffered by the plaintiffs by reason of false and fraudulent representations made by the deceased as president of the plaintiff company, whereby the profits for the year 1902, both in an approximate statement submitted to the directors by the deceased, upon which a dividend was actually declared, and in his report to the shareholders for the same year, were overstated by about \$30,000 (one-half).

Considerations which induced Street, J., to find that these representations were false, to the knowledge of deceased, were,—the positive evidence of Macdonald, the plaintiffs' bookkeeper, who was without motive to "misrepresent the position of the company or to throw upon Long the odium of having wilfully misled the board and the other shareholders;" the fact that when Macdonald made his statement Long was alive and in a position to contradict it; that Long was in a position with regard to the company which "made a continuance of confidence in its earning power a matter of much importance to him;" that he profited largely by the misrepresentation in question, having made large sales of stock shortly after the date of his report; and the misleading character of a previous statement for 1901. It was also found as a fact that the directors were misled by the statement in question, as they were intended to be, and it was held that the plaintiffs were entitled to recover, notwithstanding that the moneys paid out as dividends were paid to shareholders, and would have been entitled to recover even if the then shareholders were the same as those who received the dividends; and the measure of damages was held to be such a sum as would put the plaintiffs "in the position in which they would have been had the representations made to the directors been true."

**Guarantee Insurance.]**— In *Elgin Loan and Savings Co. v. London Guarantee and Accident Co.*, 7 O. W. R. 109, the plaintiffs' appeal from the order of a Divisional Court (5 O. W. R. 349, 9 O. L. R. 569, noted 25 C. L. T. 218), affirming the judgment of MacMahon, J. (4 O. W. R. 99, 8 O. L. R. 117), dismissing an action on a guarantee policy issued by the defendants in favour of the plaintiffs to secure the fidelity of one George Rowley as manager of the plaintiff company, was dismissed by the Court of Appeal, on the ground that representations, by the plaintiffs, in the application for the policy (which was stated in the policy to form the basis of

the contract) as to audits and other checks on Rowley, were to be regarded not as mere statements of intention, Rowley having been in the plaintiffs' employment for a number of years, but as representations of an existing course of business. *Hay v. Employers' Liability Assurance Corporation*, 6 O. W. R. 459, was distinguished.

**Jury.]**—In *Moore v. Grand Trunk R. W. Co.*, 6 O. W. R. 1031, the jury answered the first and second of three questions submitted to them, by finding that the death of deceased was caused by the negligence of the defendants in the conduct of the train which caused the death of the plaintiff's husband, and that such negligence consisted in not ringing the bell. To the third question, "Could William Moore have avoided the injury by the exercise of reasonable care?" they answered, "Yes, but it has not been proven to us that he did not use ordinary care." A discussion then took place between the Judge and the foreman, when the latter said: "We say he did use reasonable care and still he was killed." Further questions were then submitted: (5) If William Moore had used reasonable and ordinary care would he have sustained injury? (6) Did the deceased use reasonable and ordinary care in going towards and on defendants' track upon the occasion of his injuries? (7) If he did not do so, wherein was he negligent? To the first two of these the jury answered "Yes," and it was thus unnecessary to answer the third. On appeal by the defendants and cross-appeal by the plaintiff from the judgment of Magee, J., 5 O. W. R. 211, noted 25 C. L. T. 142, refusing a nonsuit and refusing to enter judgment for either party, the Court of Appeal held that the third question and answer should have been struck out when the jury retired to consider those finally submitted, and, though this was not done, and it still remained on the record, the uncertainty of the answer (if there was any) could not neutralize the clear and precise findings on the subsequent questions, which fully disposed of the case; and the plaintiff was therefore entitled to judgment.

**Limitation of Actions]**—The defendants in *Cobean v. Elliott*, 7 O. W. R. 13, were held by Falconbridge, C.J., to have acquired a title by possession, the period of prescription then being 20 years, to the lands in question, in view of the facts that Andrew Elliott, through whom they claimed, had gone into possession under such circumstances as constituted him a tenant at will some time in 1848 or earlier, and had remained in possession and lived on the land thereafter, and was assessed as owner thereof since 1857. In any case, the provision of the will of John Elliott, who had the paper title and who died in 1873—"I also give and bequeath to my son Joseph Elliott the east half of the west half of lot number 15 in the 6th concession east of Hurontario street, in the township of Caledon, in the county of Peel, at the death of my brother Andrew Elliott. I give and bequeath to my brother Andrew Elliott the use of the east half . . . during the term of his natural life, on condition that he neither sells nor rents the same without consent in writing of my son Joseph Elliott"—does not bring the case within the principle of *Re Dunham*, 29 Gr. 258, and *Re Defoe*, 2 O. R. 623, for, while Andrew Elliott knew of the devise to himself, he did not remain passive, but actively and openly violated the condition imposed by the will by renting the land for two years to Thomas McCartney, 12 or 13 years ago, and to William Dunn for a year in April, 1895, and the writ being issued on the 29th May, 1905, Andrew Elliott had, more than 10 years ago, openly set at naught the conditions of the will.

**Liquor License Act.]**—On motion by the defendant in *Re Rex v. Smith*, 7 O. W. R. 40, for an order directed to the Judge of a County Court prohibiting further proceedings on a conviction against the defendant, a licensed hotel keeper, on appeal, under s.-s. 6 of s. 118 of the Liquor License Act, by the license inspector from an order of a police magistrate dismissing a complaint preferred by the inspector against the defendant, it appearing that the magistrate had, in preparing

the order of dismissal, used a printed form for use by a justice of the peace and signed his name over the printed description "J. P. Co. Simcoe," yet that in the body of the order he had struck out the printed description "a justice of the peace in and for the county of Simcoe," and inserted the words "police magistrate for the town of Orillia," and that the information was sworn before him as police magistrate and the summons was issued and the minute of judgment at the end of the depositions signed by him in this capacity, Teetzel, J., held that the magistrate was acting as police magistrate and not as an ex officio justice of the peace under R. S. O. 1897 c. 87, and that there was no appeal from his judgment in the matter in question; s. 6, as introduced into the Act by 55 V. c. 51, s. 9, only applying to the order of "a justice," though the words "or justices" were added in the revision of 1897, especially having regard to the fact that before the introduction of this section there was an appeal by a convicted licensee from a conviction or order of "a justice, justices, or police magistrate," expressly provided by s.-ss. 1, 2, 3, 4, and 5 of s. 118.

**Master and Servant.]**—In *Shea v. John Inglis Co.*, 6 O. W. R. 962, a Divisional Court dismissed the defendants' appeal from the judgment at the trial, upon the findings of a jury, in favour of the plaintiffs in an action for injuries sustained by an apprentice of the defendants to the trade of boiler-making, while acting, pursuant to the order of one Sinclair, foreman of the defendants' shop, as a helper of one Green, in the place of the regular helper of the latter. It was held that, since the character of the work was such that it was necessary that the assistants should perform some portion of their duties under the direction of the workman operating the machine (a hydraulic rivetter), and the particular direction to "climb the post and hold off the stays" from getting in the way of the rivetter while Green operated it, which resulted in the accident, was to do something which Green could not do himself and the necessity of which it was

within his province to determine, there was evidence to support the finding that Green was a person in the employ of the defendants to whose orders Shea was bound to conform, and that he received his injuries owing to having conformed to the order of Green; and that there was evidence of negligence on the part of Green to go to the jury, because he sent the plaintiff inside the boiler they were working on (where it was dark) to climb the post, a difficult thing to do, on which there was no rest or platform, and the plaintiff would have a precarious foothold and only one hand free to catch and hold the dangling stays, knowing that these stays were a source of "mischief and danger, loose and uncontrollable, unless caught and held." and, then, without ascertaining that the boy had succeeded in carrying out his instructions, proceeded to lower the boiler shell, when one of these stays caught on the pulling post, causing the boiler to tilt and the hook on one side supporting it to become unfastened, resulting in the accident. "An order—proper enough in itself—but given at a time and under circumstances such that the person giving it knew or should have known that its execution involved unnecessary danger to the person obeying it, may . . . be termed a negligent order."—The injury for which damages were claimed in *Commerford v. Empire Limestone Co.*, 6 O. W. R. 1018, was occasioned by the plaintiff's foot slipping, while getting upon a moving dump car of the defendants, as it was his duty to do, in order to control its motion down an incline by the application of a brake, and getting under one of the wheels. The appeal by the defendants from the order of a Divisional Court affirming the judgment of Boyd, C., at the trial, upon a verdict of a jury in favour of the plaintiff, was dismissed by the Court of Appeal (Osler, J.A., dissenting), in view of the facts that evidence was adduced, on behalf of the plaintiff, of men accustomed to the work, who said that much, if not all, the danger could have been prevented either by so running the cars as to have the brake at the rear or by the use of a projecting footboard; and that the defendants

did not produce evidence to shew that the present contrivance in use by them for enabling the men to get upon the cars is what is in general use at similar works, or that there is no better one known or in common use; the Court being of opinion that there was not evidence of that character upon which it could be held that there was nothing to go to the jury on the question of failure to provide the most reasonably safe and proper contrivance for the protection of the workmen, defendants calling no witnesses who were experts in the manufacture of cars of this description, and their witnesses saying only that they knew of no safer way; and this notwithstanding that there was testimony that this was the first accident of the kind during the period of 17 years that the work had been going on.—Two questions arose in *Amendola v. Doheny*, 7 O. W. R. 32: (1) Who was the employer of the plaintiff? (2) Was the angle formed by the intersection of the rails of converging tracks about 3 feet wide, and laid with light rails (33 lb.) on ties about 3 feet apart, along which dump carts used in construction work were drawn by horses, a railway frog, or what is a frog and what is a railway? Falconbridge, C.J., was of opinion that the evidence was amply sufficient to establish that the defendants had retained personal control over the workmen of Cosco and Vetere, alleged sub-contractors, so as to satisfy the test established by a line of cases of which *Levering v. London and St. Katharines Docks Co.*, 3 T. L. R. 607, is the leading one, notwithstanding the apparent contract, “to take out the cut from station 148n. to station 156n., and to carry on the works according to the terms of the specification on which the railway (Temiskaming) is being built, and to accept the estimate of the engineer as final,” and to do the work at certain prices mentioned, and the defendants agreed “to pay the above prices when the engineer in charge gives a certificate that the work is completed;” and on the authority of *Doughty v. Fairbank*, 10 Q. B. D. 358, held that the construction described was a railway, although the cars in this case were hauled by horses, while in that cited they were



propelled by steam engines, and that the angle in question was within the definition of a frog in *Southern Pacific Co. v. Seley*. 152 U. S. R. at p. 150.

**Mechanics' Liens.**]—The appellants in *Boake Manufacturing Co. v. McCrimmon*, 6 O. W. R. 979, sought, on their appeal to a Divisional Court from the Master in Ordinary's report, priority, as against the respondents (mortgagees) in respect of their liens, on the increased selling value given to the land by the works and services performed by them. It appeared that after the filing of the liens the respondents refused to make any further advances, probably because they feared that they might as to such further advances be postponed to the liens, whereupon the parties entered into an agreement that notwithstanding the claims of lien the respondents might advance the moneys necessary to complete the building, such moneys to be a charge on the lands prior to the liens, but the agreement to be without prejudice to the right of the lien-holders to their liens and to proceed with the enforcement thereof, and the respondents to advance the moneys necessary and to be entitled to add the amount of any such advances to the amount of their mortgages. The judgment of the Court dismissing the appeal was delivered by Meredith, C.J., who said, in part: "The claim of the contractors to a lien on the increased selling value of the land, having regard to the incomplete condition of the buildings and the want of money to complete them, was probably, at the date of the agreement, of little, if any, commercial value, and it seems to me improbable that it was then thought to be of sufficient value to warrant the contractors insisting upon retaining it at the risk of the mortgagees refusing to make any further advances. The language used in the first paragraph, which deals with the reservation of the contractors' rights 'to enforce their liens against the said lands,' is not that which would have been used if the special lien which the appellants now claim, viz., a lien on the increased selling value of the land, were

intended to be preserved, but is apt language to describe the liens which they undoubtedly had upon the lands themselves, subsequent, however, in priority to the respondents' mortgages."

**Mortgage.]**—Where the assignee of a mortgage afterwards becomes the owner of the equity of redemption in the lands mortgaged, the question of merger being one of intention, *Mabee, J., in Rogers v. Brann*, 6 O. W. R. 993, held that the intention disclosed by the circumstances of that case, both grantor and grantee being dead, was that there should not be a merger, because at the time one R. H. Nesbitt conveyed the equity of redemption in the property to John A. Nesbitt, the latter concealed from him the fact that he was the assignee of the mortgage, that the assignment was not registered, and the later conveyance from John A. Nesbitt to R. H. Nesbitt was made expressly subject to this mortgage, which, it was shewn by a memorandum in the handwriting of R. H. Nesbitt, he knew was outstanding. The land being vacant and no one being in physical possession, it was held that the constructive possession went with the legal estate, and was in John A. Nesbitt, the assignee of the mortgage, from the date of its maturity. Even if it could be held that the mortgagor was in possession, letters written by the plaintiff, as agent of R. H. Nesbitt, operated as an acknowledgment by him of the right of John A. Nesbitt to receive the mortgage moneys, R. H. Nesbitt being at the time unable to write, and these letters might be regarded as having been written by his amanuensis within the authority of *Dublin Corporation v. Judge*, 11 L. R. Ir. 9, although s. 13 of R. S. O. 1897 c. 133 does not make provision for acknowledgment by an agent.—In *Kennedy v. Foxwell*, 7 O. W. R. 26, an action for foreclosure, judgment had been granted by the Master in Chambers under Rule 595, and a final order of foreclosure ultimately made. An application was made by one Marion Hill, in whom the undivided interest in the mortgaged property of his deceased son, Llewellyn

Allan Foxwell, one of the mortgagors, to which she became entitled as one of his heirs at law, vested at the expiration of a year from his death, to vacate the final order of foreclosure, the Master's report, and all other proceedings taken subsequently to the 20th June, 1899; and various other proceedings, having in view the same object, were taken by different parties interested. By consent of all parties, leave having been given to appeal from a certain order appointing an administrator ad litem of the estate of Albert Foxwell, one of the mortgagors, the same being attacked on the grounds that the Court had no power to make the appointment in a case such as this, and, if there was power to appoint, that the appointment was improperly made, the appeal and all the motions to set aside the various proceedings attacked came on to be heard before a Divisional Court, when it was held that the final order of foreclosure was not binding on Marion Hill, because no notice was taken of the son's death pendente lite, "but the action proceeded as if he were still living, and he and not his personal representatives, or those claiming under him, are declared to stand absolutely debarred and foreclosed." "His personal representative, or at all events some one to represent his estate in the mortgaged lands, should have been made a defendant, and an order should have been obtained to continue the proceedings against the surviving defendants, and the person or persons upon whom his estate in the mortgaged lands devolved at the time of his death." The applicant Marion Hill was ordered to be added as a defendant (*Campbell v. Holyland*, 7 Ch. D. 166), and an order made that the action be carried on as between the plaintiff and the continuing defendants and the new defendant, and that it stand in the same plight and conditions in which it was at the time of the death of Llewellyn Allan Foxwell, and a new account was directed, and the fixing of a new day for redemption. It became unnecessary to decide other questions raised. Quære, whether the constitution of the action should be changed to bring before the

Court the persons who had become entitled to the interest in the mortgaged premises of Albert Foxwell.

**Municipal Corporations.]**—The defendants' appeal from the judgment of Magee, J., in *Phillips v. City of Belleville*, 6 O. W. R. 1, noted 25 C. L. T. 395, in favour of the plaintiff upon a second trial of the action, as directed by a Divisional Court, 9 O. L. R. 732, 5 O. W. R. 310, noted 25 C. L. T. 148, was allowed by a Divisional Court, upon the ground that the effect of the judgment of the Divisional Court which ordered the new trial was that the Courts are entitled to examine into and pronounce upon the sufficiency of the reasons which have actuated the minds of the members of a municipal council in selling real estate of the corporation to the highest bidder, and, although the corporation, acting in good faith, has deemed its reasons sufficient, may restrain them from acting upon them if they happen to come to a different conclusion; and therefore that it should be sufficient for the decision of the question at issue if the Court find, first, that the council acted in perfect good faith, and second, that they had reasons before them which they may reasonably have considered good and sufficient to justify their action without entering upon so doubtful and elusive an enquiry as that of the respective weights that these different aldermen may have given to the various reasons on which they acted.

**Negligence.]**—*Oatman v. Michigan Central R. W. Co.*, 7 O. W. R. 81, is a decision of the Court of Appeal somewhat tardily reported, for it was decided in 1901, before the days of the *Ontario Weekly Reporter*. If not a case of the first importance, it is at least one which deserves attention, and we shall not be surprised to hear of it being frequently cited. The case was before the Court of Appeal on a former occasion, on appeal from the judgment at the first trial, 1 O. L. R. 145. A new trial was then ordered and resulted in a verdict for the plaintiff, based upon the answers of the

jury to questions submitted. The action was for negligence in allowing fire to escape from an engine of the defendants, which destroyed the plaintiff's barn and contents. The sole ground of negligence was that the engine was fitted with the stack known as the "diamond," instead of with an improved modern stack known as the "straight." There was conflicting expert evidence as to the merits and demerits of the two types of stack. All the witnesses, however, concurred in saying that more sparks are emitted from the "diamond" stack, and escape therefrom in all directions. Those who spoke in favour of it said that, as they escape through a smaller mesh than that of the wire used in the straight stack, they are necessarily smaller, and there is, therefore, less danger of fire, as they are more likely to be extinct when they reach the ground. The advocates of the straight stack shewed that it is so constructed that the live cinders are more burnt up, beaten down, and deadened, than is possible in the diamond, before they reach the point of escape, and that those that do escape, though they may be in one respect larger than those emitted by the diamond, are ejected from the stack by force of the exhaust, directly upwards to a great height, and thus are more likely to die before they fall. The jury found that the burning of the barn was caused by fire from the defendants' engine, and that the escape of the fire was due to negligence of the defendants in not adopting the modern stack. The Court was of opinion that the jury might well have adopted the view that one stack had no practical advantage over the other; but, on the other hand, that the case could not properly have been withdrawn from the jury. The two questions of fact, whether the straight was inferior in point of safety to the diamond, and whether that was the reason or one of the reasons which had induced railway companies to substitute it for the latter, were for the jury to decide, upon the opposing expert testimony, not for the Court, and the jury were justified in finding, on the evidence, that a reasonable time had elapsed for making the change and abandoning the use of the diamond stack over

the whole system. "Negligence in not adopting a new style of engine or stack," said Osler, J.A., "ought not to be so easily inferred as in a case of mere non-repair. For a long time it must be a matter of observation and experiment, and experience alone can decide whether a new method or device is an improvement upon the old. And if it is, a reasonable time must elapse before it can be taken into use, having regard to the company's business, and the alterations rendered necessary in the rolling stock. Nevertheless, once it is recognized that the improvement, whatever it may be, is a practical one, shewn by experience . . . to be of large, indisputable, and permanent value, the time must arrive sooner or later when it may be said that it is negligence in the company not to adopt it." The Port Glasgow and Newark Sail Cloth Co.'s Case, 19 Rett. 614, and in the House of Lords, 30 Rett. 35, and National Telephone Co. v. Baker, [1893] 2 Ch. 186, 204, 206, were referred to.

**Parties.]**—The action of Eddy v. Booth, 7 O. W. R. 75, was to restrain the defendants from prosecuting certain works upon the Ottawa river, which, as the plaintiffs alleged, would unduly interfere with and lessen the supply of water to which they claimed to be entitled as lessees of certain water lots from the government of the province of Quebec, the defendants claiming the right, as lessees of the government of the Dominion of Canada, and acting with the sanction and approval of such government, to proceed with the undertakings to which the plaintiffs took exception. On motion by the defendants to stay or dismiss the action for failure of the plaintiffs to bring in the Attorney-General for Canada and the Attorneys-General for Quebec and Ontario, as parties, pursuant to an alleged direction of Boyd, C., who had refused to permit the trial to proceed until the plaintiffs had taken such steps as were open to them to bring in the Dominion and the two provinces as parties, it appeared that the plaintiffs had been unable to secure the assent of these authorities, without which they could not be added. Anglin, J., regarded it as

obvious that without the Crown in right of the Dominion, and the Crown in right of the provinces, before the Court, the determination of the several issues raised upon the record would be as difficult as it might be embarrassing and delicate, and, at all events, of little direct advantage to the parties; but, the plaintiffs being willing to accept this risk, held that such redress as the Court could give them should not be denied them, because in ascertaining whether the plaintiffs were entitled to the relief they sought as against the present defendants, it might become necessary to inquire into and pass upon the title, the rights, and the interests of persons who refused a consent without which the plaintiffs were unable to bring them before the Court.

**Pleading.]**—The defendants in *Stephens v. Toronto R. W. Co.*, 7 O. W. R. 39, were, after a new trial had been directed unless the plaintiff was willing to accept and the defendants to pay \$500 as damages in lieu of \$2,100 assessed by a jury (6 O. W. R. 657), the plaintiff being willing to accept the \$500, but the defendants declining to pay, allowed by the Master in Chambers to amend their statement of defence by pleading payment into Court of \$500, as sufficient compensation to the plaintiff for the admitted wrong, the action being then at large as if it had never been tried: *Hunter v. Royd*, 6 O. L. R. 639, 2 O. W. R. 1055.—On appeal by the plaintiffs and cross-appeal by the defendants from the order of the Master in Chambers (6 O. W. R. 555, noted 25 O. L. T. 700), striking out or requiring amendment of a part of the statement of claim in *Copeland-Chatterson Co. v. Business Systems Limited*, 7 O. W. R. 42, Teetzel, J., on the authority of *O'Keefe v. Walsh*, [1903] 2 I. R. 681, reversed the order appealed from in so far as it directed that all claims against the individual defendants for anything done by them or any of them prior to the incorporation of the defendant company, should be struck out; and directed that there should be two separate issues prepared for trial—one containing all causes of action except those in respect of

the infringements of the 4 patents of invention, and another containing the several causes of action in respect of the alleged infringement. The defendants then appealed to a Divisional Court, and the appeal was dismissed, the plaintiffs abandoning their claim for personal libel: 7 O. W. R. 72.—On appeal by the defendant in *Muir v. Guinane*, 7 O. W. R. 54, from two orders of the Master in Chambers, one (6 O. W. R. 383) dismissing a motion by the defendant to strike out of the original statement of claim the paragraphs setting up certain bills of exchange, and the other (6 O. W. R. 844, noted ante 36), dismissing a motion to set aside the amended statement of claim, Mabee, J., held that the extended claims set up were within the scope of Rule 244; but, that there might be no doubt about the defendant's right under the Statute of Limitations, the latter order was varied to provide that the defendant should be at liberty to plead the statute against the plaintiffs' claim upon the acceptances as if the action had been commenced at the date of delivery of the statement of claim. *Bugbee v. Clergue*, 27 A. R. 96, 717, and *Hogaboom v. MacCulloch*, 17 P. R. 377, were cited.

**Presumptions of Marriage and Legitimacy.]**—Whether Parley Hunt jun., at the time of his death in 1896, had the status of a lawful child of his mother, who died in 1833, was the question for decision in *Hunt v. Trusts and Guarantee Co.*, 6 O. W. R. 1024, where the Court of Appeal affirming the judgment of Anglin, J. (10 O. L. R. 147, 5 O. W. R. 405, noted 25 C. L. T. 222), held that legislation of the State of New York, where all parties resided, and which was the home of the intestate, and under the laws of which the question involved must be decided, passed in 1895, providing that all illegitimate children whose parents had intermarried should be considered legitimate, had the effect of giving to Parley Hunt jun. the status mentioned. His mother's first husband had absented himself for five successive years, had spread a false report of his death, and led her to believe him dead; and two years afterwards she, in good



faith, believing him to be dead, married Parley Hunt the elder, and five years elapsed before the birth of Parley Hunt the younger, and the question was whether a contract of marriage was again entered into after the lapse of five years so as to prevent the application of a statute of 1828. "If this were to be dealt with as questions of fact usually are, no one would hesitate to answer the question in the negative, for why should those who believed themselves to be man and wife, under a marriage ceremony lawfully performed, enter into another contract of marriage? But the Courts have gone to extreme lengths in presuming the necessary facts to support marriage and legitimacy: and such cases as *De Thoren v. Attorney-General*, 1 App. Cas. 686, warranted, if they did not require, the finding of the trial Judge that there was a new contract of marriage entered into between the man and the woman at a time when it was lawful for them to intermarry." The Act of 1828 was passed before the child's birth, and it ought to be presumed that the parents would not wait until the Act came into force, and possibly, by the death of either or otherwise, result in the bastardizing of the child. In any event, the marriage proved to have been contracted was one which the Act of 1828 provided should be void only from the time that its nullity should have been declared by a Court of competent authority.

**Prohibition.]**—On a motion for prohibition to a magistrate to prohibit him from proceeding to hear a complaint against the applicant for an offence against the Railway Act, upon the ground of want of jurisdiction, Street, J., held that there was no jurisdiction in Chambers to prohibit a magistrate in respect of a criminal prosecution: *Re Hodge and Kerr*, 7 O. W. R. 131.

**Promissory Note.]**—The judgment of MacMahon, J., in *Jones v. Reid*, 6 O. W. R. 608, noted 25 C. L. T. 701, was affirmed by a Divisional Court: 7 O. W. R. 131.

**Railway.]**—"The jury have found that the plaintiff was injured by the negligence of the defendants, and that the door of the vestibule was not properly closed. This may be connected with the other finding, that when on the steps at the open door of the vestibule plaintiff was jolted from the car by its starting after the stop. But there is a link wanting to shew that plaintiff was properly at the door of the car. This might be, if what occurred amounted to an invitation to alight; and there is evidence to warrant such a finding; but the jury have not so expressly found, and this creates such an uncertainty as to leave the action really undetermined. All that can be done is to direct a new trial, with costs to the ultimately successful party. The vestibule question is raised in the record, and plaintiff may amend by making a more explicit statement if so advised:" Boyd, C., delivering the judgment of a Divisional Court in *Buck v. Canadian Pacific R. W. Co.*, 7 O. W. R. 71.

**Receiver.]**—An appeal from an order of a local Judge appointing a receiver by way of equitable execution after judgment shall be made to a Judge of the High Court in Court (Rule 48, clause (c), Rule 47), and it is not necessary that an application be first made to the local Judge to rescind the order under Rule 358. In the circumstances of *Wise v. Gaymon*, 7 O. W. R. 61, Mabee, J., thought the defendant entitled to an extension of time for appealing from such an order made ex parte by a local Judge on the 5th December, 1905, the same not being understood by the defendant and not coming to the attention of her solicitors until the 26th December, when they immediately applied to the plaintiff for an extension of time, which was refused, and launched their motion therefor on the 28th December, and the order having been made after Meredith, C.J., had declined to make the order ex parte, leaving the applicant to move on notice, the fact of the refusal being disclosed to the local Judge, but not the fact that the Chief Justice had left the plaintiff to apply for the order upon the usual notice

being given. By reason of a provision in the will under which the defendant, a married woman, received from the trustees thereof the income sought to be reached by equitable execution—"It is my express wish that in no way shall my said daughter be allowed to anticipate her income or deal in any way with the capital so invested"—it was held that she was restrained from anticipating her income, and, as there was not shewn to be money in the hands of the trustees payable to her, the rule must be applied that the power of the Court is to be measured by the married woman's own power, and that, as the defendant could not anticipate this income by any engagement, assignment, or contract entered into by her, so the Court could not do so; and the order appointing a receiver was accordingly set aside.

**Sale of Goods.]**—The traveller of the plaintiffs in *Imperial Cap Co. v. Cohen*, 7 O. W. R. 128, took an order not signed for a bill of goods from the defendant, but she, claiming to have countermanded the order before the goods reached her, refused to accept them, and as a defence to the plaintiffs' action set up the Statute of Frauds. A Divisional Court, following *Murphy v. Beven*, L. R. 10 Ex. 126, declared the law on the point to be that the entry of the name of a buyer, as in this case "Miss H. Cohen," made by a salesman, is not evidence per se of his agency to sign unless some further facts are given to shew that he was acting in the premises as the agent of the purchaser. Certain "letters put in evidence do not eke out what is insufficient, for they in no way identify this contract, but speak of the goods generally."

**Schools.]**—On a proper application therefor a by-law was passed by the municipal council of the township of Ellice pursuant to the provisions of s. 2 of the Separate Schools Act, R. S. O. 1897 c. 294, authorizing the establishment of a Protestant separate school, but no such school was ever established or brought into operation. The applicants then

refrained from sending their children to the public school in the section, and sent them to the public school at Stratford, and at irregular intervals the trustees of the Protestant separate school transmitted to the public school inspector returns of the names of persons who were sending their children to the Stratford public school, or contributing towards the expense of doing so. In this way, most of these persons, being treated as exempt from public school rates, escaped payment of them for 1902, 1903, and 1904. This it was held to be the duty of the public school trustees to correct, under s.-s. 3 of s. 71 of c. 39, 1 Edw. VII. (O.), as to the three years next preceding the correction, in the rates for 1906, by charging those who had escaped payment sufficient to make up what they were liable to pay with interest at 5 per cent., and crediting those who had paid more than their share with the amount so overpaid with interest at 5 per cent. Because by-law 425 was bad in not defining any lawful school section under s.-s. 1 of s. 2 of c. 294, R. S. O. (including as it did lots in an adjoining union school section), the school authorized by it could not go into operation by the 25th December following the date of the application, as required by s. 4 of the Act, and it was too late in July, 1902, when by-law 447 was passed, to amend it, to do so. A new application and by-law only could authorize a Protestant separate school, for it must be capable of going into operation on the 25th December after the application, and so no Protestant separate school had ever been validly authorized by either by-law. It was an error of the township clerk not to place on the collector's roll for the debenture vote to raise money to pay the debentures issued pursuant to by-law 449, for raising \$800 to build a public school house, the supporters of a Roman Catholic separate school established after the building of the new public school house was undertaken, and also the supporters of the so-called Protestant separate school, and, although the council had instructed the clerk to reduce the sum charged against the public school

supporters to the amount they would have been called upon to pay had the Roman Catholic separate school supporters paid their share, it still left the public school supporters and Roman Catholic separate school supporters chargeable with the share which the so-called Protestant separate school supporters should constitute, and an injunction was granted to the plaintiff Parker to restrain the corporation of Ellice from collecting from said plaintiff any greater sum in this respect than he would have been required to pay if all the persons chargeable with a share of it had been made chargeable: Street, J., in *Ellice (No. 1) Public School Trustees v. Township of Ellice*, 7 O. W. R. 6.—The plaintiff's motion for a mandamus in *North Plantaganet High School Board v. Township of North Plantaganet*, 7 O. W. R. 17, was refused by Anglin, J., on the ground that s. 13 of the High Schools Act requires that the county council shall determine which of its appointees to a high school board shall enjoy a three-year term, which shall hold office for two years, and which shall retire at the end of the first year, and this the county council had failed to do, the appointments made by them being either for one year only or that of each trustee being left undefined and uncertain. "In this state of affairs, and in the absence of evidence that a quorum of the board, constituted as it was, was present at the organization meeting in 1905, and at the meeting at which it was resolved to demand \$750 from the township council, I certainly should not feel justified in granting a mandamus requiring the defendants to furnish to the plaintiffs that sum of money. "The action of the defendants, on the other hand, in refusing to fill the vacancies upon the board which they had power to fill, appears to have been wholly unjustifiable. Section 14 is imperative in its terms. The municipal council has no discretion to refuse to act under it. But, apart from other objections to it, the present application to compel the township council so to act has been so tardily made that it cannot succeed."

**Stock Speculations.]**—The defendant's appeal from the order of a Divisional Court in *Ames v. Sutherland*, 6 O. W. R. 20, 9 O. L. R. 631, noted 25 C. L. T. 396, dismissing the defendant's appeal from the judgment of Street, J., 5 O. W. R. 328, noted, 25 C. L. T. 224, was dismissed by the Court of Appeal: 7 O. W. R. 116.

**Surrogate Court.]**—The provisions of s. 34, s.-s. 2, of R. S. O. 1897 c. 59, "No cause or proceeding shall be so removed unless it is of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the Surrogate Court and disposed of by the High Court, nor unless the property of the deceased exceeds \$2,000 in value," were held by Mabee, J., in *Re Wilcox v. Stetter*, 7 O. W. R. 65, not to have been satisfied where the value of the deceased's estate was \$2,150, and the plaintiff's affidavit alleged that the deceased was not, at the time of the execution of the will, of sound and disposing mind, memory, and understanding, the will was not executed according to the Wills Act, the deceased did not know or approve of its contents, and it was obtained by fraud, misrepresentation, and undue influence. These grounds of opposition were "simply the usual questions that are presented in almost every issue of this sort; and there are no facts connected with any of these alleged issues, set out in detail in the material, upon which I can say this particular cause is of 'such a nature and importance' that renders its removal into the High Court proper;" and the amount being so near the statutory limit, it was held not to be a case where the applicant should be allowed to supplement his material.—It was held by a Divisional Court in *Re McIntyre*, 7 O. W. R. 122, on appeal, by the sister of the deceased, who claimed as a creditor of the estate and had not been paid by the administrator, from the order of the Judge of the Surrogate Court of the County of Elgin, upon passing the accounts of the administrator, assuming to disallow in part the claim of the appellant for

payment by the administrator of a sum of \$792 alleged to be due to the appellant on a bond, that the Surrogate Judge had no jurisdiction upon passing the accounts to allow or disallow the claim, which did not form part of the administrator's account.

**Tax Sale.]**—The judgment of Boyd, C., in *Fisher v. Parry Sound Lumber Co.*, 6 O. W. R. 381, noted 25 C. L. T. 544, was affirmed by a Divisional Court: 7 O. W. R. 55.

**Third Party Procedure.]**—Where leave had been given to serve a third party notice, and the order giving leave had not been reversed, it was held by the Master in Chambers, in supposed obedience to a ruling of Street, J., in *Holden v. Grand Trunk R. W. Co.*, 2 O. L. R. 423, that it was too late, upon a motion by the defendants under Rule 213 for an order for directions as to trial, after appearance by the third parties, for them to contend that they were not properly made third parties: *Donn v. Toronto Ferry Co.*, 6 O. W. R. 920. This decision, however, was reversed by Meredith, C.J., after consultation with Street, J., and the *Holden* case was explained: 6 O. W. R. 973.

**Vendor and Purchaser.]**—*Dundas v. Dinnick*, 7 O. W. R. 124, was an action against trustees under a trust conveyance, for specific performance of a contract to sell certain lands and houses for \$1,200. Boyd, C., dismissed the action, upon the defendants returning the deposit with interest, paying \$25 for outlay to solicitor of purchaser, and costs of action, saying: "The terms of the contract are made out with certainty, and there is no dispute as to what was agreed upon by all parties. The difficulty is, that considerable hardship and probable loss will be brought upon defendants if the contract is to be enforced in specie. In all the circumstances, they should be relieved from this position, on the equitable terms of making good to the purchaser the outlay and costs incurred by him, that is, such damages as would be given for

breach of the contract at law. This can be worked out in the one suit: *Casey v. Hanlon*, 21 Gr. 445; *Tamplin v. James*, 15 Ch. D. 223. There is sufficient evidence of the contract to bring all letters and documents, including deed signed in escrow, into consideration as forming one transaction: *Gillatley v. White*, 18 Gr. 1; *Hubbard v. Hatch*, 174 Mass. 296."——The contract for sale of land in question in *Walker-Parker Co. v. Thompson*, 7 O. W. R. 125, was signed by the defendant Thompson in his own name as agent for the owner. There was authority in writing to sell from the owner to the Real Estate Agency Co., a concern with which the defendant Thompson was connected, but a separate entity. A Divisional Court held that, if the company were considered to be the agent, and, in the opinion of the Court, the evidence confirmed the writing on this point, Thompson had no right of his own motion to sign so as to represent or bind the company; but this he did not assume to do, he signed for himself as agent, and unless his signature was sufficient under the Statute of Frauds, it could not be said that the contract of sale had been signed by or on behalf of the constituted agent, the Real Estate Agency Co.

**Venue.]**—An agreement under seal with the provision, "In case any litigation in any Court shall arise out of this transaction, or on any of the securities relating thereto, it is agreed that the trial shall take place in the county where the head office of the company (defendants) is located, or elsewhere as may be determined by the company," was the basis of an action. *Wright v. Ross*, 7 O. W. R. 69, to have the same and certain notes and a chattel mortgage given thereunder cancelled, on the ground that the machinery which was the subject matter of the agreement was not delivered at the time agreed upon, and when delivered was entirely useless. On motion by the defendants to change the venue from St. Thomas to St. Catharines, the Master in Chambers overruled the plaintiffs' contention that these words did not



apply because this action was not based on the agreement but on the assertion that no agreement was ever entered into binding upon the plaintiffs, because the action must be said "to arise out of the transaction." It might be otherwise if the plaintiffs were asking cancellation on the ground of their not having signed the agreement, or of their signature having been obtained by fraud or duress.

**Water and Watercourses.]**—On the facts disclosed in *James v. Rathbun Co.*, 6 O. W. R. 1005, Meredith, C.J., after a careful review of the legislation and authorities bearing on the question before him, held that the plaintiff's dam was not, at the time of the passage of the defendants' logs, in good repair so as to comply with the requirements of R. S. O. 1897 c. 140; and, following *Farquharson v. Imperial Oil Co.*, 30 S. C. R. 188, that, notwithstanding that the want of repair was due to an unusual spring freshet, that this could not have been guarded against, and the injury was, therefore, the result of vis major, and that it was not practical for the plaintiff to have repaired the dam before the arrival of the defendants' drive; the right of the defendants to float their logs and timber down the stream was paramount to the plaintiff's right to erect and maintain his dam, and the duty of the plaintiff to repair was an absolute one; and that therefore the action of the defendants in abating "the nuisance by the removal of the obstruction" was within their rights under R. S. O. 1897 c. 142. The defendants' counterclaim, however, was held to be on a different footing, being based on the allegation that the condition of the plaintiff's dam was due to his negligence—which negligence was negatived by the facts.

**Will.]**—By the will in question in *Re Nevett*, 6 O. W. R. 971, the testator, among other provisions for his wife, bequeathed to her, subject to the terms of the will, all his chattels, household furniture, and articles used in house-

keeping; and to Charlotte Sutton "and her heirs" certain portraits. There was a direction to pay debts primarily out of property other than that bequeathed to the testator's wife and Charlotte Sutton. The latter having predeceased the testator, it was held that this was not a case where a testator disposes of a fund with an exception out of that fund, which he gives to somebody else, so that a lapse occurring by the death of that person in the lifetime of the testator, the exception is practically written out of the will, because the testator had shewn that the words which he used in the bequest to his wife were not intended to include the pictures, and that, there being no residuary clause in the will, the pictures were to go to the next of kin.

## CASES FROM WESTERN CANADA.\*

**Account Stated.]**—On appeal by the plaintiffs, the full Court in *Jackson v. Drake* (B.C.), 2 W. L. R. 379, held, affirming the judgment of Martin, J., at the trial (1 W. L. R. 97, noted 25 C. L. T. 228), that the statement of account sued upon was a conditional one, and not therefore such an account stated as would imply a promise to pay, and that, besides, there was evidence to support the trial Judge's finding that there was an express agreement that there should be no such promise implied.

**Appeal.]**—On motion by the plaintiffs in *Grant and Strong v. Treadgold* (Y.T.), 2 W. L. R. 484, for an order extending the time for depositing the appeal books in Court upon appeal by the plaintiffs from a decision of the Gold Commissioner, the full Court, relying on *Owen v. Sprung*, 28 O. R. 607, and *Wheeler v. Gibbs*, 3 S. C. R. 374, held that the Court had no jurisdiction in the matter until the appeal books were filed and the appeal inscribed in Court, because Rule 13 of the regulations respecting practice in the Gold Commissioner's Court, provides that the application shall be made to the Gold Commissioner and to no one else; and also because by the Court Rules the Court to apply to was the Court appealed from. If the case were in the Court at the time, Rule 555 would apply, but the Court has not power to abridge the time for doing any act in the Gold Commissioner's Court. The opinion was expressed that the Gold Commissioner was not limited to time and might grant the order after the time for filing the appeal books had expired.

**Attachment of Debts.]**—Moneys owing the defendant by the garnishee under a mortgage from him to the defendant,

\* Short notes of the most important cases in Volume II. of the *Western Law Reporter*, Nos. 6 and 7, pp. 373 to end of volume, inclusive.

falling due after service of the attaching process, are bound thereby, such moneys being a debt debitum in presenti though solvendum in futuro, and the party who has first sued out and served a garnishee summons, has priority. though the mortgage moneys sought to be attached are not presently due, over another whose garnishee summons has been served afterwards and after such moneys have become due: Prendergast, J., in *MacPherson Fruit Co. v. Hayden* (N. W. T.), 2 W. L. R. 427.—It was held by Craig, J., in *N. A. T. and T. Co. v. Seaton* (Y. T.), 2 W. L. R. 559, that the wages or salary of a master of a steamboat plying on the Yukon river were not exempt from attachment, as are those of a seaman, under s. 80 of c. 74, R. S. C.: “No wages due or accruing to any seaman or apprentice belonging to any ship registered in any of the said provinces shall be subject to attachment from any Court,” etc., for, notwithstanding that both the *Inland Waters Seamen’s Act*, c. 75, and the *Act respecting the Shipping of Seamen*, c. 74, provide that “the master of any ship subject to the provisions of this Act, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages and for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as by this Act or by any law or custom any seaman not being a master has for the recovery of his wages,” his wages are not exempt from attachment under the Act, because the enactments quoted apply only to the mode of recovery of his rights, and his rights to recover from the owner and the owner’s property.

**Bill of Sale.]**—Without regard to the extraordinary dealings between the debtor and the claimant and to the question whether the consideration given by the claimant to Mueller as the foundation of the bill of sale set up against the judgment creditors were fraudulent or not, Wetmore, J., in *Mueller v. Cameron* (N. W. T.), 2 W. L. R. 524, held that

the bill of sale in question was executed, delivered, and registered after the delivery to the sheriff of the execution under which the goods covered thereby were seized; and applied in favour of the execution creditor the provisions of Rule 356 of the Judicature Ordinance, which gives priority to an execution in the sheriff's hands over bills of sale, where such bills of sale have not been followed by an actual and continued change of possession, as was the fact in the case in question. The Court was also inclined to take the view that the bill of sale was void under the Bills of Sales Ordinance, because the consideration was not truly expressed therein, being alleged to be a present payment, whereas it was actually a past indebtedness, namely, two years' wages of the claimant as Mueller's housekeeper, and the proceeds of certain lands in which the claimant had been interested.

**Costs.]**—The costs of an application for a stay of proceedings pending an appeal to the Court in banc against a verdict for the plaintiffs after a trial with a jury, where the stay was granted upon payment into Court of the amount of the verdict and costs of the trial, should be ordered to be taxed and paid into Court along with the costs in the cause to abide the result of the appeal. "The stay is . . . a necessary motion in the cause on behalf of the applicant, who is appellant, and I cannot understand the principle upon which these costs are always to be made payable forthwith:" Craig, J., in *Stonor v. Lamb* (Y. T.), 2 W. L. R. 514.—The acceptance by a plaintiff of money paid into Court with a plea of tender does not ipso facto entitle a defendant to costs: *Griffiths v. School District of Ystradyfogwg*, 24 Q. B. D. 307; *American Aristotype Co. v. Eakins*, 7 O. L. 127, 3 O. W. R. 256, and hence *Mathers, J., in Nixon v. Betsworth* (Man.), 2 W. L. R. 570, allowed the plaintiff's appeal from the certificate of a taxing officer allowing defendant's costs at \$20.70 on a taxation thereof, defendant by his defence admitting a debt of \$37.95, and pleading tender of

this amount, which he paid into Court, and which plaintiff, in alleged pursuance of Rule 532, took out of Court.

**Criminal Law.]**—The defendant in *Rex v. Barré* (Man.), 2 W. L. R. 376, was convicted under s. 177 (b) of the Code, but neither the conviction nor the warrant of commitment stated that the offence was committed “wilfully.” Upon motion for habeas corpus to discharge the prisoner, it appeared that after the notice of motion was served a new conviction and commitment, in which the defect was cured, were substituted for the defective ones, whereupon it was objected on behalf of the defendant that the defect, being one of substance and not of form, was incurable, but Mathers, J., dismissed the application, saying in part: “The right to substitute a good for a bad conviction or commitment, after a motion has been made for a habeas corpus, has long been recognized and acted upon: *Clarke’s Magistrate’s Manual*, p. 235; *Paley on Convictions*, p. 320. In no place have I found it stated that that right is confined to cases where the defect is one of form only, and in one case at least it was permitted to be exercised when the defect was clearly one of substance: *Re Plunkett*, 1 Can. Crim. Cas. 365.” An appeal to the full Court was quashed, on the ground that the right to such an appeal did not exist in Manitoba.—On an application in *Rex v. McGregor* (B.C.), 2 W. L. R. 378, to quash a conviction by a police magistrate under the summary convictions clauses of the Criminal Code, Hunter, C.J., said in part: “The conviction is clearly bad. There is nothing to shew on what evidence the prisoner was convicted or even to shew how he pleaded, there being no record kept of the proceedings. It is new to me to learn that the validity or the scope of a conviction is to depend on the justice’s memory, which may not be called into action for months or weeks after the event. If there is no record, how can there be any effective remedy or appeal?”—The conviction in *Rex v. Williams* (B.C.), 2 W. L. R. 410, was held to be bad by Hunter, C.J., on two grounds: (a) that the magis-

trate did not hold the preliminary inquiry required by s. 789 of the Criminal Code, one object of which is "obviously to prevent there being a second prosecution of the accused on the same facts for any graver offence than that in which the magistrate has power to try;" and (b) that the magistrate did not inform the prisoner as to the probable time of the sitting of the next Court of competent jurisdiction. —It was objected by the defendant in *Rex v. Hannay* (B.C.), 2 W. L. R. 543, on motion to quash an indictment for theft, that there is no jurisdiction in any magistrate to hear such a charge twice, and much less the same magistrate who has before dismissed it; and that the depositions laid before the grand jury, and on which the indictment was founded, only included those taken at the second hearing, and not those taken at the first. These objections were overruled by Martin, J.

**Crown Lands.]**—The defendant in *Esquimalt and Nanaimo R. W. Co. v. McGregor* (B.C.), 2 W. L. R. 530, was held by Martin, J., to have been, at the time of the passing of the "Settlement Act" (47 V. c. 14) merely a squatter on the lands in respect of which a declaration of right and injunction were asked as regards the coal and timber thereon against the defendant, because at the time he entered upon such lands in 1879, they were, by s. 42 of the Land Act then in force and the exercise of the powers thereby conferred, reserved from pre-emption and settlement as to the public generally, including those claiming rights under article 11 of the terms of union of the province with Canada. Being a squatter at that time, defendant could only save himself by relying on the Vancouver Island Settlers' Rights Act, 1904, which would extend to him and the benefit of which he was entitled to claim if he had complied with the requirements of s. 3, which he had done, and reserved a Crown grant in fee simple, and this, being the last word of the legislature on a matter over which its jurisdiction is paramount, must prevail against any rights of plaintiffs under the Settlement Act.

**Fraudulent Conveyance.]**—Where a defendant, being indebted to the plaintiff on what is called a “lien note,” gave a quit claim deed of lands for which he held a homestead entry, and without such lands and perhaps with them, he was insolvent, to his wife, a co-defendant, who thereupon procured the patent therefor to be issued to her, and the plaintiff sued upon the note, which was payable “on or before the 1st day of December, 1892,” on the 3rd December, 1898, and recovered judgment on 19th July, 1899, a certificate of which judgment was registered in the registry office of the district in which the land lay, and then brought this action against the husband and wife, asking that the wife be declared a bare trustee of the lands for her husband, and that the same be declared subject to sale to satisfy plaintiff’s claim and be sold for that purpose, it was held by Richards, J., that the wife was not a trustee for the husband, that the conveyance was absolute though voluntary, and the land did not therefore become bound in any way by the registration of the certificates. There being a prayer for general relief, the question arose whether the plaintiff should be allowed to amend his pleading and attack the conveyance under 13 Eliz. c. 5, but it was decided that the so-called “lien note,” containing, as it did, provisions which, on the authority of *Bank of Hamilton v. Gillies*, 12 Man. L. R. 495, rendered it not negotiable, was not a promissory note and, therefore, would be barred by the Statute of Limitations on the last day of November, 1898, and was barred when the action thereon was brought, and, notwithstanding that the husband did not plead the statute, the wife was entitled to set it up, especially against the suggested amendments, so that the debt to plaintiff must be considered as having been incurred at the date of the judgment, and no other debt on which such an action could be based having been proved to have existed at the time the conveyance attacked was made, the action was dismissed: *Keddy v. Morden* (Man.), 2 W. L. R. 373.—On an application by way of originating summons in *Carbonneau v. Letourneau* (Y.T.), 2 W. L. R.



193, on behalf of defendants (judgment creditors) directed to the plaintiff Belinda A. Carbonneau (judgment debtor) personally, and as agent of the Klondike Venture Gold Mining Company, Limited, to shew cause why the property embraced in a certain conveyance by her to the company should not be sold to realize the amount of defendants' execution, Macaulay, J., directed an issue pursuant to Rule 246 of the Judicature Act (Y.T.), being of opinion that, while on the material filed, a case of strong suspicion was made out against plaintiff, in view especially of the conflict between her statements as to the period at which the impeached transaction originated and that disclosed in the documents themselves, still the defendants, in order to succeed, must allege and actually prove fraud, which he considered they had not done within the authorities on the question of proof of fraud.

**Landlord and Tenant.]** — The situation presented by *Meighen v. Armstrong* (Man.), 2 W. L. R. 578, was that defendant Jeanette A. Todd was tenant of defendant Armstrong of a farm, and the rent reserved was one-third of the grain and one-third of the hay grown on the lands, the grain to be threshed and drawn to the elevator or cars to be stored or shipped in the name of the lessor. After the threshing of the grain Armstrong made a seizure for rent. Later the plaintiff, not being able to realize the amount of his seed grain chattel mortgage on the crop to be grown on this farm, brought action against the Todds for the balance, and against Armstrong for conversion of the grain, and in the alternative for money had and received. Dubuc, C.J., in dismissing the action as against Armstrong, held that the seizure, apart from certain irregularities, was illegal, as being made at a time when there was no rent due, no time being fixed for the delivery of the grain at the elevator, in consequence of which defendant Todd had until the end of the term to deliver it, and because the tenant was

not in possession at the time of seizure; and the plaintiff's chattel mortgage was also held invalid because it was taken to secure \$310, whereas the price of the seed grain purchased by Todd was \$300.75, the \$10 being the amount of cost of conveyance and registration, the consideration stated in the mortgage being for more than the price of the seed grain, was to this extent illegal under s. 39 of the Act; besides, the consideration was not truly stated: *Ex p. Charing Cross Advance and Deposit Bank*, 16 Ch. D. 35; *Ex p. Beetenson*, 42 L. T. 808; *In re Rolfe*, 19 Ch. D. 98; *Hamilton v. Chaine*, 7 Q. B. D. 319; and the mortgage being invalid plaintiff had no right to relief as against Armstrong, whatever rights the Todds might have for illegal distress.

**Limitation of Actions.]**—On appeal by the defendant in *United Saving and Loan Co. v. Rutledge* (Y.T.), 2 W. L. R. 471, the full Court held, affirming the judgment of Craig, J., that this action upon a foreign judgment was an action to recover a simple contract debt, and must be brought within six years after the cause of action arose; and that the statute of 4 & 5 Anne, which deals with the absence of a defendant "beyond the seas" (the laws in force in England prior to the 15th July, 1870, having become the laws of the North-West Territories), being no more inconsistent with or repugnant to s. 1 of c. 29 of the Consolidated Ordinances of the Yukon Territory, "All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty, shall be commenced within six years after the cause of such action arose," than it is with and to the statute 21 Jac. I., is not repealed by such Ordinance; the two run concurrently and are both in force.

**Mines and Minerals.]**—The case of *Star Mining Co. v. Byron N. White Co.* (B.C.), 2 W. L. R. 411, involved a claim for damages and an injunction in respect of the alleged taking of ore by the defendants from the plaintiffs' claims.

The defendants admitted the taking, but alleged that, under the law governing their claims, they were entitled to this ore as belonging to a vein the apex of which was on their own claims, and which they had in due course followed down into plaintiffs' ground. This question of fact and expert opinions bearing on the continuity of the vein in question are discussed by Hunter, C.J., in a judgment in which the question is determined in favour of the defendants.—Prior to the amending Act of 1905, the Commissioner, under the Water Clauses Consolidation Act, 1897, having adjudicated upon an application for a record and made an appropriate entry, was *functus officio*. In *Wallace v. Flewin* (B.C.), 2 W. L. R. 418, Duff, J., refused to entertain a petition, under s. 26 of the Act of 1897, for cancellation of a water record issued to one Keith in February, 1905, and afterwards in March, at Keith's request, amended to read as granted to Keith and Hamilton, since what the Commissioner did in March—being *extra fines mandati*, and a nullity—could not by virtue of s. 36 be reviewed in these proceedings as the “decision of a Commissioner” under this section.—A preliminary question raised in *Carpenter v. Calligan* (Y.T.), 2 W. L. R. 488, on appeal by the plaintiffs from the judgment of the Gold Commissioner, on a protest heard by him over certain water grants under the water regulations, was whether the protest provided for under ss. 1 and 2 of the water regulations of 3rd August, 1898, is a ministerial act, and should be decided by the mining recorder, or a matter to be heard and determined judicially by the Gold Commissioner under s. 1 of the rules governing the hearing and decisions of disputes in relation to mining lands in the Territory. The full Court held that the Gold Commissioner had jurisdiction to so hear and determine such matters, and the distinction set out in *Lindley on Mines* at p. 712 did not exist here between a protest and an adverse claim, since the only means of bringing a matter in dispute before the Courts is under s. 2 of the

water regulations, which provides that a protest may be entered, but, in exercising this jurisdiction, he is simply acting in a judicial capacity, and has no ministerial functions when hearing such protest, and consequently no right to make directions as a ministerial officer. On the merits the appeal of plaintiffs was allowed, the Court being of opinion that the water grant to defendants above the point at which plaintiffs, who had a grant of 200 inches of water, diverted the water, interfered with the vested rights of the plaintiffs, there being not more than 200 inches to be had from the source of supply—and furthermore that, in attempting to dispose of the water in the manner he has done in his judgment, the Gold Commissioner exceeded his authority and attempted to act in an administrative capacity, when he should only have acted judicially.—The defendants' appeal from the judgment of the Gold Commissioner in favour of plaintiff restraining defendants from interfering with plaintiff's dam and flume by means of which he carried water to his pump opposite hill claim No. 30 on the left limit of the hydraulic reserve, under a grant on 9th August, 1904, of the right to divert and use the water from the left limit of Hunker creek at a point opposite hill side No. 34 left limit hydraulic reserve, to the extent of 200 inches in *McDonald v. Klondike Government Concession, Limited (Y.T.)*, 2 W. L. R. 501, was dismissed. The defendants alleged that, under their hydraulic lease granted by the Department on 12th February, 1900, of a certain parcel or tract of land on Hunker creek, near its junction with the Klondike river, they were first entitled to the water flowing through their concession on Hunker creek in so far as they required it for mining purposes, and that plaintiff's rights under his grant were subject to its requirements, inasmuch as under s. 13 of the lease—"Her Majesty does not in any way warrant that there shall be a sufficient quantity of water in the said creeks or rivers to admit of operations under this lease"—it must have been the intention of the Government to grant them riparian rights to the water

flowing through such creek, and, consequently, the only reasonable construction to place on that provision would be that they were entitled to the natural flow of the water running over their ground for mining purposes, such as the owner or lessee of a creek placer mining claim is entitled to. The full Court, Craig, J., dissenting, after pointing out that the mining regulations provide that the owner or lessee of a creek placer mining claim shall be entitled to the ordinary flow of the water in the creek passing over his claim, for mining purposes, and that there is no such regulation in regard to bench or hill claims, or to hydraulic reserves, and considering defendants' contention that the word "the" is necessary to be added before the word "water" to make clear the meaning of s. 10 of the hydraulic regulation, which reads, "The lessee's right to water on his location, or to the diversion of water in connection with his operations, shall be subject to the regulations approved by order in council of the 3rd August, 1898," and the effect of s. 5 of such regulations, expressed the opinion that while the Gold Commissioner may have been right in holding that under s. 10 of said regulations defendants were only entitled to such water as they might apply for under the water regulations, and that not having applied for any water under those regulations, their rights to water were subject to the rights of plaintiff to his 200 inches under his said grant, the question was one of great uncertainty.—The judgment of Craig, J., in *Clazy v. Thornburn* (Y.T.), 2 W. L. R. 534, was based principally on two objections to the plaintiff's claim to prevent the defendant working the mining claims in question: the first being that the Klondike Gold Placer Mines Co., who mortgaged these claims to plaintiff, had not taken out the license required by c. 59 of the Consolidated Ordinances of the Yukon Territory, being a foreign company, and the license procured by them pursuant to c. 49 of 61 V. (Dominion), extending only to permission to carry on mining operations and not to matters of contract and civil rights, which are

under the jurisdiction of the local authorities; and the second, that defendants' lease or lay, being prior in point of time to the plaintiff's mortgage (though not registered), was prior in law, for if it was a lease it need only have been by parol and did not require to be registered, and, if it was not a lease, it was not a disposition of the property under s. 38 of the mining regulations, and that section does not say that any instrument not registered shall be void, nor does it provide for notice by registration. A further objection was upheld, in that the sale under the mortgage by which plaintiff acquired title was really a sale to himself, the ostensible purchaser immediately on the sale re-conveying the property to him: *Bank of Australia v. Knight Hand in Hand*, 4 App. Cas. 391; *Downes v. Grazebrook*, 3 Merrivale 200, 17 Revised Reports 62.—The points decided by Martin, J., in *Wheelden v. Cranston* (B.C.), 2 W. L. R. 546, an action for damages for trespass to a mining location, and for an injunction to restrain the defendant from trespassing, were that the building of a cabin on first settling down to the serious working of a mineral claim was just as much miner's work in reference to the holding and working of the claim as is afterwards the sinking of a shaft or the driving of a tunnel, or building a pump; that the plaintiff, having essayed to make a valid location of a creek claim under repealed s. 20 of the statute of 1897, which gave him a claim of 100 feet square, could, when he found out that the law had been changed and that by the law of 1901 he was entitled to a claim of 250 feet square, without complying with s. 7 of the Placer Mining Act, 1901, as to posting formal notice of abandonment on the 4 posts of his first location not recorded, treat such location as a nullity, because no valid claim had been located by him, and begin de novo to locate one; that the using of one post to mark the coterminous boundary between two claims, one the one side being written the name of the Owl claim, and on the other that of the Eagle, is sufficient compliance with the Act, which does not require that a distinct set of posts be

set up or that no post can perform a double duty; and that the claim of plaintiff should by virtue of s. 49 of the Placer Act, be deemed to have been continuously worked during the weeks plaintiff was occupied on a rock cut and drain through the Hawk claim, which was necessary to the minerlike working of the Owl.

**Money in Court.]**—On application for an order for payment or delivery out of Court of certain gold dust in Court in *Raymond v. Faulkner* (Y.T.), 2 W. L. R. 461, the judgment of Macaulay, J., affirmed by the full Court, Craig, J., dissenting, was that the Canadian Bank of Commerce were not entitled, in the circumstances of the case, to participate in the same, there not being more than sufficient gold dust in Court, according to the judgment of the trial Judge, to satisfy the plaintiffs' claim, though, on appeal, plaintiffs' damages were reduced so that there was a balance over after satisfaction thereof, and the bank having entered into an agreement with the other parties claiming to participate, to the effect, among other things, that, after certain payments out of any portion of the gold dust remaining to defendants' credit after the trial of the action, the bank should be entitled to one-quarter of the remainder to an amount sufficient to satisfy their judgment against defendants, and that, if an appeal should be taken by defendants and they should be awarded a greater amount of such gold as a result of such appeal, the bank should, by agreeing to pay one-quarter of the expenses of such appeal, be entitled to share in any such additional amount of gold dust awarded, to the extent of one-quarter thereof, but otherwise should be entitled to only one-quarter of the gold dust awarded at the trial, and it appearing that, on the evidence, the bank had not communicated to the other parties their willingness to share in the expenses of such appeal as agreed; nor was the position of the bank improved by a provision in the agreement that "the receipt by the said bank of any gold dust or moneys under and by virtue of the

same, should not be nor be deemed to be, or to operate as, a waiver or merger of any rights or remedies that the said bank might have under their said judgment against the said Faulkner," this being only a reservation of their rights against Faulkner for any balance of their claim not received pursuant to the agreement, and not to be construed as entitling them to fall back on the original position which they occupied, prior to the agreement being entered into, by virtue of holding the first stop order against the fund or property in question.

**Mortgage.]**—On the application of the defendant Wills, a subsequent incumbrancer, in *Cameron v. Rutledge* (Y.T.), 2 W. L. R. 473, for an extension of time to redeem in a foreclosure action (the time allowed being two months, as is customary in the case of mortgages of mining claims), it appeared that the time had been already twice extended, owing to the absence of the defendant Wills, who was travelling in Europe, and who at the time of the present application was on the ocean and expected to arrive in a day or two. Craig, J., thought it clear on the authorities that the mortgagor, upon paying interest and costs and on shewing special grounds, may have the time extended, and that the same rule should apply with more force to a second mortgagee, and granted an extension of time for two weeks, costs to be paid by defendant Wills, but not as a condition precedent to the extension; no funds being available to pay costs or interest, and only a few days being asked in addition; the imposing of terms, which would have to be observed forthwith, having the effect of preventing the order being of any benefit to the said defendant; and it not being shewn that the first mortgagee would suffer by this extension, the only objection being that the plaintiff had given an option to sell the property upon foreclosure, but it turned out that this option was given to the wife of the mortgagor (who had entered a defence, but afterwards withdrew it and consented to judgment), which of itself was, in the opinion of the Court, "suspicious."



**Municipal Corporations.]**—The price of a lot necessary for the prolongation of Broad street, from Pandora street to Cormorant street, and interest, were held by the full Court, in allowing the plaintiffs' appeal from the judgment of Hunter, C.J., in *City of Victoria v. Meston* (B.C.), 2 W. L. R. 384, to have been items properly included in the "cost" of a local improvement consisting in such prolongation, by plaintiffs, by virtue of by-laws passed pursuant to the powers conferred on them by s. 273 of the Municipal Act, 1892, for which defendant as owner of adjacent property was assessed. A by-law reducing the amount to be paid by defendant and others, and providing a time for payment and that, should payment not then be made, the right of plaintiffs to recover the total assessment should remain in full force, having been passed by plaintiffs, it could not be varied by resolution of council or the time for payment so extended.—In *Re Cameron and City of Victoria* (B.C.), 2 W. L. R. 387, the full Court on appeal from the judgment of Martin, J., refusing the appellant's application to quash two by-laws of the city—441, to expropriate a 40-foot strip of land belonging to appellant for the purpose of the extension of Birdcage walk, and 442, providing for the carrying out of such extension as a local improvement—held that by-law 441 was valid notwithstanding that the land expropriated was not shewn on the city engineer's plan, and his and the city assessor's report, of which due notice was given in the "Daily Colonist," inasmuch as no notice of intention whatever was required to pass the expropriation by-law, and the plan required as a preliminary to by-law 442 had nothing whatever to do with by-law 441; that the appellant's contention that the assessment under by-law 442 was inequitable was not a matter for the Court, the question being one for the city engineer and city assessor; that a contra petition filed and presented within the time limited therefor did not represent names and values competent to prevent the passage of said by-laws, pursuant to s. 245, s.-s. 21, of the Municipal Clauses Act, because one of

the signatories withdrew his name (which the Court was of opinion he had a perfect right to do until the matter was reported upon by the assessor), and anyway his signature was of no value after he had sold his property, and the petition would not have been sufficiently signed without the appellant's signature, and her signature was invalid because all her land was being expropriated for the improvement, and, in any event, the report of the assessor, in the absence of fraud or mala fides, was conclusive; that the question whether by-law 441 took away more land than was necessary or convenient was one for the council, and the Courts could only have jurisdiction where there was fraud or mala fides; that the proceedings were not defective by reason of the cost of sidewalks not being mentioned in the resolution, as it was not the function of the resolution to give details of the proposed scheme; and that, in view of the fact that there was no protest from any member of the city council as to the course adopted, and that there was no suggestion that the council was not unanimous in adopting the course they did adopt in meeting half an hour or more after the appointed time, it could not be said that the meetings at which the by-laws were dealt with were irregular and the proceedings contrary to the Act and city by-law No. 331.

**Negligence.]**—It appeared that the plaintiff in *Malcolm v. McNichol* (Man.), 2 W. L. R. 515, rented a store from the defendant McNichol, which the latter for an extra payment agreed to heat during certain months. The heating apparatus proved insufficient, and frequent requests were made both to McNichol and Pepler, his agent, to have this matter remedied. Pepler was McNichol's agent to attend to the renting of the building in question, collect the rents, and do necessary things in connection therewith, including necessary repairs, and in fact he had ordered repairs to other stores in the same block without objection from McNichol, and the latter, on one occasion when plaintiff complained of the insufficient heating of the premises, informed her that he

would leave Pepler to attend to it. McNichol being in New York, Pepler finally instructed a firm of plumbers to remedy the defect by installing another radiator, which they proceeded to do, when during one night the steam escaped through a safety valve not being closed and caused great damage to plaintiff's goods, for which damage the action was brought. In the circumstances, Dubuc, C.J., held that Pepler was the agent of the defendant McNichol to order the repairs in question, and that negligence was established, saying, in part: "The plumber Fiddler says that the safety valve was closed when he left the store on the evening of the 28th December, but, as there is absolutely nothing in the evidence to shew or suggest that any person had gone into the store and had interfered with the valve during the night, it must be presumed that Fiddler was mistaken about that, that he thought he had closed it tight, while, by forgetfulness or otherwise, he must have left it only partly closed. The fact that it was found open the next morning, with evidence from the wet state of the goods that it must have been open for a considerable time, leads necessarily to that conclusion," and "is sufficient *prima facie* evidence of negligence and imposes on defendant the onus of rebutting it." The fact that the work was intrusted to independent contractors did not, in the circumstances of this case, relieve the owner and landlord: cited on this point, *Am. & Eng. Encyc. of Law*, vol. 16, p. 200; *Hole v. Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 497; *Ellis v. Sheffield Gas Consumers*, 2 E. & B. at p. 769; and *Halliday v. National Telephone Co.*, [1899] 1 Q. B. at p. 227.

**Nuisance.]**—The point on which *Woolard v. Corporation of Burnaby* (B.C.), 2 W. L. R. 402, an action for an injunction and damages for the flooding of the plaintiff's lands caused by the defendants constructing a ditch which emptied into a ditch of plaintiff along the westerly side of his said lands, and one Woodward constructing a ditch connecting

with defendants' and turning the waters of a creek therein, depended, was whether the defendants could physically prevent, without committing a trespass, the water from this creek coming down and flooding plaintiff's land. An appeal by the defendants from the judgment of the County Court Judge for damages in the plaintiff's favour was dismissed by the full Court, Martin, J., dissenting.

**Parliamentary Elections.]**—Two preliminary objections in *Re Yukon Dominion Election, Grant v. Thompson* (Y.T.), 2 W. L. R. 435, were that the petitioner was not a person who had the right to vote at the election to which the petition related so as to give him the status to petition, and that the respondent was not at the time of the presentation and service of the petition a person who could be petitioned against under the Act, no return having at that time been made, the election being held on the 16th December, 1904, and the date fixed for the summing up of the votes and the declaration of the election being the 7th February, 1905. The petition, which, by s. 5 of 54 & 55 V. c. 20, is required to be presented within 40 days after the "holding of the poll," was presented on the 25th January, 1905. Craig, J., after careful consideration, held that the petition was regular though presented before the return, as the election was the real thing and not the return, and the petitioner would have been out of Court had he waited for the return. With respect to the other objection, that the petitioner's status was not properly established, no evidence of it was adduced in the first instance except the usual affidavit verifying the petition. Later, leave was given to furnish further evidence, and, in pursuance thereof, a list was produced, and petitioner gave his evidence that his was the name on the list and that he voted, etc. It was held that this was not sufficient evidence of the status of petitioner because this list was only a copy, and the notice required by s. 19 of the Canada Evidence Act had not been given, and because neither this list

nor the certificate of the Clerk of the Crown in Chancery, or the evidence adduced, proved that the list in question was a true copy of the list of voters used in the proper polling sub-division and the proper district, which was of record in the office of the Clerk of the Crown in Chancery, and which was returned to him by the returning officer, and that it was in the same plight and condition as it then appeared, and that the original list was then of record in his office.

**Physicians and Surgeons.]**—Whether or not the respondent was guilty of infamous or unprofessional conduct in respect of the matters comprised in the terms of the charges against him, and, if so, whether his conduct was of such a character as to justify the imposition of the extreme penalty of expulsion, were the questions involved in *Re Telford* (B.C.), 2 W. L. R. 405, and an appeal by the Council of the College of Physicians and Surgeons of British Columbia from an order of Morrison, J., under the British Columbia Medical Act, 1898, allowing an appeal from the decision of the Council that the respondent had been guilty of infamous or unprofessional conduct and decreeing his expulsion, was allowed, on the ground that, while the respondent was not shewn to have been guilty of committing or concerned in procuring an abortion, his conduct in inflicting a wound on patient's body for the purpose of deceiving her parents and causing them to believe that she was at his sanitarium, having been operated upon for appendicitis, with a view to concealing the fact, which he anticipated, that it might be necessary to expel the contents of her uterus owing to unsuccessful attempts on her part to bring about a miscarriage, was such as, in the opinion of the Court, to be "beyond the bounds of reasonably justifiable professional conduct," and to negative interference by the Court with the Council's finding "that his conduct placed him beyond the pale of discretionary lenity."

**Principal and Agent.]** — The action of *Arbuthnot v. Dupas* (Man.), 2 W. L. R. 445, was to recover the price of certain lumber furnished by plaintiff, and, on appeal by defendant from a County Court, the full Court considered that the finding of the County Court Judge that the evidence established the agency of the defendant's husband, who had ordered the lumber in question, could not be disturbed, but, it appearing that the defendant had given her husband the money to pay the account, the question arose as to her liability, she having paid her agent while he was still, in so far as plaintiff knew, the principal debtor. The Court dismissed the appeal, holding that, as it was not suggested that there was anything in plaintiff's conduct which should have led the defendant to believe that he had settled with her husband, or that there was anything in the character of the business that would naturally have led the defendant to suppose that plaintiff would give credit to the husband alone, the defendant could not escape liability, the result of the cases being correctly stated by Pollock on Contracts, at p. 104, as follows:—  
“The principal is discharged as against the other party by payment to his own agent, only if that party has by his conduct led the principal to believe that he has settled with the agent; or, perhaps, if the principal has in good faith paid the agent at a time when the other party still gave credit to the agent alone and would naturally from some peculiar character of the business, or otherwise, be supposed by the principal to do so.”—An agent's commission is earned when he has procured a binding agreement to be entered into between the vendor and purchaser, notwithstanding that the vendor afterwards, by the exercise of a right conferred on him by one of the clauses of such agreement, had cancelled the same: *Wetmore, J., in Scott v. Benjamin* (N.W.T.), 2 W. L. R. 528.

**Promissory Note.]**—The action of *Duncan v. Tobin* (B.C.), 2 W. L. R. 396, was brought to recover one-half the

amount of a promissory note to which the plaintiff and defendant were parties, and which covered an indebtedness for money borrowed to purchase a mine. Defendant contended that he was only an accommodation indorser. The full Court, on appeal by the defendant from a judgment of a County Court, held, in the circumstances of the case, and having regard to the fact that, when the original note on which money was borrowed was given, the plaintiff and defendant had an interview, as to what took place at which they differ, with reference to making some money out of this mine, and that, afterwards, with knowledge of the situation, defendant accepted the position, as his actions indicated, in which he found himself, that plaintiff and defendant were equally interested in the venture. It appearing, however, that defendant had expended moneys in the mine in question, which he was entitled to recover and for which he counter-claimed, the appeal was allowed and the matter referred back to the County Court Judge to take the accounts between the parties.—The appeal by the defendants from the judgment of Macaulay, J., in *Laduc Gold Mining and Development Co. v. Prudhomme* (Y.T.), 2 W. L. R. 482, was dismissed by the full Court, it appearing that, as to the payment of \$600 for which the defendant claimed credit, the transaction was evidenced by the oath of Prudhomme, by the oath of Fletcher, who says he saw the receipt, and by the oath of Hannen, who says he was charged with the sum, the same being credited to Prudhomme; and that, as to the other payment of nearly \$1,000, there was no evidence besides that of Prudhomme except that he proves a withdrawal from the bank about the date when he alleges he made the payment, and the alleged fact, supported by independent evidence, that the plaintiffs were "long on cash"—about the sum claimed—which overplus of cash from the book entries could not be accounted for; and, to offset this, the fact that Prudhomme had two accounts with plaintiff shewing balances, for which balances the notes sued on were taken at different times; the

conduct of Prudhomme among other things in not clearing up the matter long before, if these were accommodation notes as claimed; in promising the general manager of the plaintiff company to pay these notes; and the fact that he had lost the receipt for the \$600 and had no books shewing entries of these matters, as claimed by him, and which he promised to shew plaintiffs' bookkeeper, but did not do.

**Recognizance.]**—The applicant for a writ of certiorari to remove a conviction under the Masters and Servants Act must be a party to the recognizance required by R. S. M. 1902 c. 163, s. 4: *Perdue, J., in Re Western Co-operative Construction Co. and Brodsky (Man.)*, 2 W. L. R. 541.

**Registry Laws.]**—The registrar is, under the Land Titles Act, 1894, entitled to the fees (in this case \$56) specified in items 11 and 12 of the tariff, for the registration of an injunction or order of the Supreme Court restraining him from dealing with the lands included in a certain caveat filed. "The injunction is an order within the meaning of item 11, and the term 'instrument' in item 12 is intended to include all documents of the nature specified in item 11. This is evidenced by the fact that in the tariff the words '(see, however, item 12)' appear at the end of item 11. In addition to this, that term appears to be wide enough to cover such an order, as it is 'a document in writing affecting the transfer of or other dealing with land' (see s.-s. k. of s. 2 of the Act, as amended by 61 V. c. 32, s. 2):" *Scott, J., in Re Saskatchewan Land and Homestead Co. (N. W. T.)*, 2 W. L. R. 419. —By s.-s. 2 of s. 33 of the Land Titles Act, 1894, the registrar cannot receive mortgages for registration unless accompanied by the duplicate certificate of title to the lands covered by such mortgage; and when, at different times, three mortgages all covering a certain parcel of land, the duplicate certificate of title to which is only produced with the last, are produced to the registrar for registration, such mortgages covering other lands than the parcel aforesaid, for which



Duplicate certificates of title are produced, the registrar is obliged to receive and register them as to such other lands but not as to the parcel mentioned, and the production of the duplicate certificate of title of this parcel does not relate back to the dates of receipt of the two first mentioned mortgages, because there should not be, on the page of the register relating to such parcel, or elsewhere in the registrar's books, any entry or memorandum to shew that any mortgage on these lots was on file in his office, and the last of the three mortgages was the first for which registration was applied for after the production of the certificate: Scott, J., in *Re Green-shields Co. (N. W. T.)*, 2 W. L. R. 421.

**Sheriff's Interpleader.]**—Whether certain property was liable to seizure under an execution against goods was held by Wetmore, J., in *Eastern Townships Bank v. Drysdale (N. W. T.)*, 2 W. L. R. 423, to be a question that could not be raised by the claimant (defendant) on an interpleader by the sheriff, there being only one case where the execution debtor can call upon the sheriff to interplead, viz., where he claims the benefit of any exemptions from seizure allowed by law. The exemption claimed for defendant's blacksmith shop was disallowed, clauses 9 and 10 of s. 2 of the Exemptions Ordinance having been passed with the object of providing a home for execution debtors, "so as to give them shelter beyond the reach of financial misfortune," as set out in 15 Am. & Eng. Encyc. of Law, p. 526. The words "house and buildings" in clause 10 mean the house which is the residence of the debtor and the buildings used in connection therewith.

**Ship.]**—The evidence in *Adams v. British Yukon Navigation Co. (Y.T.)*, 2 W. L. R. 476, established, on the one hand, that the plaintiff's raft, for damage to which by the defendants' steamer the action was brought, was not what might be called a solidly constructed raft, but was more in the

nature of a nest or loosely constructed raft surrounded by booms; on the other hand, that the steamer on approaching the raft in a channel at least half a mile wide, near Nine Mile Island (that is, an island about nine miles from the city of Dawson), slowed to half speed and passed the raft at least 150 feet and probably 200 feet away from it; that the steamer in passing the raft turned bow on so as to throw whatever swell there was away from the raft, and did not start at full speed until the stern of the vessel was past the stern of the raft—how far the evidence did not determine. When the raft was about 150 to 200 feet past the steamer, the front boom of the former broke and some wood escaped. The full Court dismissed the appeal of plaintiffs from the judgment of Macaulay, J., dismissing the action, being of opinion that the injury was caused, not by the swell from the stern wheels of the steamer, but by the rebound swell from the shore, and held on the authorities that the steamer was properly navigated, but that the raft was not properly constructed, so that it should have been able to resist such rebound swell from a steamer slowed to half speed: cited, art. 27 of s. 2 of c. 79, R. S. C.; *Brown v. Mallett*, 5 C. B.; *Luxford v. Large*, 5 C. & P. 421; “*The Dundee*,” 1 Hagg. (Adm.) 109; “*The Nevada*,” 106 U. S. 154; 25 Am. & Eng. Enc. of Law, 1004; “*The Marpesia*,” L.R. 4 P.C. 212.—In *Kennedy v. The “Surrey”* (B. C.), 2 W. L. R. 550, an action in rem to recover damages for injuries to a boom of shingle bolts owned by the plaintiff, by reason of alleged negligence in the management and operation of the defendant ferry boat, *Martin, J.*, found as a fact that this boat was not handled with that “ordinary care, caution, and maritime skill” which it is the duty of a prudent mariner to exercise, and it then became necessary to consider the defendants’ contention of non-liability, because, as they alleged, the plaintiff was a trespasser, not having complied with R. S. C. c. 92, s. 2, upon which the Court held, applying the rule of *Brace v. Union Forwarding Co.*, 32 U. C. R. 43, that the defendants would not be justified in de-

stroying or injuring the boom, merely because it was in the river, if they could by reasonable care on their part have avoided doing so. In abating a nuisance of that description, a private person can interfere with it only to the extent to which it is an injury to him, and obstructing his passage: *Dennis v. Petley*, 15 Q. B. 276, 283. It was also held that there had not been an interference with navigation by plaintiff in the true sense of that term, not that he had the right to continuously appropriate to himself any portion of the water, or bank or shore of navigable water, for the purpose of making up a boom of logs, but simply that he might in a reasonable manner and for a reasonable period, having regard to local conditions, make use of such waters for that purpose; and that a delay from the 23rd June to the 31st July, 1905, did not constitute unreasonable laches and delay in enforcing his claim so as to bar the action in rem of the present owners, being purchasers of the vessel from the corporation of New Westminster in good faith without notice, and, in any event, it was not shewn that the owners had been prejudiced or that the corporation were not in a position to indemnify them.

**Summary Trial.]**—Notwithstanding the ruling in *The Queen v. France*, 1 Can. Crim. Cas. 321, the full Court in *Re Rex v. Flynn* (Y. T.), 2 W. L. R. 468, affirming the order of Craig, J., 1 W. L. R. 388, noted 25 C. L. T. 409, held that the offence of keeping a common gaming house is one over which a magistrate having the jurisdiction of two justices of the peace has absolute jurisdiction: reference to ss. 195, 196, 198, 207, 783, and 784 of the Criminal Code.

**Trust.]**—*Phillion v. Douglas* (Man.), 2 W. L. R. 572, decided on a question of fact as to whether a quit claim deed from the plaintiff to the defendant was only for the purpose of raising a loan entirely in defendant's name, and, consequently, constituting defendant a trustee for plaintiff of an

undivided half interest in the property, or absolute as claimed by the defendant, whose version was that there was a complete settlement of the matter between the plaintiff and himself; that the purchase price of plaintiff's interest was taken into account in such settlement; and that the balance of plaintiff's claim was paid over to him. Dubuc, C.J., finding the evidence "conflicting and particularly contradictory," and nothing in the demeanour of the parties in the witness box that would warrant a belief that one was more truthful than the other, and the onus on the defendant to prove the payment of the consideration to the plaintiff, the quit claim deed being expressed to be for a nominal sum, gave judgment in favour of defendant, relying on the corroborative evidence in the statement of plaintiff to defendant, sworn to by a law student named Isbister, to the effect that defendant did not require a receipt because he had the title deed, in the evidence of Clement, who said he had heard plaintiff and defendant talk about settling up and that defendant had borrowed \$35 from him to settle with plaintiff, and in the fact that after the transaction in question, plaintiff seemed to have taken no more interest in the property, did not ask defendant to account for the surplus of the loan, or inquire about the crop of 1904, or if the farm was rented for the season, or about improvements.

**Vendor and Purchaser.]**—In *Tiel v. Taylor* (N. W. T.), 2 W. L. R. 458, an action for specific performance, it was shewn that the plaintiff had written the defendant in Ireland offering him \$6 an acre for the quarter section in question, adding: "If this is satisfactory to you, please let me know, and I will make a deposit in either bank you wish, and we can have the papers made out at leisure." To this defendant replied: "I received your letter and offer of \$6 for N. E. 9, 38, 8, which I will take. Of course that price is net. If you go to Mr. Acheson, he will make out the transfer, and will send it to me to sign. If you deposit \$100 with

him, that will do until the transfer comes back from me signed, when you can pay the remainder." The plaintiff's case depended on whether the defendant's letter was an acceptance of the plaintiff's offer. Immediately on receipt of it, the plaintiff went to the office of Mr. Acheson, the defendant's solicitor, prepared to carry out the purchase on terms of defendant's letter, when Dr. Willoughby came in and informed him that he had sold this quarter section for defendant some four or five days before. This was held by Prendergast, J., to be a revocation of any offer contained in defendant's letter, and he also held that the condition as to the deposit therein was one that the plaintiff had given no intimation he would accept, and it prevented that letter being considered an acceptance of plaintiff's offer.

**Warehousemen.]**—Palmer v. Christie (Y.T.), 2 W. L. R. 561. was an action to recover moneys advanced by the plaintiffs to the defendant, the price of storage on a quantity of oats, and interest. Apart from questions as to the right of plaintiffs to sell the oats stored, and as to the price to be paid by them for these oats, which they "had sold to themselves" on defendant's default in making repayment of the moneys advanced, which were raised on a note made by defendant, indorsed by plaintiffs, and discounted with the Bank of British North America, there was a question as to the rate of interest to be allowed on such note, which carried 24 per cent. per annum, and Craig, J., held that the plaintiffs, not being the holders of the note in December, when they first demanded payment to it, were not then limited to 5 per cent. They became the holders on the 13th August. In the meantime, the plaintiffs had voluntarily paid the interest at a rate in excess of that allowed by the Bank Act, and this was the consent of Christie, who was aware that the note was running in the bank, and that the bank was charging a higher rate of interest than the legal rate, and that that rate was being paid. He allowed his then agents, the plaintiffs, to pay that

increased interest; they were paying it for him and with his entire consent and concurrence; and he was held bound to pay the rate of interest which plaintiffs paid the bank up to the 13th August, 1901, and after that date only 5 per cent.

**Writ of Summons.]**—The writ of summons in *Wilson v. Graves* (Y. T.), 2 W. L. R. 504, on appeal by the defendant from the order of Macaulay, J., refusing to set aside the order for service of process upon defendant out of the jurisdiction, etc., was held by the full Court to be irregular because, while the order shortened the time for appearance to 60 days, the writ was in the form ordinarily used when the service is to be made within the Territory, whereby the defendant is commanded to appear if he disputes the claim “within the time allowed by s.-ss. 2 and 3 of Rule 3, a copy of which appears at the foot hereof,” and because the affidavit leading the order was made on information and belief and did not state the grounds of such information and belief. It was also held (Craig, J., dissenting) that defendant, by joining with his motion to set aside the proceedings for irregularity motions for an extension of time within which to appear and for a stay of proceedings, had waived his objections to such irregularities and subjected himself to the jurisdiction of the Court, on the principle set out in the judgment of Dugas, J., that, although the defendant may act without waiver when his position is passive, or that he has, by some proceedings, to protect himself against any attempt to get the best of him before the Court, yet if he takes, himself, any step to obtain from the same Court any intervention which would amount to a submission on his part to the jurisdiction of the Court, then he has waived whatever irregularities he might have had the right to invoke otherwise.

## EDITORIAL REVIEW.

**The Ontario Courts.**

Statements have been recently made in the newspapers about the large number of cases standing for judgment in the Superior Courts of Ontario, and the long delays to which litigants are subjected. Strange to say, there has been no time within the last 25 years in which the Courts have been so nearly abreast of their work as they are at present. The Court of Appeal began its January sitting with a smaller list than it has had during that period, and it seems probable at the time of writing that nearly all the cases will be heard before the sitting ends. The Divisional Courts are also well up with their work, and the Toronto sittings for the trial of actions without a jury are going on vigorously. In fact the arrears seem to be confined to one Judge of the High Court, who has been peculiarly unfortunate and who is perhaps over-conscientious in the pains he takes in arriving at a decision. It is a pleasure to know that he is rapidly overtaking his arrears; having the better opportunity of doing so because his brother Judges have been able to relieve him to a great extent from taking up new cases while he is considering those which have been heard and reserved. With one Judge of the High Court absent on leave, it would not have been possible to make such an arrangement before the appointment of the two additional Judges. It is well, as has often been pointed out, to have a reserve of judicial strength; and this has been peculiarly and forcibly exemplified in the necessary and substantial aid given by the Judges of the High Court to the Court of Appeal at the present sitting. In a case heard by the Court of Appeal on the 21st February, the writ of summons was issued on the 20th September previous, and the trial took place on the 20th November. This may not be a typical instance, but it shews what can be done in the way of expedition.

**County of York Law Association.**

From the annual report of the board of trustees of the County of York Law Association for the year 1905, we quote the following paragraphs:—

“It is now twenty years since the association was formed, and the past year has been one of the most successful in our history.

“Successive boards of trustees have recognized that the objects of the association were not merely the establishment and maintenance of a good library, but mainly the promotion of the general interests of the profession and good feeling and harmony among the members of the Toronto Bar. The year has been marked by encouraging advances made in promoting the social objects of the association through the holding of periodical Bar dinners, which have done much to maintain pleasant relations between the Bench and the Bar, and have also brought together in pleasant intercourse many members of the Bar who, owing to the calls of professional business, seldom if ever meet except in the most casual way. The board recommends that these meetings be continued during the coming year.

“During the year there have been disgraceful revelations in regard to the creating of unlawful trade combinations. A number of those accused were, after trial, found guilty, and others, upon being arraigned, pleaded guilty. All alleged in extenuation that they had acted under legal advice in doing the acts complained of. The nature of the advice given was not disclosed nor was it shewn under what circumstances the advice was sought and received. Nevertheless this excuse was made the occasion of much comment in the public press upon the duty of members of the Bar, such comment being based upon the assumption that members of the Bar had deliberately set about to abet breaches of the law. This association protests against the unwarranted slur thus cast upon the members of the legal profession.

“At the last session of Parliament, statutes were passed dealing with Judges' salaries. This question has been continuously urged upon the government by the association



since the year 1892, and the passage of the statutes is a matter of congratulation.

“The library has been efficiently maintained. 198 volumes were added during the year, of which 84 volumes were donations, principally amongst which were the *Encyclopædia of Pleading and Practice*, presented by the Carswell Company; the statutes of the Dominion and provincial governments; and the sessional papers of the Dominion and province of Ontario.

“The Library, which began twenty years ago with 200 volumes, now comprises 5,270 volumes, and the average annual increase is now about 200 volumes of books. Want of shelf room in the rooms of the association has already become a serious problem.

“The following books are missing from the library: *Armour on Titles*, *Brice's Ultra Vires*, *Foot's International Law*, *Maclaren's Bills of Exchange*, *Holmsted's Index of Cases*, and *Law Reports [1893] 2 Q. B.*

“It is a matter of great regret that the permanent removal from the library of valuable books has now become a serious evil. This is due in many cases to carelessness in returning books, which are taken away without signing receipts in accordance with the rules, but in some cases books appear to have been taken away without any intention of returning them.

“The committee on legislation has considered all bills introduced during the past year in the Legislative Assembly for the province. The only bill which required special attention embodied proposals to amend the *Division Courts Act*, by providing for procedure of a very summary character. It was found that garnishees, wherever resident in the province, would only be entitled to two clear days' notice of hearing. Representations were made in the proper quarter that the bill should be materially amended. In the result it was withdrawn.

“There has been placed in the Library a portrait of *Mr. J. B. Clarke, K.C.*, president for 1904, presented by *Mr. Hamilton Cassels, K.C.*, president of the association.

“The trustees record the death during the year of the following members of the Toronto Bar: *A. H. Sinclair*, 12th

February; D. H. Watt, 13th February; O. A. Howland, K.C., 9th March; Thomas Caswell, City Solicitor, 9th June; McDowal Thomson, 10th August; Charles A. Durand, 16th August; E. F. Blake, 5th September; Larratt W. Smith, K.C., 18th September; W. G. Hannah, 24th September; Fred. W. Canniff, 4th October; and Christopher Robinson, K.C., 31st October.

"The trustees have had under consideration the question of honouring in a suitable manner the memory of Mr. Robinson, by a memorial which shall be lasting and at the same time appropriate and worthy of that eminent member of the profession, whose loss is so deeply deplored by all. At the first meeting of the trustees after his death the following resolution was adopted: 'The trustees of the County of York Law Association desire to place on record their deep sense of the loss sustained by the lamented death of Mr. Christopher Robinson, K.C. So many eloquent tributes have already been paid to his memory that we can only add to them a few words of admiration and respect. We recall with pleasure that he was one of our first presidents, and that we owe to him some of the most valuable books on the shelves of our library. For upwards of half a century he worthily upheld the highest traditions of an honourable profession. His reputation extended far beyond the confines of this province, and of the Dominion. He represented the cause of Canada before two great international tribunals, winning the admiration of the English-speaking world by his efforts on her behalf. He was

' A man who lived in honour, died in fame;  
And left on memory's page a stainless name.'

"Mr. Robinson was the third president of the association, and he always evinced a deep interest in our affairs.

"The trustees feel assured that if an appeal be made to perpetuate Mr. Robinson's memory, it will meet with universal and hearty response from the members of the profession throughout the Dominion. The trustees recommend that the Toronto Bar should co-operate with the Bar of the province, and with others who were his friends and admirers, in taking the necessary steps to perpetuate his memory in a fitting manner, and that they be authorized to appoint a committee for

that purpose which shall form part of a general committee to be formed with all convenient speed."

At the annual meeting of the association held on 29th January, 1906, the report was adopted.

A resolution was passed requesting the Benchers of the Law Society to make a grant of a set of Law Reports for the Province of Ontario to the Royal Colonial Institute (London, England).

A resolution looking to an amalgamation with the Toronto Bar Association was also carried.

A committee was appointed to co-operate with others in perpetuating the memory of the late Christopher Robinson, K.C.

The following were the officers elected for 1906:

President—D. W. Saunders.

Vice-President—William Davidson.

Treasurer—Walter Barwick, K.C.

Curator—Angus MacMurchy.

Secretary—C. B. Nasmith.

Trustees—E. E. A. DuVernet, F. E. Hodgins, K.C., Charles Elliott, George C. Campbell, W. E. Middleton, D. T. Symons, H. T. Kelly.

Committee on Legislation—John T. Small (convener), W. E. Middleton, Angus MacMurchy, W. H. Blake, K.C., R. J. MacLennan, George Bell, A. J. Russell Snow, F. E. Hodgins, K.C., W. C. Chisholm, Hamilton Cassels, K.C.

#### **Hamilton Law Association.**

The Annual Meeting of the Hamilton Law Association was held on the 9th January.

The trustees' 26th annual report, for 1905, shews a membership of 69, a library of 4,264 volumes, of which 159 were added during the year. The report refers to the death of

Mr. Justice Robertson, at one time vice-president of this association.

The following officers were elected for 1906:

President—F. MacKelcan, K.C.

Vice-President—S. F. Lazier, K.C.

Treasurer—Charles Lemon.

Secretary—W. T. Evans.

Trustees—William Bell, G. Lynch-Staunton, K.C., T. C. Haslett, P. D. Crerar, K.C., S. F. Washington, K.C.

Auditors—W. S. McBrayne and James Dickson.

Committee on Legislation—H. Carscallen, K.C., S. F. Washington, K.C., G. Lynch-Staunton, K.C., William Bell, A. Bruce, K.C., F. MacKelcan, K.C., S. F. Lazier, K.C., W. T. Evans.

#### **County of Hastings Law Association.**

At a meeting of the County of Hastings Law Association, held recently, the following officers were elected for the ensuing year:

Hon. President—J. P. Thomas.

President—W. N. Ponton.

Vice-President—F. E. O'Flynn.

Secretary—W. J. Diamond.

Treasurer—J. F. Wills.

Curator—W. C. Mikel.

Trustees—W. S. Morden, E. G. Porter, M.P., W. B. Northrup, K.C., M.P., W. J. McCamon, S. Masson.

Auditors—E. J. Butler and A. A. Roberts.

At an adjourned meeting of the association, the following resolution was unanimously adopted:

"That we, the members of the County of Hastings Law Association, do enter upon our records our deep sense of the especial loss sustained by the members of the Bar of this county through the lamented death of His Honour Thomas Appleby Lazier, who for over thirty years, with courtesy, with integrity, and with devotion to duty, exercised his high judicial functions among us.

"And we desire to convey to the family and relatives of the kindly gentleman, the faithful public servant, the im-

partial Judge, who has just passed away, our truest and warmest sympathy and condolence in this their time of bereavement and sorrow for one who was in every sense a beloved husband, father, brother, friend.

“Joining with them in sincere grief and with a full realization of personal as well as public loss, we pledge to them the assurance that his example will ever be deemed a standard, his life’s work will be valued highly, and his memory will be held dear, by the members of the legal profession of the county of Hastings, the county with which for nearly four-score years he has been so continuously and so honourably identified.”

#### **New County Court Judges in Ontario.**

Judge Harding, junior Judge of the County Court of Victoria, has been appointed senior Judge in the place of Judge Dean, who died recently at an advanced age. Mr. Hugh McMillan, of Guelph, has been appointed junior Judge of Victoria. A correspondent has forwarded us copies of articles from the Guelph newspapers on both sides of politics in reference to Mr. McMillan’s appointment. Both express regret that he is leaving Guelph, but emphatically declare that he has all the qualities of a good Judge. Mr. G. E. Deroche, a young barrister who practised in Deseronto, has been appointed senior Judge of the County Court of Hastings in place of Judge Lazier, deceased.

#### **The New Lord Chancellor.**

The following pen and ink sketch of the new Lord Chancellor will be interesting to Canadians. In the Judicial Committee he will, no doubt, be an important factor in shaping the law which governs our Courts.

Sir Robert Reid, the new Lord Chancellor, has just been raised to the peerage by the name, style, and title of Lord Loreburn of Dumfries. The new occupant of the woolsack bids fair to prove as popular in the House of Lords as he has been in the House of Commons, having a keen sense of humour, a complete absence of self-assertion and self-advertisement, with a kindly, genial man-

ner, wholly devoid of affectation. He comes from an old Scottish family, the Reids of Mouswald, is a bachelor, and while at Oxford distinguished himself not only as a scholar but also as an athlete, figuring for three years in the 'varsity cricket eleven, and thrice representing Oxford in racquets as the champion of his alma mater. At a later period in his life—it was after he became Attorney-General—he played for the amateur championship at tennis, and was only beaten in the last game by Sir Edward Grey, now his colleague in the Liberal Cabinet as Secretary of State for Foreign Affairs.

At one time—it was in the early days of the home rule controversy—he was subjected to a good deal of baiting by the Tories. He conquered them, however, by a touch of human nature which appealed to them. One day in the course of a speech, when pulling a bundle of notes and memoranda from his pocket while addressing the House, there rolled right into the middle of the floor a very much smoked briar root pipe, which he immediately picked up with such an appearance of anxiety and concern lest it should have sustained any injury—interrupting his speech for the purpose—that the entire House began to cheer him uproariously and sympathetically.

#### **Resignation of Lord Justice Mathew.**

Lord Justice Mathew has placed his resignation in the hands of the Lord Chancellor in consequence of illness. The learned Lord Justice was appointed a Queen's Bench Judge in March, 1881, and was afterwards raised to the Court of Appeal in October, 1901, so that he has completed nearly 25 years' service on the Bench.

#### **The New Lord Justice of Appeal.**

Mr. J. Fletcher Moulton, K.C., recently appointed a Lord Justice of Appeal, in the place of Lord Justice Mathew, resigned, is the son of the Rev. James Egan Moulton, and was born at Madeley in November, 1844. After spending his school days at New Kingswood School, Bath, he went to St. John's College, Cambridge, where he had a brilliant scholastic career. Besides gaining honours at London University, he

was Senior Wrangler and First Smith's Prizeman in 1868. He held a Fellowship at Christ's College for a few years, but resigned it and came to London in 1873. In 1874 he was called to the Bar at the Middle Temple, of which he is now a Bencher, and took silk in 1885. Mr. Moulton is a Fellow of the Royal Society, and has been a member of the Senate of the University of London since 1895. His Parliamentary career began in 1885, when he was elected as a Liberal for the Clapham Division. He also represented South Hackney for a short time. In 1898 he was elected member for the Launceston Division of Cornwall, which he represented till the recent dissolution of Parliament. — *The London Law Times*.

#### **Lord Hemphill.**

Mr. Charles Hare Hemphill, K.C., who was Solicitor-General for Ireland in the last Liberal administration, has been elevated to the peerage with the title of Baron Hemphill.

#### **Justice as Administered at Home.**

Associate: Prisoner at the Bar, do you plead guilty or not guilty?

Prisoner: I did take the watch; but I did not mean to steal it.

Judge: Enter a plea of not guilty.

First witness (P. C., No. 1): The boy confessed to me he had stolen the watch after I had told him it would be better for him to tell the truth and he would get less punishment.

Judge: I shall not allow this evidence, as the confession was not free and spontaneous: (see 2 East, P. C., 659).

Second witness (the boy's mother): Please, your Lordship, I said I would smack his head if he did not tell me all about it, and he said he did steal the watch.

Judge: This evidence is inadmissible, as obtained by menaces: (Warrickshell's Case, 1 Leach, C. C. R.).

Prisoner's Counsel: "I find, my Lord, this indictment charges the boy with having "unlawfully" stolen the watch, not "feloniously."

Judge: Then he must be acquitted: (R. v. Gray, L. & C. 365).

AS ADMINISTERED ABROAD.

(According to the French Novelist.)

Magistrate: Prisoner, did you steal this watch?

Prisoner: No.

Magistrate: Your denial will not avail you. Far better to confess it at once.

Prisoner: But I did not do it.

Magistrate: The Court knows better. Now, about your history. Did not your parents live together without being married?

Prisoner: I don't know.

Magistrate: The Court does, fortunately. Now, as to your sister, the washerwoman. Did she fifteen years ago steal a handkerchief, value 1 franc?

Prisoner: Not that I know of.

Magistrate: This assumed ignorance will do you no good with the jury. Now, as to your mother-in-law and her aunt?

Prisoner: Well, sooner than go on with this, I will admit it.

Magistrate: You do well, although too late to save the increased punishment due to your obstinacy.—*The London Law Times*.

**Recent American Decisions.**

*Carriers*.—That livery-stable keepers are not within the rule that common carriers of passengers are bound to exercise extraordinary care for the safety of their passengers is decided in *Stanley v. Steele* (Conn.), 69 L. R. A. 561.

*Deed*.—That a deed absolute on its face cannot be delivered to the grantee therein named to be held by him in escrow; and that such a delivery will operate as absolute and freed from all parol conditions, vesting the title at once,—is held in *Whitney v. Dewey* (Idaho), 69 L. R. A. 572.



*Evidence.*—Parol evidence to shew that one who signed a memorandum for the sale of goods necessary to satisfy the Statute of Frauds acted as agent for the one who is seeking to enforce the contract, so as to permit him to maintain the action, is held, in *Usher v. Daniels* (N. H.), 69 L. R. A. 629, to be admissible.

*Innkeeper.*—A trespass committed upon a guest in a hotel by a servant of the proprietor, whether actively engaged in the discharge of his duties at the time or not, is held, in *Clancy v. Barker* (Neb.), 69 L. R. A. 642, to be a breach of the implied undertaking that the guest shall be treated with due consideration for his comfort and safety, for which the proprietor is liable in damages. A note to this case reviews the other authorities on liability of innkeeper for injury to guest by servant.

That an innkeeper is not liable for an injury inflicted upon a guest in his hotel by a servant who was not at the time of the injury acting within the apparent or actual scope of his employment, is declared in *Clancy v. Barker* (C. C. App. 8th C.), 69 L. R. A. 653.

*License.*—Permission to use a stairway erected on the outside of a building for ingress and egress to and from the second storey of another building, in consideration that the owners of the latter building will permit the owner of the other one to erect a porch on a 5-foot strip of a vacant lot adjoining the back end of his building, is held, in *Howes v. Barmon* (Idaho), 69 L. R. A. 568, not to amount to the grant of an easement, but to constitute a license only, revocable by the licensor.

*Municipal Corporations.*—A fair occupying 75 or 80 feet in width and 4 blocks in length of an important business street in a city, and consisting of numerous tents inclosing shows and exhibitions, in front of which are stationed men blowing horns and talking through megaphones, together with various other stands, booths, Ferris wheels, merry-go-rounds, etc., which is permitted by the authorities to be main-

tained on the street for a week, is held, in *Augusta v. Reynolds* (Ga.), 69 L. R. A. 564, to be a public nuisance.

The liability of a municipal corporation for injuries to a traveller upon a sidewalk through the fall of a billboard insecurely placed by an abutting owner upon his own property near the edge of the street, is denied in *Temby v. Ishpeming* (Mich.), 69 L. R. A. 618.

*Negligence.*—Where a complaint is definite and uncertain because the pleader has confused the elements of ordinary negligence with gross negligence, and the attention of the trial court is called thereto, it is held, in *Rideout v. Winnebago Traction Co.* (Wis.), 69 L. R. A. 601, that the Court should compel the plaintiff to proceed upon one theory or the other, or to give such permissible construction to the pleadings as to confine plaintiff's claim to one species of wrongdoing. The other cases on right to recover for ordinary negligence under allegation of gross, wilful, or wanton negligence, or vice versa, are collated in a note to this case.

*Railway.*—Failure of the employees operating a car and engine by which a trespasser on the railway track is struck and injured without fault of the employees, to take charge of the wounded man and give him care and attention, is held, in *Union P. R. Co. v. Cappier* (Kan.), 69 L. R. A. 513, not to be a violation of a legal duty for which the company is liable. An elaborate note to this case reviews all the other authorities on care due to sick, infirm, disabled, and otherwise helpless persons with whom no contract relation is sustained.

*Trees.*—The right to recover punitive damages for the cutting of trees upon a sidewalk for the accommodation of electric-light wires, in entire disregard of the rights of the abutting owner, and against his protest, is sustained in *Brown v. Asheville Electric Co.* (N. C.), 69 L. R. A. 631.

## BOOK REVIEWS.

**Kant's Index of Cases Judically Noticed** (1865-1904), containing every case cited in judgments reported in the Law Reports from the commencement of their publication in 1865 to the end of 1904, as also a statement of the manner in which each case is dealt with in its place of citation. By A. N. Kant, M.A., B.L. London: William Clowes and Sons, Limited: 1905. Toronto: The Carswell Company, Limited.

Perhaps a concrete example will serve better to shew the method adopted than an elaborate explanation such as the author or compiler gives in the preface. Let us take:

“ **RICHARDSON v. RICHARDSON**, L. R. 3 Eq. 686.

“ *Observed upon* L. R. 16 Eq. 340.

“ *Not followed* L. R. 18 Eq. 11.

“ *Approved* 9 Ch. D. 113.

“ *Referred to* 17 Ch. D. 416.”

The book seeks to combine in itself the advantages of both **Dale and Lehmann's Digest** and **Talbot and Fort's Index**. The compiler hopes that the index will prove useful in the Colonies. It will. It is unhesitatingly commended to readers of the *Canadian Law Times*.

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**Williams on Vendor and Purchaser**:—A Treatise on the Law of Vendor and Purchaser of Real Estate and Chattels Real, intended for the use of Conveyancers. By T. Cyprian Williams, LL.B., Barrister-at-law; assisted by J. F. Iselin, M.A., LL.M., Barrister-at-law. Second volume. London: Sweet and Maxwell, Limited.

We noticed the first volume some time ago. The second volume begins with the discussion of the grounds for avoiding the contract, and contains chapters on “Mistake,” “Fraud, Misrepresentation, Duress, and Undue Influence,” “Illegality in the Contract,” and “Personal Incapacity.” The third and final volume will contain chapters on “Incapacity in Equity.”

“ Remedies for Breach of the Contract,” and “ Sale of Registered Land.” At the end of volume 2 will be found a complete general index and index of cases and statutes to the whole book so far as it has now appeared. It is a valuable work; the discussion of several vexed questions, such as the true theory with respect to mistake as a ground for avoiding a contract, will be found highly interesting.

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**Wilshire's Elements of Criminal Law and Procedure** for the use of students. By A. M. Wilshire, LL.B., Barrister-at-law. London: Sweet and Maxwell, Limited.

This is a very concise book—accuracy and brevity are successfully combined.

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**Duckers's Guide to Students' Law Books** and to both Branches of the Legal Profession. By J. Scott Duckers, solicitor. London: Sweet and Maxwell, Limited.

This little book contains a brief notice of every current English law-book suitable for the use of students for the legal profession or for university law degrees. Over 200 books are dealt with, and chapters are added on “ How to become a Barrister ” and “ How to become a solicitor.” The latest regulations of the Bar Council and the Law Society are also given.

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**Ringwood's Outlines of the Law of Torts.** By Richard Ringwood, M.A., Barrister-at-law. Fourth edition. London: Stevens and Haynes.

This is a new edition of a very good students' text-book, perhaps not so well known as it deserves to be. Among other new matters in the present edition, the author formulates the rules deducible from *Allen v. Flood* and *Quinn v. Leatham*, opportunely enough at a time when legislation is about to be introduced to do away with the effect of these decisions.

## PERIODICALS AND PAMPHLETS.

**The Issue of Corporate Stock for Property Purchased—A new Phase.** By Leonard M. Wallstein, of the New York Bar. (Reprinted from Yale Law Journal, January, 1906.)

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**Opinion of Kellogg, J., in Young v. Equitable Life Assurance Society.** (New York Supreme Court.)

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**Harvard Law Review** for January and February, 1906. C. C. Langdell writes in the January number on "Dominant Opinions in England during the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of it, during that Period;" and E. Parmalee Prentice on "Congress and the Regulation of Corporations." The February issue contains "Equitable Conversion" (VI.), by C. C. Langdell; "The Creation of the Relation of Carrier and Passenger," by Joseph H. Beale jr.; and "The Conveyance of Lands by One whose Lands are in the Adverse Possession of Another," by George P. Costigan jr.

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**Columbia Law Review** for January, 1906. "Are Defectively Incorporated Associations Partnerships?" by Francis M. Burdick; "The Relation to each other of different Administrators of the same Deceased," by Thaddeus D. Keneson; "Agency by Estoppel—a Reply," by Walter Wheeler Cook.

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**Michigan Law Review** for January, 1906. "Law as a Culture Study," by Edson R. Sunderland; "Federal Regulation of Quarantine," by W. E. Walz; "Liability for the Unauthorized Torts of Agents," by W. R. Vance.

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**American Law Review** for January-February, 1906. "The Growth of Hague Ideals," by Hannis Taylor; "Origin

of English Land Tenures," by Frederick C. Bryan; "Injunctions against Strikes," by James Wallace Bryan; "The Nature of Rights and the Principles of Right or Jurisprudence," by George H. Smith.

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**Law Magazine and Review** for February, 1906. "Imprisonment for Debt," by Charles M. Atkinson, and other interesting articles. (London.)

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**The Law** (St. Louis, Mo.)—No. 14 of Vol. 1—a new and useful publication.

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**Law Notes** (Northport, N.Y.).—A very good publication, full of interesting matter.

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**Central Law Journal** (St. Louis, Mo.)—Issues of 15th December, 1905, 5th and 19th January, and 16th February, 1906.

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**The Law Student's Helper** (Detroit, Mich.)—January, 1906.

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**Chicago Legal News**—16th December, 1905, 6th, 13th, and 20th January, and 3rd February, 1906.

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**Chicago Law Journal**—29th December, 1905, and 5th and 12th January, 1906.

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**The Punjab Law Reporter** (Lahore)—October and November, 1905.

**The Digest, a Monthly Journal** (Lahore)—October, 1905.

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**The Calcutta Weekly Notes**—4th and 18th December, 1905.

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**The Criminal Law Journal of India**—October, November, and December, 1905. "What is a Workman?"

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**The Madras Law Journal**—October, 1905. "Some Topics on the Law of Adoption," by P. R. Ganapathi Iyer, is the title of the leading article. December, 1905. "Legislation in 1903."

## OCCASIONAL NOTES.

## Supreme Court of Canada.

ONTARIO.]

[22ND DECEMBER, 1905.]

## WADE v. KENDRICK.

*Company — Act of directors — Unauthorized expenditure — Liability of innocent directors.*

The directors of a limited company, without authority from the shareholders, passed a resolution providing that, in consideration of a firm, of which two directors were members, carrying on business of a similar character, continuing the same until the company could take it over, the company indemnified it from all loss occasioned thereby. K. and F., two members of the firm, refused their assent to the terms of this resolution and declared their intention, of which the majority of the directors were made aware, to retire from the firm. F. subsequently wrote to the president and another director reiterating her intention to retire, and declaring that she would not be responsible for any further liability. The company afterwards took over the business of the firm, paying therefor \$30,000, and receiving assets worth \$12,000, and having eventually gone into liquidation, the liquidator brought an action to recover from the members of the firm the difference. The Court of Appeal (*Wade v. Pakenham*, 5 O. W. R. 736), held that K. and F. were not liable, though their partners were.

*Held*, reversing that decision, that K. and F., having received the benefit of the money paid by the company, were also liable to repay the loss.

*W. M. Douglas*, K.C., and *S. B. Woods*, for the appellant.

*G. F. Shepley*, K.C., for the respondent Forsythe.

*John W. McCullough*, for the respondent Kendrick.



NOVA SCOTIA.]

[22ND DECEMBER, 1905.]

DOMINION COTTON MILLS CO. v. TREGOTHJE MARSH  
COMMISSIONERS.*Certiorari—Assessment—Prescription—Delay of Judge—Jurisdiction.*

Where a statute authorizing commissioners to assess lands provided that no writ of certiorari to review the assessment should be granted after the expiration of 6 months from the initiation of the commissioners' proceedings:—

*Held*, affirming the judgment appealed from, 38 N. S. Rep. 23, GIROUARD, J., dissenting, that an order for the issue of a writ of certiorari made after the expiration of the prescribed time was void, notwithstanding that it was applied for and judgment on the application reserved before the time had expired.

*Per* TASCHEREAU, C.J.C.:—Where jurisdiction has been taken away by statute, the maxim *actus curiæ neminem gravabit* cannot be applied, after the expiration of the time prescribed, so as to validate an order either by ante-dating it or entering it *nunc pro tunc*; in the present case the order for certiorari could issue, as the impeachment of the proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction, but the appellants were not entitled to it on the merits.

*Per* GIROUARD, J., dissenting: — In the circumstances, the order in this case should be treated as having been made on the date when judgment on the application was reserved by the Judge. Upon the merits the appeal should be allowed, as the commissioners had no jurisdiction in the absence of proper notice as required by s. 22 of the Marsh Act, R. S. N. S. 1900 c. 66.

*W. B. A. Ritchie*, K.C., and *Sangster*, for the appellants.

*E. L. Newcombe*, K.C., and *Mellish*, K.C., for the respondents.

**BIGELOW v. CRAIGALLACHIE DISTILLERY CO.**

*Contract—Place of completion—Sale of liquor—Prohibited sale—Knowledge of vendor.*

The plaintiffs, who carried on business in Glasgow, in Scotland, as whisky distillers, appointed sales agents at Halifax, N.S., with authority restricted to receiving and transmitting orders; the acceptance of such orders and forwarding of the goods being in the discretion of the plaintiffs' officers in Glasgow. The defendant, who carried on a trade in liquors in Nova Scotia, without the license required by the Liquor License Act, R. S. N. S. 1900 c. 100, placed orders, by written memoranda, with these agents, which orders were transmitted to the plaintiffs at Glasgow. On receipt of the orders, the plaintiffs shipped the whisky thereby ordered to the defendant, through common carriers at Glasgow, to be forwarded to him at the addresses he gave in Nova Scotia, and, after he had received the goods, passed drafts upon him for the price, which he accepted. The drafts were dishonoured at maturity, and, upon being sued for the amount, the defendant pleaded that the contract was void, having been entered into in Nova Scotia with the object of enabling him to make illicit re-sales of the whisky in a locality where the Canada Temperance Act was in force, and in contravention of the provisions of that Act, and of the local License Act prohibiting such sales on pain of fine and imprisonment.

*Held*, affirming the judgment appealed from, 37 N. S. Rep. 482, IDINGTON, J., dissenting, that the contract was not completed until the acceptance of the orders and delivery of the goods to the defendant at Glasgow, in Scotland, and that the plaintiffs were entitled to recover, as there was no evidence to shew actual knowledge upon their part of any intention to contravene the statutes.

*Lovett*, for the appellant.

*W. B. A. Ritchie*, K.C., for the respondents.

**MUNICIPALITY OF INVERNESS v. McISAAC.**

*Railway—Expropriation of land—Municipal resolution—Confirming Act—Plans.*

A municipal council passed a resolution by which it agreed to pay for lands required for the right of way, station grounds, sidings, and other purposes of a railway, as shewn upon a plan filed under the provisions of the general Railway Act. At the time of the resolution, there were 4 such plans filed, each shewing a portion of the land proposed to be taken and including in the aggregate a greater area than could be expropriated for right of way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be expropriated, the corporation pleaded no liability on account of such excess, and also that there was no specific plan on file describing the land.

*Held*, affirming the judgment appealed from, 38 N. S. Rep. 76, that the first defence failed because of the Act confirming the resolution, and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution.

*E. L. Newcombe*, K.C., and *A. A. Mackay*, for the appellants.

*Mellish*, K.C., and *H. Y. Macdonald*, for the respondent.

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**HUTCHINGS v. NATIONAL LIFE INS. CO.**

*Life insurance—Condition of policy—Payment of premium—Promissory note.*

When the renewal premium of a policy of life insurance became due, the assured gave the local agent of the company a note for the premium, with interest added, which the agent discounted and had the proceeds placed to his own credit in a bank. The renewal receipt was not countersigned nor delivered to the assured, and the agent did not remit the amount of the premium to the company. When the note matured a part was paid and a renewal note given for the balance, which

was unpaid at the time of the death of the assured. A condition of the policy declared that if any note given for a premium was not paid when due, the policy should cease to be in force.

*Held*, DAVIES and MACLENNAN, JJ., dissenting, that the transactions between the assured and the agent did not constitute a payment of the premium in cash, and that the policy had lapsed on default to pay the note at maturity.

Judgment of the Court below affirmed.

*Mellish*, K.C., for the appellant.

*W. B. A. Ritchie*, K.C., for the respondents.

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### McISAAC v. BEATON.

*Will—Trust—Conditional devise.*

A will provided as follows: "I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am at present possessed, whether real or personal or wherever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them, and also order that all my just and lawful debts be paid out of the same;" and appointed executors.

*Held*, affirming the judgment appealed from, 38 N. S. Rep. 60, that the widow took the real estate in fee, with power to dispose of it and the personalty whenever she deemed it was for the benefit of herself and her children to do so.

*A. Mackay*, for the appellant.

*Mellish*, K.C., and *Jamieson*, for the respondent.

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### MADER v. HALIFAX TRAMWAY CO.

*Negligence—Trial by jury—Findings—Statutory privilege.*

On the trial of an action based on negligence, the jury should be asked to state specifically what the negligence of the defendant was that caused the injury. General findings

of negligence, unless the same is found to be the direct cause of the injury, will not support a verdict.

Judgment of the Court below affirmed.

*R. L. Borden*, K.C., and *W. B. A. Ritchie*, K.C., for the appellant.

*E. L. Newcombe*, K.C., and *Mellish*, K.C., for the respondents.

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### INVERNESS RAILWAY AND COAL CO. v. McISAAC.

*Expropriation of land—Submission to arbitration—Award—Notice—Entry on land—Trespass.*

By statute in Nova Scotia the recompense for land taken for railway purposes and for earth, gravel, &c., removed, must be determined by arbitration. A railway company proposed to expropriate, and their engineer wrote to M., who had acted for them in similar matters before, instructing him to ascertain if the owners had arranged their title so that the arbitrators could proceed, and if so to act for the company and request the owners to appoint their man, the two to appoint a third if they could not agree. The engineer added in his letter: "I will send an agreement of arbitration, which each one can subscribe to, or, if they have one already drafted, you can forward it here for approval." No agreement was sent or received by the engineer, but the three arbitrators were appointed and met and investigated the damages, making an award, which the company refused to pay, and the owner sued.

*Held*, reversing the judgment appealed from, 38 N. S. Rep. 80, that, as the company had not taken the preliminary steps required for expropriation, the award was not made under the statute, and was void for want of a proper submission.

Under the statute the company could enter upon the land prior to expropriation, on giving notice to the owner of their intention and stating the quantity of land they intended to take. Without giving such notice the company entered and cut down trees and removed gravel. The owner sued on the

award and added an alternative claim for trespass. The trial Judge held the award bad, and dismissed the claim for trespass on the ground that the owner's sole remedy was by arbitration.

*Held*, that the entry on the land was not under the statute, and the remedy by action was not taken away, and the owner was entitled to a new trial on his claim for trespass.

*E. L. Newcombe*, K.C., for the appellant.

*Alexander McDonald*, for the respondent.

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NEW BRUNSWICK.]

[8TH FEBRUARY, 1906.]

*In re* CUSHING SULPHITE FIBRE CO.

*Appeal—Winding-up Act—Final judgment—Amount in controversy.*

By s. 76 of the Winding-up Act, an appeal can be taken to the Supreme Court of Canada by leave of a Judge of that Court, if the amount involved is \$2,000 or over. On application for leave to appeal from a judgment of the Supreme Court of New Brunswick setting aside an order of a Judge in the winding-up proceedings, which postponed a sale of lands of the insolvent company in a suit in equity for foreclosure of a mortgage, and directed the sale to proceed:—

*Held*, that s. 76 of the Winding-up Act must be taken in connection with s. 28 of the Supreme Court Act, and by the latter an appeal can be taken only from a final judgment; and that the judgment in this case was not final; and leave to appeal could not be granted.

*Held*, also, that no pecuniary amount was involved in the proposed appeal, and leave should be refused on that ground also.

Motion refused with costs.

*Blair*, K.C., *Pugsley*, K.C., and *Hazen*, K.C., for the motion.

*R. G. Code* and *Hanington*, contra.

# THE CANADIAN LAW TIMES.

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MARCH, 1906.

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## PRESUMPTIVE NEGLIGENCE.

RES IPSA LOQUITUR.

UPON the general rule in actions of tort, that the burden of proof rests upon him who holds the affirmative, when negligence is charged as the cause of an injury, there has been grafted an exception, known by the familiar maxim, *res ipsa loquitur*, which implies that, in certain cases, the mere happening of an injurious event may be of such a character as to raise the presumption of negligence on the part of the defendant.

This rule had its origin over sixty years ago in a dictum or ruling made by Lord Denman, C.J., during the trial of *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747 (1842). The plaintiff brought action against the company to recover damages for injuries sustained in consequence of the carriage in which he was conveyed having been thrown off the rails. His Lordship told the jury: "That it having been shewn that the exclusive management, both of the machinery and of the railway, was in the hands of the defendants, it was presumable that the accident arose from their want of care, unless they gave some explanation of the cause by which it was produced; which explanation the plaintiff not having the same means of knowledge as the defendants, could not reasonably be expected to give." The jury found for the plaintiff.

A rule nisi for a nonsuit was granted, on the ground of want of notice under the Act, or, failing that, for a new trial on the ground of misdirection on the part of his Lordship in telling the jury that, from the peculiar circumstances of this case, it lay on the defendants to disprove negligence, rather than on the plaintiff to prove it. During the argument on shewing cause, counsel for the defendants said they wished for the opinion of the Court on the point of notice only. This case cannot be relied upon as an authoritative decision for the doctrine of presumptive negligence, since there was direct evidence of negligence given by the plaintiff, and the question of *res ipsa loquitur* was abandoned on the appeal. The case is noteworthy simply from the fact of Lord Chief Justice Denman's dictum.

The doctrine first received distinctive enunciation in 1850, in the case of *Skinner v. London, Brighton, and South Coast Railway Company*, 5 Ex. 786. The accident in which the plaintiff was injured was occasioned by the train in which he was travelling running against another standing at the station, it being then dark. Chief Baron Pollock, in summing up, told the jury that the fact of the accident having occurred was of itself *prima facie* evidence of negligence on the part of the defendants, citing the dictum of Lord Denman, C.J., in *Carpue v. London and Brighton Railway Company*. On motion for a new trial, on the ground of misdirection, a rule was refused. Alderson, B., said: "This is not the case of a collision between two vehicles belonging to different persons, where no negligence can be inferred against either party, in the absence of evidence as to which of them is to blame. But here all three trains belong to the same company; and whether the accident arose from the trains running at too short intervals, or from their improper management by the persons in charge of them, or from the servants at the station neglecting to stop the last train in time, the company are equally liable; and it is not necessary for the plaintiff to trace specifically in what the negligence



consists; and if the accident arose from some inevitable fatality, it is for the defendants to shew it."

A few years afterwards, in 1863, the doctrine was extended by the decision in the case of *Byrne v. Boadle*, 2 H. & C. 722. In this case the plaintiff was passing along a public highway when a barrel of flour fell upon him from a window above the defendants' shop, causing serious injury. It was strenuously contended by counsel on behalf of the defendants that the doctrine was confined to the case of a collision between two trains upon the same line, and both the property and under the management of the same company. It was further contended that the doctrine of presumptive negligence was qualified by the decision in *Bird v. Great Northern Railway Company*, 28 L. J. Exch. 3, in which it was held that the fact of a train's running off the line was not *prima facie* proof where the occurrence is consistent with the absence of negligence on the part of the defendants. Yet Pollock, C.B., in delivering judgment, placed the question in clear light. "How," he asks, "could the plaintiff possibly ascertain from what cause the barrel fell?" Proceeding, he said: "It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimney, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are *prima facie* responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them."

Scott v. London Dock Company (1865), 3 H. & C. 596, followed the rule laid down in Byrne v. Boadle. In the Scott case the plaintiff, a customs officer, was injured as he was passing, in the discharge of his duty, in front of a warehouse in the dock, by bags of sugar falling upon him. It was contended that the cases were distinguishable, because the place in which the accident occurred was not, as in the Byrne v. Boadle case, a public highway, but a dock the property of a company, and the public had no right to walk in front of the warehouses. The Court of Exchequer Chamber, however, on appeal from the Court of Exchequer, held: "Where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of proper care."

The case of Briggs v. Oliver (1866), 4 H. & C. 403, followed along the lines of previous decisions. A packing case, placed by the defendant against the wall on his premises, fell upon the plaintiff as he was passing, causing injury. A majority of the Court held that the fact of the case's falling constituted evidence of the defendants' negligence, on the ground that it would not have fallen from its own weight, if it had been carefully placed in a proper position and securely propped.

The case of Kearney v. London, Brighton, and South Coast Railway Company (1870), L. R. 5 Q. B. 411, calls for more than passing notice, since it lies directly on the border land between presumptive and non-presumptive negligence. In delivering judgment, Chief Justice Cockburn said: "This is a case where the principle of *res ipsa loquitur* applies. although it is certainly as weak a case as can well be conceived, in which that maxim could be taken to apply." The plaintiff was passing under the defendants' bridge when a brick fell and injured him. The defendants called no witnesses, but

rested their defence on the ground of want of proof of negligence on their part. The Court held that the maxim was applicable; but their judgment was not unanimous. Cockburn, C.J., said: "The company who have constructed this bridge were bound to construct it in a proper manner, and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it, the public having a right to pass under it. Now, we have the fact that a brick falls out of this structure, and injures the plaintiff. The proximate cause appears to have been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendants to use reasonable care and diligence, and I think the brick being loose affords, *prima facie*, a presumption that they had not used reasonable care and diligence." Lush, J., arrived at the same conclusion, but with a wavering mind. Hannen, J., in dissenting, said: "In this case, the evidence consists of the bare fact that the accident happened from some utterly unknown cause. I think it did not lie on the defendants to offer any evidence in such a state of things. If any conjecture may be offered as to whether or not the defendants, by proper inspection, would have been able to guard against the occurrence of that accident, it seems to me that it lies on the plaintiff to shew that the facts were such that by an inspection anybody might have seen that the brick was about to fall down."

The case was carried on appeal to the Court of Exchequer Chamber, *Kearney v. London, Brighton, and South Coast Railway Company* (1871), L. R. 6 Q. B. 759. The Court appealed to unanimously affirmed the judgment of the Court of Queen's Bench. Chief Baron Kelly, in delivering the judgment of the appellate Court said: "It appears, without contradiction, that a brick fell out of the pier of

the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. No doubt, it is humanly possible that the percussion of the iron girder arising from expansion and contraction might have gradually shaken out the mortar, and so loosened the brick; but this is merely conjecture. The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge, and ascertain that the brick work was in good order and all the bricks well secured."

The case of *Wakelin v. London and South Western Railway Company* (1886), 12 App. Cas. 41, treats the question from another point of view, wherein it was held by the House of Lords, on appeal, that notwithstanding the proof of negligence on the part of the defendants, the plaintiff failed to prove that such negligence was the immediate and proximate cause of the calamity which resulted in the death of the plaintiff's husband. The facts of this case were briefly these. The dead body of the plaintiff's husband was found on the line of railway near a level crossing. No one witnessed the fatality. No evidence was offered to shew how, when, or under what circumstances the deceased met his death. An action having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff. The only evidence of negligence was, that the train did not whistle or otherwise give warning of its approach; and further, that the watchman who was employed by the railway company to take charge of the gates and crossings during the day, was withdrawn at night, the accident having occurred at night. It was held by the House of Lords, affirming the decision of the Court of Appeal, that, even assuming that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident, and consequently the company were not liable. Their Lord-

ships held that the liability of the defendant company must rest upon the fact of some negligent act or omission on the part of the company or their servants, which materially contributed to the injury complained of. Mere proof that the company were guilty of negligent acts or omissions, which might possibly have occasioned injury to somebody, but had no connection with the injury for which redress is sought, is not sufficient. It must be proved, not merely that they were negligent, but that their negligence caused or materially contributed to the injury. Lord Chancellor Halsbury said he was unable to see any evidence of how the calamity occurred. One might surmise, but it was surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing. Nor was there anything to shew that the train ran over the man, rather than that the man ran against the train." He further said: "It is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved, the plaintiff fails; and if, in the absence of direct proof, the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition: *ei qui affirmat non ei qui negat incumbit probatio*. If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence

of both, but if that is the state of the evidence the plaintiff fails, because 'in pari delicto potior est conditio defendentis.' It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, i.e., in this case the negligent act done, has discharged herself of that burden. I am of opinion that the plaintiff does not do this unless she proves that the defendants have caused the injury in the sense which I have explained."

In a recent Canadian case, *Asbestos and Asbestic Company v. Durand* (1900), 30 S. C. R. 285, on appeal from the Superior Court for Quebec, the Supreme Court of Canada held the appellant company liable in damages for the death of an employee from an explosion of dynamite, although the direct cause of such explosion was unknown, Gwynne, J., dissenting. The plaintiff below (*Durand*) charged the defendant company with neglect in allowing a large quantity of dynamite to remain unguarded in a dangerous place, and also with neglect in not making proper arrangements and providing suitable facilities to prepare it for use in some isolated situation. Various theories were suggested as causing the explosion: such as spontaneous combustion; or in consequence of its proximity to steam pipes; or from fire set to rubbish by carelessness, generating sufficient heat to produce explosion. The trial Court awarded damages to the plaintiff below. The Court of Review affirmed the trial Court judgment, and held the defendant company in fault in imprudently placing a large quantity of dynamite in an engine room without anyone to take charge of it. King, J., in delivering the judgment of the Court, said: "The peril to life from high explosives is so great, and, as shewn by the evidence, the cause of their explosion frequently so obscure, that damage may fairly be anticipated as likely to ensue from the act of one who accumulates an unusual and unreasonable quantity in dangerous proximity

to others. In placing it where an opportunity for damage may be created, either by the nature of the substance or by fortuitous circumstances or neglect of others or other cause, he takes the chance of the happening of such other event, and cannot disconnect himself from the fairly to be anticipated consequences of his own negligence."

Mr. Justice Gwynne, in dissenting, concluded a remarkably able judgment in these forceful words: "It is suggested that the quantity of dynamite which was in the building at the time of the explosion was greater than should have been allowed to be there, but there is nothing in the judgment asserting a contention, nor anything in the evidence to support a contention, that the quantity of the dynamite in the building had, or could have had, any effect in causing the explosion. In fine, the judgment of the Superior Court appears to me to amount to this, that although the actual cause of the explosion is absolutely unknown, and although no cause can be suggested for it, which rests upon anything else but conjecture and surmise, still as the explosion could not have taken place in the building if the dynamite had not been there, this is sufficient to require the Court to pronounce a judgment that the explosion was caused by negligence of the defendant. If the judgment of the Superior Court be maintained by this Court, it appears to me to be so in conflict with all the judgments heretofore rendered by this Court in cases of a like nature with the present, as to cause the very greatest confusion in applying the judgments of this Court to cases of a like nature in the future. I am therefore of opinion that the appeal should be allowed with costs, and the action in the Court below dismissed with costs."

In the following year, 1901, a somewhat similar case, that of Dominion Cartridge Company v. McArthur, 31 S. C. R. 392, underwent consideration by the Supreme Court of Canada, but with a different result. The facts of this case were these: The respondent, plaintiff below, a servant of the appellant company, was seriously injured by an explosion at

the company's works. There was no direct evidence to shew how the explosion occurred. It originated in an automatic machine for filling cartridges and shells with powder and shot. The explosion, which was instantaneous, blew in the wall of the building and knocked the machine to pieces. The origin of the accident was totally unexplained. It was shewn that the machine in question was constructed by competent machinists, and that it had worked well for fourteen months without accident or complaint of any defect in its operation. The jury, however, found that the explosion occurred through the fault and neglect of the company in not supplying suitable machinery, and in not taking proper precaution to prevent an explosion, and they assessed the damages at \$5.000. The trial Judge refused to render judgment upon the verdict, but decided to reserve the case for the consideration of the Court of Review. That Court dismissed with costs a motion on behalf of the company for a new trial, and confirmed the verdict in favour of the plaintiff. The Court of Queen's Bench affirmed the judgment of the Court of Review. This was an appeal from the judgment of the Court of Queen's Bench.

Girouard, J., in delivering the majority judgment of the Supreme Court of Canada, remarked that while the present case was similar to the preceding one, *Asbestos and Asbestic Company v. Durand*, in respect that the accident was caused by an explosion, yet it was distinguishable in other respects: in that the cause of the explosion was very different; that no fault or negligence was established, and no presumption possible; that the Courts below did not attempt to indicate any; that all of the witnesses declared they could not account for the accident; and that it was proved that the machine was perfect and worked properly; and that the trial Judge so found and certified to the Court of Review. The appeal was allowed with costs, and the respondent's action dismissed with costs.



On appeal to the Judicial Committee of the Privy Council, *McArthur v. Dominion Cartridge Company*, [1905] A. C. 72, their Lordships humbly advised His Majesty that the appeal should be allowed, the judgment of the Supreme Court reversed with costs, and the judgment of the Court of King's Bench restored.

*Grand Trunk Railway Company v. Hainer* and two other cases (1905), 36 S. C. R. 180, on appeal from the Court of Appeal from Ontario, were actions brought under Lord Campbell's Act to recover damages for the alleged negligence of the defendant railway company, causing the death of two young women and a young man when attempting to cross over a track at a level crossing, in the village of Grimsby. There was no evidence of just how it occurred. As no one witnessed it, the case rested to a certain extent upon conjecture, and in some features resembled that of *Wakelin v. London and South Western Railway Co.*, 12 App. Cas. 41. At the place where the accident happened, the train was running at a rate of speed prohibited by statute. The jury found that the death of the parties was due to the negligence of the defendants "in violating the statute by running at an excessive rate of speed." The Court of Appeal for Ontario affirmed the verdict at the trial in favour of the respective plaintiffs in each of the three cases. It was strongly urged upon the attention of the Court on appeal, by counsel for the company, that the cases were not distinguishable from that of *Wakelin v. London and South Western Railway Company*; that, even assuming negligence on the part of the defendants, the evidence fell short of proving that the immediate and proximate part of the calamity was in consequence of the company's running their train at a rate of speed prohibited by law; that it was mere conjecture as to whether or not such a violation of a statutory rule was the *causa causans*. The Court, however, held that, notwithstanding no affirmative evidence had been given of such, or in fact of any, negligence as had for certainty caused the

injury, yet the facts were such as to justify a reasonable presumption that such had been the case, and with fair insistence to exclude any other inference. The Court further held that, although passengers crossing railway tracks are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended, yet, in the absence of evidence to the contrary, there was a legal presumption that such reasonable precaution had been taken by the victims of the calamity.

The Court unanimously dismissed the appeals with costs.

The following rules and dicta, drawn from the foregoing cases, may prove interesting as well as profitable:

The Judge will not be justified in leaving the case to the jury, where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant.

Where it is a perfectly even balance upon the evidence, whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case.

There must be reasonable evidence of negligence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, will not justify a Judge in leaving the case to the jury.

There is an old pleading rule, that less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.—Blackburn, J.

The mere occurrence of an injury is sufficient to raise a *prima facie* case:

(1) When the injurious agency is under the management of the defendant.

(2) When the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care.—Beven.

If on the whole it is left in doubt what the cause of the damage is, then the defendant will be entitled to a verdict, because it must be clearly seen that he is guilty of negligence before a verdict can be found against him. If it turns out, in the consideration of the case, that the injury may as well be attributable to one cause as to another, if either is consistent with a want of negligence, then, also, the defendant will not be liable.—Denman, C.J.

To the general rule, he who affirms must prove, not he who denies, there are two exceptions:

(1) Where there is a presumption of law in favour of an affirmative allegation, the party who supports the negative must call witnesses to rebut the presumption.

(2) Where the subject matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it.—Bayley, J.

It is not necessary to give exact proof of the negligence which caused the injury, but it is sufficient if the facts are such as to justify a reasonable presumption that such was the case and exclude any other inference.

Where the law of negligence is concerned the words of the late Poet Laureate seem most apt when he speaks of:

The lawless science of our law —  
That codeless myriad of precedents;  
That wilderness of single instances.

—Nesbitt, J.

SILAS ALWARD.

St. John, N.B.

## RECENT CASES FROM THE TIMES REPORTS.\*

**Attorney-General.]**—Watson v. Mayor of Hythe, 22 T. L. R. 245, decides that an action by certain burgesses of a borough to restrain the council from consenting to a bill to authorize the laying of a tramway on a borough highway, is an action relating to the performance of a public duty, and therefore not maintainable without the concurrence of the Attorney-General.

**Betting.]**—It is, under s. 1 of the Betting Act, 1853, an offence to keep an office for the purpose of money being received in consideration of an undertaking to pay money on a contingency relating to a game. The respondents in Hawke v. Hulton and Co., 22 T. L. R. 169, were newspaper proprietors who issued in each number of their newspaper a coupon in which was to be filled in the names of the probable winners of certain football matches, a money prize being given for the most accurate forecast. Copies of the newspaper could be purchased at the respondents' office as well as from news agents, etc., and any number of coupons could be filled in by the same person. It was held that it was a question of fact whether money was received for coupons or for newspapers, and if the former, that the respondents ought to be convicted. The case was remitted for a decision on this point.

**Company.]**—It was held in McMillan v. LeRoi Mining Co., 22 T. L. R. 186, that under articles of association providing that votes might be "given either personally or by

\*Including the cases in No. 12, Vol. 22, week ending 6th February, 1906.

proxy." and that a poll if demanded should be taken "in such manner, and at such time and place as the chairman of the meeting directs," a vote could not be taken, though so directed by the chairman, by polling papers signed by shareholders and delivered at the company's office at any time within a fortnight of the day of the meeting. In the absence of special provision, a voter must attend and personally give his vote. The articles, it was held, allowed the substitution of a proxy, but did not authorize the chairman to alter and enlarge the mode of giving the vote.—In *Boschoek Proprietary Co. v. Fuke*, 22 T. L. R. 196, it is decided that shares held by a liquidator of one company in another company are not shares held by the liquidator "in his own right" so as to qualify him as a director. The director was held liable for salary received by him as managing director, alleged ratification by a general meeting not being made out. Payments made out of the company's funds for income tax on the managing director's salary were also held to be improper.

**Consideration.]**—*Hookham v. Mayle*, 22 T. L. R. 241, is an important decision on a matter of everyday occurrence. A judgment creditor, in consideration of the judgment debtor paying him part of the debt and agreeing to pay the balance in weekly instalments, agreed to withdraw an execution. He did not do so and the execution was enforced and the debtor's goods sold. The consequent action for damages was held not to lie, the agreement being void for want of consideration. But in dealing in Ontario with a question of this kind the effect of s.-s. 8 of s. 58 of the Judicature Act would have to be kept in mind.

**Costs.]**—In *re Salmond*, 22 T. L. R. 161, deals with a rather trivial question of taxation practice. In an administration action an order had been made for taxation of the costs of the plaintiff and defendants. One of the defendants was an infant and was represented by a guardian ad litem,

who had retained the same solicitors as the plaintiff. After the order and before the taxation, the infant came of age, and changed her solicitors, retaining the solicitors who had been acting for her co-defendant. It was held that the taxing officer was entitled to direct the solicitors for the guardian to attend on the taxation of the costs of the defendants' solicitors.—In *Bullock v. London General Omnibus Co.*, 22 T. L. R. 244, it is decided that in an action for damages for negligence against two defendants in the alternative, the plaintiff may be allowed as against the defendant who is held to be liable, not only his own costs of the action, but also the costs which he is ordered to pay to the defendant who escapes liability.

**Damages.]**—The action of *Turley v. Daw*, 22 T. L. R. 231, arose out of somewhat unusual circumstances. The plaintiff, in default of attendance upon a judgment summons, was committed to gaol for a week. The summons purported to have been served upon him by a sub-bailiff of the defendant, who was the bailiff of the Court, but it had not in fact been served. The plaintiff claimed damages because of the failure to serve him and give him an opportunity of appearing on the summons. It was held, without deciding whether the bailiff was responsible for the omission of the sub-bailiff, that the action would not lie while the committal order stood unquashed.

**Declaratory Action.]**—It is decided in *North Eastern Marine Engineering Co. v. Leeds Forge Co.*, 22 T. L. R. 178, that a person who is threatened with an action for infringement of a patent cannot bring an action against the holder of the patent for a declaration of its invalidity. There must, it is pointed out, be some limitation to the rule authorizing actions seeking declaratory judgments, and, without attempting to define the limitations, it was held that, as there was in the case in hand an available remedy by way of proceedings to revoke the patent, the extraordinary procedure for a general declaration should not be encouraged.

**Landlord and Tenant.]**—In *Williams v. Gabriel*, 22 T. L. R. 217, many authorities are considered and the conclusion come to that a covenant by a lessor for quiet enjoyment, free from any interruption or disturbance by the lessor or any person claiming under him, is confined to an interruption or disturbance by some person who is in a position to claim rightfully under his title from the lessor that he is authorized to do the act complained of, and does not extend to wrongful and negligent acts not authorized by or under the title obtained from the lessor.—In *Wilson v. Rosenthal*, 22 T. L. R. 233, the attempt was made, but without success, to draw a distinction, upon the question of necessity of prior notice, between an action for a mere declaration of forfeiture of a lease and an action for re-entry and possession. The agreement for lease in question contained covenants to use the premises for certain specified trades and no other; not to sub-let without consent; and not to commit or permit anything which might be a nuisance. It was held that under the Conveyancing Act. 1881 (R. S. O. 1897 c. 170, s. 13), notice, except as to sub-letting, was a condition precedent. The covenant against sub-letting did not in terms refer to the premises “or part thereof.” It was held to apply only to a case of sub-lease of the whole premises.

**Life Insurance.]**—The policy of insurance in question in *In re Parker*, 22 T. L. R. 259, was taken out by a married man for the benefit of his “widow or widow and children, or some or one of them,” in such shares, etc., as the insured should by deed or will appoint. The first wife died, leaving children. The insured married again and made an appointment in favour of the second wife. It was held that she was entitled. “Widow” did not mean “my present wife if she survives and becomes my widow,” but the person who at the time of the insured’s death might answer that description.

**Limitation of Actions.]**—In *In re Boswell*, 22 T. L. R. 247, several points as to part payment are discussed. Where

some items of an account are statute-barred, a payment by the debtor must be, unless expressly made on the statute-barred items, treated as applicable to the items not statute-barred, and avails only as an acknowledgment in respect of those items. The payment too, to be of service, must be made by the debtor. Sums collected by the creditor from third persons indebted to the debtor and retained by the creditor with the debtor's assent, and sums paid to the creditor by a third person who feels himself under a moral obligation to contribute towards the settlement of the indebtedness, do not keep the right of action alive.

**Master and Servant.]**—The rules relating to the formation and management of the superannuation fund of a railway company, provided that a contributing employee "dismissed the service for dishonesty" should forfeit all interest in the fund. It was held in *Thayre v. London, Brighton, and South Coast R. W. Co.*, 22 T. L. R. 240, that "dishonesty" in matters unconnected with the service of the company extinguished the right just as much as dishonesty in the service itself.

**Negligence.]**—The *Bearn*, 22 T. L. R. 165, is a good example of independent liability on the part of two persons for the same accident. A ship moored at a wharf was badly strained by grounding on a heap of clinkers when the tide fell. The harbour authorities were held liable because they had received fees for the use of the harbour and were therefore bound to see that it was kept in a safe condition, and the owners of the wharf were also held liable because they had received fees for the use of the wharf and were therefore bound to see that there was no hidden peril for any vessel moored at it.—Upon which side was the onus of proof was the point for decision in *Angus v. London, Tilbury, and Southend R. W. Co.*, 22 T. L. R. 222. The plaintiff received injuries because of the sudden and violent stopping of a train in which he was travelling. This was held to make



out a *prima facie* case of negligence. The defendants contended that this *prima facie* case was rebutted upon their shewing that this sudden stop was made in order to avoid running over a man who was on the track. But it was held that they were bound to go further and shew that the man was not on the track because of any negligence on their part.

**Parent and Child.]**—In *Waterhouse v. Waterhouse*, 22 T. L. R. 195, the extraordinary spectacle was seen of a father asking an injunction to restrain his son from entering the father's house. The application, which came on on motion for judgment in default of defence, was refused. Buckley, J., who heard it, pointed out that whatever the limits may be of a parent's legal obligation to provide for the maintenance and education of his child, there are many obligations morally binding upon the parent, of which he cannot relieve himself, no matter what the misconduct of the child may have been, and that, except in very grave circumstances, the Court would not make any order with the intent and result of severing the connection which ought to exist between parent and child.

**Restraint of Trade.]**—The covenant in question in *Cade v. Calfe*, 22 T. L. R. 243, made by a servant on entering the employment of a trader, was that the servant would not within two years after leaving the employment "either directly or indirectly be engaged, concerned, or interested in or carry on" a similar business within a certain radius. Entering the service of a trader engaged in a similar business was held to be a breach; a conclusion also come to in the Ontario case of *Parnell v. Dean*, 31 O. R. 517.

**Restrictive Covenant.]**—The judgment in *In re Nisbet and Potts's Contract*, 21 T. L. R. 261, noted 25 C. L. T. 209, holding that land subject to a restrictive covenant remains subject thereto in the hands of a person who has acquired title by possession has been affirmed by the Court of Appeal:

22 T. L. R. 233. The covenantee does not come within the Act, and his equitable right remains in full force, notwithstanding the title acquired adversely against the covenantor.

**Service out of Jurisdiction.]**—In *Mutzenbecker v. La Aseguradora Espanola*, 22 T. L. R. 175, the Court of Appeal help to some extent to make plain the meaning of the service out of the jurisdiction Rule. The defendants, a foreign insurance company, appointed the plaintiffs, who carried on business in London, their agents for five years for the United Kingdom, binding themselves not to do any business except through them, and to open credits at a bank in London for their use. It was held that an action could be brought in England for damages for wrongful termination, in London, by a duly authorized representative of the defendants. of the arrangement, this being, as was held, a breach within the jurisdiction of a contract which according to the terms thereof ought to have been performed within the jurisdiction, the defendants being bound to abstain from interfering with the plaintiffs in the fulfilment of their duties, and also to assist them in the fulfilment thereof by doing in London what might be necessary for that purpose.

**Solicitor and Client.]**—It is held in *In re Mercantile Lighterage Co.*, 22 T. L. R. 250, that in taxing between solicitor and client the costs of a voluntary winding-up, party and party costs taxed against and paid by a third party should be included in the bill, and credit given for the amount received. It is also held that in deciding as to the one-sixth deduction (no longer of essential importance in Ontario) the “professional charges” should be taken by themselves and irrespective of disbursements.

**Staying Action.]**—The Court of Appeal in *Logan v. Bank of Scotland*, 22 T. L. R. 187, hold that in the exercise of the discretion it possesses the Court ought to stay an action if there is vexation and oppression as a result thereof, which

the defendant would not suffer were the action brought in another accessible and competent court. The action was brought in England by a plaintiff residing in Scotland against the Bank of Scotland, which had its head office in Edinburgh and a large number of branches in Scotland, to recover damages for alleged misrepresentation in a prospectus issued and acted on in Scotland, and the writ had been served upon the manager of a branch of the bank in London. The inconvenience, unfairness, and expense resulting from compelling defendants under such circumstances to fight an action in another jurisdiction are forcibly pointed out.

**Will.]**—Trustees having “uncontrolled discretion” as to the time of conversion of shares owned by the testator, are not, it is held in *In re Schneider*, 22 T. L. R. 223, responsible for the loss incurred, when they in good faith hold the shares for some years in a falling market. Nor will the fact that the views of one of the trustees, who has a personal interest in the result, have been allowed by the others to influence their decision, amount to a failure to exercise their own discretion and make them liable, no bad faith being shewn. It is also held in this case that payment of a legacy is not a conclusive admission of assets, but is susceptible of explanation.—By the will in question in *In re Unite*, 22 T. L. R. 242, there was a gift of a large sum “towards the rebuilding and equipment, to the satisfaction and under the direction of my executors,” of a certain hospital. It was held that this was a gift for a specified purpose and not a general gift to the hospital, and that the executors must decide in the exercise of a proper discretion how much, not exceeding the named sum, should be expended.—It is decided in *In re Rattenberry*, 22 T. L. R. 249, that a legacy to a creditor of a sum equal to or greater than the debt, is a satisfaction thereof, although the debt is overdue and is bearing interest, and no time is fixed for payment of the legacy and no provision made for interest upon it.

## THE LATEST ONTARIO DECISIONS.\*

**Appeal.]**—The motion by the plaintiffs to quash the appeal of the Standard Chemical Co., third parties, from the judgment of Britton, J., in *Deseronto Iron Co. v. Rathbun Co.*, 3 O. W. R. 697, argued after judgment on the appeal (6 O. W. R. 688), was granted by the Court of Appeal (7 O. W. R. 162), on the ground that the order of directions giving the third party the right to appear at the trial is not equivalent to an order giving him leave to defend, which is only given upon his admitting that in the event of the plaintiff succeeding against the defendant he (third party) is liable to the defendant. The plaintiff is not entitled to any relief against him, except, perhaps, a judgment for costs, if it appears that he is the person who is really fighting the plaintiff. "The rights of third parties are defined and limited by the Judicature Act and the Rules, and nowhere in them is there to be found given either expressly or by implication a right to third parties to appeal against a judgment obtained by the plaintiff against the defendant alone. For that relief they must rely upon such rights as they may have to require or compel the defendant to appeal for their benefit." "The third parties in the present case did not obtain an order allowing them to defend the action; on the other hand, they did obtain an order allowing them to appeal, not in their own name, but in the name of the defendants, an order which they acted upon, and prosecuted an appeal to this Court in the defendants' name." "This right of appeal to this Court is the extent of the third parties' right here, and it follows that the appeal launched on their own behalf and in their own name against the plaintiffs' judgment is not competent."

\*Short notes of the most important cases in Volume VII. of the *Ontario Weekly Reporter*, Nos. 4, 5, 6, and 7, pp. 137 to 304, inclusive.

**Arbitration and Award.]**—The effect of the decision of Teetzel, J., in *Re Village of Beamsville and Field-Marshall*, 7 O. W. R. 276, is that there is no appeal from the award of arbitrators appointed pursuant to notice under the Municipal Act under an agreement of submission, including besides matters within the function of arbitrators under the Act (s. 451), matters without the scope of their statutory authority, where a lump sum is awarded as damages.

**Assessment and Taxes.]**—The plaintiff in *Goodwin v. City of Ottawa*, 7 O. W. R. 204, was a shareholder in the Ottawa Electric Railway Company, which, by agreement with the defendants, confirmed by Dominion and Ontario statutes, was exempt from taxation on income, and he contended (1) that his dividends were a part of the income of the company, and thus exempt, under the agreement, as against the defendants, and (2) that under the Ontario Assessment Act, 1904, the Ottawa Electric Railway Company would, but for such agreement, be assessable for income, and, therefore, dividends on the stock of the company were exempt under s.-s. 17 of s. 5 of the Assessment Act. Teetzel, J., however, in dismissing the action, expressed the opinion that the first objection failed because the exemption provided by the agreement was a relief to the company, not to third parties, between whom and the defendants there was no privity, and that the second also failed, because, apart from agreement, the Ottawa Electric Railway Company, being liable to "business assessment" under clause (i) of s.-s. 1 of s. 10 of the latter Act, was, by s.-s. 7 of s. 10, not subject to assessment in respect of income.

**Company.]**—The petition under the Dominion Winding-up Act, in *Re People's Loan and Deposit Co.*, 7 O. W. R. 253, was refused by Magee, J., for the want of status in the petitioners. inasmuch as no one of the claims on which the petition was based amounted to \$200; the claims in which either petitioner was beneficially interested did not together amount to \$200; and the alleged debts were, if existent at all,

in respect of contracts ultra vires of the company: C. S. U. C. 1859 c. 53; the Building Societies Acts of 1877 and 1887; and R. S. O. 1897 c. 205. Then, too, it seemed probable that this company had already been dissolved by winding-up proceedings under the Ontario Act; and quære as to whether this company was subject to the Dominion Winding-up Act, which does not apply to companies not having a capital stock.

• **Conspiracy.]**—The effect of the schemes and devices, set out in detail in the judgment of Clute, J., in *Rex v. Master Plumbers and Steam Fitters' Co-operative Association, Limited*, and *Central Supply Association of Canada, Limited*, 7 O. W. R. 213, as practised by the defendants, was, in the opinion of the Court, to unduly limit the supplying or dealing in the articles or commodities which were the subject matter of agreement, and that it did restrain and injure trade and commerce in relation thereto, and did unduly prevent and lessen the manufacture and production thereof, and unreasonably enhance the price, thereby constituting the offence of conspiracy under s. 520 of the Criminal Code; and it was also held that there could be a conspiracy between two incorporated bodies; "person" under s.-s. (t) of the interpretation clause, s. 3, of the Code, including "bodies corporate;" and that this might be established by proving acts and circumstances happening before the incorporation, and that the defendants were the successors to the criminal agreement and combination, and adopted it and become responsible for it.—On the trial for conspiracy of a number of individual members of the Master Plumbers and Steam Fitters' Association, Limited, in respect of the same matters as those dealt with in the preceding case, *Boyd, C.*, in passing sentence, in *Rex v. McGuire and others*, 7 O. W. R. 225, characterized the defendants' conduct in the following language: "A company of respectable people get together to control a trade; their object in furthering their own ends, obscures or blinds the moral sense as to the fair claims of others.

Accordingly, they plan with dulled perception of individual personal responsibility; fair dealing must not come in to lessen the prospect of goodly gain. And so is formed a monopoly which is to them justified by its profitable fruits, but to others it becomes baneful, working harm and loss, stealthily depriving them of money without just value, in brief, cheating them." Pertinent remarks followed on the duties and responsibilities of members of the legal profession in advising in such matters.

**Constitutional Law.]**—In *Money Penny v. Goodman*, 7 O. W. R. 209, the defendant moved to stay proceedings on the ground that s. 534 of the Criminal Code, which assumes to allow a civil action to proceed pending a criminal prosecution in respect of the same matters, was ultra vires of the Dominion Parliament, as legislation dealing with civil rights, and hence an infringement of s.-s. 13 of s. 92 of the B. N. A. Act, not confirmed by provincial enactment as required by s. 94. The Master in Chambers felt impelled by *Gambell v. Heggie*, 6 O. W. R. 184, to dismiss the motion without expressing any positive opinion on the point.

**Costs.]**—A person sought to be examined as the transferee of a judgment debtor is entitled to the costs of an unsuccessful or abandoned motion for an order therefor: The Master in Chambers in *Lumbers v. Dundass*, 7 O. W. R. 230.

**Criminal Law.]**—The Court of Appeal, in dismissing a motion on behalf of the prisoner, in *Rex v. Burdell*, 7 O. W. R. 164, for leave to appeal from the conviction of the prisoner by Street, J., held that the trial Judge was within his right in sending the jury back for further deliberation, when, upon being polled after they had announced their verdict, one of them answered "not guilty," dissenting from the verdict as announced by the foreman. the practice, which is only an application of the settled rule that until their verdict has been recorded, or they have been discharged as unable to

agree, their connection with the case has not come to an end, being, as stated in the *Encyc. of Pl. and Pr.*, vol. 22, p. 937: "When the jury is polled, any juror may dissent from the verdict as announced, and when one or more of the jurors dissent therefrom, there can be no valid verdict. The jury may, however, be sent back for further deliberation, when they may, if all subsequently agree, render a verdict similar in all respects to the former finding"—or, in the opinion of the Court, differing from it; that the fact of the trial Judge telling the jury of the presumption which might, under all the circumstances of the case, be drawn from the fact of the prisoner not having given any account of how the stolen property came into his possession, was not a commenting upon the failure of the prisoner to testify in his own behalf; and that the possession not very long after the crime of a stolen article of a peculiar and unusual kind, bearing marks of an attempt to destroy its identity, the intimate association of the prisoner with Wilson, in whose possession was found other property stolen on the same occasion, and the latter's prompt response to the prisoner's call to resist his arrest even unto death, were all circumstances from which the jury might well draw an inference of guilt, more especially if they concluded, as they evidently did, that the witness Richardson was put forward, or had come forward, to give a false account or explanation of how the prisoner came into possession of the purse.—An appeal by the prisoner in *Rex v. Leconte*, from the order of a Divisional Court, 6 O. W. R. 970 (noted ante 107-8) was dismissed by the Court of Appeal: 7 O. W. R. 189. The principal contention before the Court of Appeal was not urged in the Court below. It related to the jurisdiction of the convicting justices sitting in the city of Brantford, where there is a police magistrate. The objection was overcome by the reception, after the argument in the Court of Appeal, of a further warrant of commitment in which the facts necessary to shew the jurisdiction of the justices were set forth.



**Division Courts.]**—In *Scharf v. Fitzgerald*, 7 O. W. R. 267, Magee, J., held that s. 8 of 57 V. c. 23, which provides that in case an execution is returned nulla bona by a Division Court bailiff “in the Court in which judgment was recovered,” the judgment creditor may sue out execution against lands of the judgment debtor, and the clerk of “the Court in which such judgment was obtained” shall issue a writ of execution against the defendant’s lands, does not authorize the issue of an execution against the debtor’s lands from a Division Court to which a transcript of the judgment has been sent under s. 22 of the Division Courts Act, and the matter is not affected by s. 233, which declares that all proceedings may be taken for enforcing and collecting the judgment in the Division Court and receiving the transcript by the officers thereof that could be had upon judgment recovered in any Division Court, since that enactment has been in force since 1855, and whilst the former procedure of transcribing the Division Court judgment to the County Court was in force, under which it was held that the transcript was necessary to issue from the Division Court in which the judgment was originally recovered.

**Extradition.]**—On application for a writ of habeas corpus in *Re Harsha*, 7 O. W. R. 155, the question was whether a person who had been discharged upon habeas corpus in extradition proceedings (7 O. W. R. 97, noted ante 114), after having been committed to gaol by the Extradition Judge, can properly be again taken in custody under a new information and warrant under the Extradition Act, charging the same offence. Street, J., while granting a rule nisi (counsel for the prisoner agreeing) according to the practice pointed out in *Regina v. Ganz*, 9 Q. B. D. 93, returnable before a Divisional Court, calling upon the Secretary of the Department of State of the United States of America, the Attorney-General for Ontario, and the Senior Judge of the County Court of York to shew cause, so that the grounds upon which the second information was laid and warrant issued

might appear, expressed the views: "There is nothing in the Extradition Act which seems to forbid it, and I cannot see why upon principle it is objectionable, for the alleged fugitive is not put upon his trial in any sense, in the proceedings under the Act; . . . nor does it seem to be contrary to s. 5 of the Habeas Corpus Act, 31 Car. II. c. 2, upon which the applicant relies:" *Attorney-General for Hong Kong v. Kwok-a-Sing*, L. R. 5 P. C. 179, at pp. 201-2. The prisoner "was discharged, not because of any defect in the warrant of commitment, but for lack of evidence to support the charge, so that the question to be determined upon a return to a writ of habeas is by no means necessarily the same as that determined by the Court of Appeal upon the former writ."—The doctrine of *res judicata*, or of former jeopardy, or of *autrefois acquit*, is in each particular quite inapplicable to the preliminary inquiry in extradition matters, in which the procedure is assimilated to that before magistrates in case of indictable offences by s. 9 of R. S. O. c. 42: *Regina v. Morton*, 19 C. P. 9; and it does not affect this result that the magistrate has previously assumed to commit illegally without evidence and has been set right by the Court. The statute 31 Car. II. c. 2, s. 6, is not applicable to extra-territorial crimes. The affidavit grounding the arrest may be sufficient though made on information and belief and without stating the grounds of such information and belief. Views expressed by Boyd, C., in *Re Harsha*, 7 O. W. R. 293, upon the dismissal by a Divisional Court of an application on behalf of prisoner for a writ of habeas corpus for his discharge from custody on a preliminary warrant of commitment.

**Husband and Wife.]**—The judgment of the Chancellor in *Lovell v. Lovell*, 6 O. W. R. 621, noted 25 C. L. T. 693, was affirmed by a Divisional Court, with a strong dissenting judgment by Street, J. Falconbridge, C.J., and Clute, J., adopted the findings and reasoning of the Chancellor.

**Justice of the Peace.]**—The evidence returned in *Rex v. Morningstar*, 7 O. W. R. 167, went far to prove the offence charged before the magistrate, but the latter allowed the case to be withdrawn on the understanding, assented to by all parties, that defendant should pay the complainant's costs, and, on her refusal to do so, wrote her warning her that if she did not make payment, he would record a conviction against her, "including penalty and costs of collecting—in default imprisonment for 21 days;" and, payment not being made, without further notice to the defendant made the order impeached, whereby, without convicting the defendant of any offence, he ordered payment by her of costs amounting to \$5.50, and in default authorized the levy of this amount by distress, and in default of sufficient distress imprisonment for 21 days. In quashing this order, a Divisional Court, in view of the circumstances, availed itself of the provisions of 1 Edw. VII. c. 13, s. 1 (O.), and s. 391 of the Criminal Code, to impose the term and condition that no action should be brought against the justice who made it or any officer who may have acted under it.

**Landlord and Tenant.]**—The landlord in *Nellis v. Mc-Nee*, 7 O. W. R. 158, sought to recover damages for the cost of restoring the building where altered by the tenant and for breach of covenant not to assign or sublet without leave. On appeal from a report, Boyd, C., held that since the piano hoist which was the occasion of the alteration was put in by the tenant with the landlord's permission, and since it was left on the premises and became permanently affixed to the property, it was not competent for the landlord to remove it and have the building restored to its former condition and seek to charge this to the tenant, on the theory that the tenant had committed a breach of the covenant to leave the premises in good repair, because he had not restored them to the original condition; the appeal was also disallowed on the other branch of the case, for, although an assignment was made without the written consent of the landlord, the latter,

knowing this, verbally assented to the change, and afterwards received his rent from the newcomer, thus constituting an election for all purposes; and, although the newcomer was assessed as a separate school supporter and thus a larger assessment for taxes was thereby imposed on the landlord, who was to pay them, the latter could not sue his covenanting tenant for the amount as damages for having accepted a separate school supporter as his tenant; and there was no breach of the covenant applicable to the situation.

**Municipal Corporations.]**—By-law 192 of the town of North Bay, passed pursuant to an agreement between the town corporation and the Canadian Pacific R. W. Co., providing that, in return for certain expenditures by the company in the town, parts of certain streets, crossed by the railway, should be closed, including 240 feet of Regina street, of which 100 feet adjoined the applicant's land, enacted simply that this portion of Regina street "be stopped up and closed." A new street was provided, but the corporation did not acquire and add thereto a strip 2 feet wide between such new road and applicant's land until after the motion was launched. Teetzel, J., was of opinion that s.-s. 2 of s. 629 of the Municipal Act (added by 49 V. c. 37, s. 15), did not have the effect of making both an offer of compensation and the provision of another convenient road conditions precedent to the right of the council to pass a by-law to close a road, and that, while the by-law was not voidable by reason of no compensation having been offered or fixed, until the corporation acquired the two feet mentioned, the by-law could have been quashed as being passed in violation of s.-s. 1 of s. 629: *Re McLean and Town of North Bay*, 7 O. W. R. 169.

**Municipal Elections.]**—On a motion in the nature of a quo warranto in *Rex ex rel. Cavers v. Kelly*, 7 O. W. R. 280, to set aside the election of the mayor and councillors of the town of Oakville, declared elected without a contest, as being

the only nominees who had filed declarations of qualification, pursuant to s. 129 of the 'Municipal Act, 3 Edw. VII. c. 19, on the ground that the defendants' declarations were invalid because they were insensible and did not comply with s. 129, s.-s. 3 (a); because it was not stated they were subscribed as required by s. 311 (1); and because the declarations were made before a commissioner for taking affidavits, and not before one of the persons mentioned in s. 315; the Master in Chambers held the objections themselves were not tenable, and that in any event they were covered by s. 204.—In *Rex ex rel. Martin v. Watson*, 7 O. W. R. 282, Teetzel, J., held that a declaration under s. 129, s.-s. 3 (a), of the Consolidated Municipal Act, 1903, as amended by 4 Edw. VII. c. 22, s. 4, on its face sufficient in form, though not disclosing the property upon which the declarant relies for qualification, was sufficient for the purposes of that section, considering its limited purpose; and that it was too late, after the election, to contend that a misstatement as to the qualifying property was a ground for setting aside the election.—Teetzel, J., allowed the appeal of the defendant in *Rex ex rel. Martin v. Moir*, 7 O. W. R. 300, from an order in a quo warranto proceeding setting aside the appellant's election as alderman for the city of Windsor for insufficient property qualification, according to the requirements of s. 76 of the Municipal Act, 1903, on the grounds that the burden of proof was upon the relator, the defendant being assessed as tenant for \$3,200 and therefore prima facie qualified; that the defendant as occupant of the dwelling house on the front of the lots in the rear of which were the barns of the Shedden Cartage Co., of which he was manager, was not a joint tenant with the company of said lots within the contemplation of s. 93, and the portion occupied by him was of an assessable value of \$2,000; and that the defendant, occupying as he did for 13 years at a yearly rental of \$72, though payable monthly, such occupancy not being necessary to the performance of his duties as manager, was a yearly tenant, and his occupation was not that of a servant.

**Negligence.]**—The defendants' appeal in *Talbot v. Hall and Delaire v. Hall*, 7 O. W. R. 187, from the judgment of Anglin, J., 5 O. W. R. 751 (noted 25 C. L. T. 349), was allowed and a new trial ordered by a Divisional Court.

**Pleading.]**—In *Muir v. Guinane*, 7 O. W. R. 152, a Divisional Court, on appeal from the order of Mabee, J., 7 O. W. R. 54 (noted ante 128), varied the order appealed from by limiting the right to set up the Statute of Limitations as if the action had been begun at the time of the delivery of the statement of claim, to such acceptances sued on as the plaintiff should at the trial fail to prove were included in their claim filed with Clarkson & Cross, assignees. —The plaintiff's claim in *Beutenmiller v. Grand Trunk R. W. Co.*, 7 O. W. R. 266, was to recover \$10,000 at common law, or in the alternative \$5,000 under the Workmen's Compensation for Injuries Act, for the death of her husband, an engine-driver, by a collision while in the defendants' service. A motion by the defendants, before pleading, for an order requiring the plaintiff to elect upon which claim she would proceed, was refused by the Master in Chambers. Reference to *Hives v. Pepper*, 6 O. W. R. 713.

**Promissory Note.]**—A Divisional Court in *Murphy v. Bryden*, 7 O. W. R. 250, held that the fact of the defendants being parties, as sureties, to a former unpaid note of one Robert Bryden, even if such note were more than 6 years overdue, was a good consideration for the making of the note sued on, and that the defendants could not be allowed to set up as a defence a contemporaneous parol agreement that they should not be required to pay it, which indeed was inconsistent with their story that the plaintiffs were to secure the signature to it of Robert Bryden.

**Railway.]**—Without deciding whether the defendants' railway was under federal legislative jurisdiction, the same being wholly situated within the province, and there being

no federal legislation providing otherwise, Meredith, C.J., on the authority of *Grey v. Manitoba and North Western R. W. Co.*, [1897] A. C. 254, and *Toronto General Trusts Corporation v. Central Ontario R. W. Co.*, 6 O. L. R. 1, 2 O. W. R. 259, 8 O. L. R. 342, 3 O. W. R. 910, 21 Times L. R. 732, [1905] A. C. 576, held, on application of the plaintiff in *Wile v. Bruce Mines and Algoma R. W. Co.*, 7 O. W. R. 157, that the High Court had in proper cases jurisdiction to appoint a receiver.

**Separate Schools.]**—Members of certain religious communities for educational purposes having been in the year 1860, and prior thereto, engaged in educational work in the province of Lower Canada, and at the time of the passing of the British North America Act, 1867, exempt from undergoing an examination as teachers in the province of Quebec under the provisions of C. S. L. C. 1860 c. 15, the question whether persons who became members of such communities since the passing of the British North America Act, should be considered qualified teachers for the purposes of the Separate Schools Act, and therefore eligible for employment as teachers in the Roman Catholic separate schools within the province of Ontario, when such members have not received certificates of qualification to teach in the public schools of the province, was, on a case stated by the Lieutenant-Governor of Ontario, answered by the Court of Appeal in the negative: *Re Qualification of Teachers in Roman Catholic Separate Schools in Ontario*, 7 O. W. R. 141. This decision was a formal reaffirmance of the decision in *Grattan v. Ottawa Separate School Trustees*, 8 O. L. R. 135, 3 O. L. R. 433, 4 O. W. R. 58, 389.

**Statutes.]**—The general rule that a prior statute is held to be repealed by implication by a subsequent statute if the two are repugnant, does not apply if the prior enactment is special and the subsequent enactment is general. Applying the exception, Teetzel, J., in *Way v. City of St. Thomas*, 7

O. W. R. 194, held that s. 3 of 48 V. c. 65 (O.), allowing municipalities to grant exemption from taxation to the Canada Southern Railway Company in whole or in part, or to accept a fixed sum therefor, was not repealed by 55 V. c. 60, s. 4 (O.): "No municipal by-law hereafter passed for exempting any portion of the ratable property of a municipality from taxation in whole or in part shall be held or construed to exempt such property from school rates of any kind whatsoever."

**Third Party Procedure.]**—After the judgment of Meredith, C.J., in *Donn v. Toronto Ferry Co.*, 6 O. W. R. 973 (noted ante 135), the defendants renewed their motion for directions as to the trial of issues raised between the defendants and third parties, when the Master in Chambers (7 O. W. R. 154) set aside the third party notice, on the grounds that there was no contract on the part of the city corporation to fence the wharf where the plaintiff was injured, and that, if there were a duty to do so, the city corporation might be liable to an action by the defendants for breach of such duty, but in such an action the damages would not be such as to conform to the rule laid down in *Miller v. Sarnia Gas Co.*, 2 O. L. R. 546. If liable generally under *Denny v. Montreal Telegraph Co.*, 3 A. R. 628, they might be excused on the principle of *Garfield v. City of Toronto*, 22 A. R. 128.

**Trade Mark.]**—The plaintiffs in *Kerstein v. Cohen*, 7 O. W. R. 247, had adopted and registered the word "Shur-On" as a trade mark for optical goods. The defendants used this word and were restrained by injunction, and thereafter adopted the word "Staz-On," later "Sta-Zon," as a trade mark in connection with similar goods. The action was to restrain the defendants from using this word or any so similar as to be likely to deceive. Mulock, C.J., in the absence of any satisfactory evidence that the public were misled, dismissed the action, but without costs, holding that similarity in detail in these words was not the test, but taking the words in



their entirety there was not similarity in appearance or sound such as an ordinary person reading the two would mistake one for the other; and that the fact that the plaintiffs had advertised their goods as "on to stay," "an eye-glass that stays on," etc., could not avail the plaintiffs, it not appearing that they had acquired any exclusive right to use any of these sets of words.

**Vendor and Purchaser.]**—The contract in *Bradley v. Elliott*, 7 O. W. R. 137, was evidenced by the following writing only: "Owen Sound, Nov. 9th, 1903. Received from Bradley \$100 in part payment of lot 16, 12th con. Albemarle; balance, \$1,175, to be paid on the delivery of satisfactory deed. P. W. Black, agent." This was held by a Divisional Court not to satisfy the requirements of the Statute of Frauds, the vendor not being named, in which case the contract can only be valid when the agent signing the contract has contracted as principal. An owner will not be held bound by an offer accepted by an agent after long delay.—An agreement for sale, executed only by the plaintiff, was intended by the parties in *Dingman v. Jarvis*, 7 O. W. R. 244, as both admitted, to effectuate only the grant to the defendant, who had paid \$200 thereon, of an option to purchase. The defendant registered the document, but did not exercise the option, and the action was brought upon the defendant's refusal to execute a quit claim deed tendered him by the plaintiff, to have it declared that the defendant had no right or interest in the lands. After commencement of the action the defendant offered to execute the deed, but refused to pay costs, or to submit the question of costs to a Judge. Magee, J., gave judgment declaring that the defendant did not pay the purchase money in accordance with the registered agreement, and that he had no right or interest in the lands, but refused to make any order as to costs.

**Will.**—The will in *Re Sibbett*, 7 O. W. R. 173, gave the property to the executors in trust for the wife during widow-

hood, "so that she may receive the income, rents, and profits thereof," and in a subsequent clause, after the power to sell any part and invest the proceeds, the executors were directed to pay her the rents and profits or other income from the estate every 6 months. It is also directed that after the wife's death the estate should be divided. The property consisted of an hotel and furniture, which the widow had been permitted by the executors to occupy and conduct, the license being transferred to her with the consent of the executors. The only other property had been applied to the payment of debts. Magee, J., on application by one of the executors and trustees under the will, for an order determining certain questions with regard to the disposition of the estate, for reasons set out in his judgment, answered such questions as follows: "(1) The widow is entitled to the beneficial enjoyment of the property of the deceased in specie during widowhood, subject to the power of sale given by the will and to the rights of creditors: (2) she is entitled to be allowed to remain in possession of the property of which she is now in possession until sufficient grounds for dispossessing her thereof are shewn; (3) and (4) she being now in possession of the hotel premises, with the consent of the executors, they are not entitled to possession until sufficient grounds be shewn, and cannot lease them without her consent, and the question of the advisability of a sale is, under the terms of the will, in their discretion."—On an application under the Vendors and Purchasers Act in *Re Martin and Dagneau*, 7 O. W. R. 191, Magee, J., held that a restraint upon alienation providing that the devisee should not have the privilege of "mortgaging or selling" the lands devised, was not an unlimited restraint upon alienation, the word "sale" representing only one of several modes of alienation, and was valid.—By the will in question in *Re Bell*, 7 O. W. R. 199, the testatrix devised a life estate to her brother Richard in a 100-acre farm subject to mortgage, and charged with the payment of certain legacies, but disclosing an intention

that the mortgage and legacies were to be paid out of her estate other than the farm, but if there was not sufficient Richard should pay the balance from the crops of the farm, of which he was to have possession at once, and, after payment of such mortgage and legacies, the full benefit for life. On his death it was to be sold. Magee, J., held that the executors under the circumstances did not take the legal estate, but only a power; that, if Richard refused the devise, the disposition "after his decease" became accelerated; that, if he accepted it, he was entitled to deduct from the proceeds of the crops wages paid by him for hired help, and for his own time and labour, but not cost of insurance or repairs; that the executors would not be responsible for Richard's failure to so apply the proceeds of crops, but they were bound to enforce payment or declare a forfeiture; and that the executors, in case Richard ceased to work the farm, would, pending a sale, be justified in renting the farm for a year at a time.—Where the testator's personalty amounted to \$8,780 and his realty to \$2,700, out of which his widow claimed dower, and by his will he gave her an annuity of \$600 and legacies to the amount of \$250, and, at either his wife's death or marriage, contemplating that there would be something left, directed "the balance" to be equally divided between his children, and that the legacies to his son and daughter should be "extra," Magee, J., in *Re Morrison*, 7 O. W. R. 231, held that the annuity to the widow was not restricted to income, and that the word "balance" conveys no intimation to the contrary; that if it should appear that the cash value of the annuity with the \$250 legacies and the value of the dower would exceed the amount of the estate after payment of debts and expenses, the widow was not entitled to dower in addition to the annuity—otherwise she was so entitled; and that the payment of the legacies was not to be postponed till the death or marriage of the widow, but was to be made in due course of administration as of legacies not so postponed.—The question whether James Milligan,

being still the registered owner of 2 of the 4 houses devised to him by this clause in a will, "I leave to my son James the Chestnut street property, also the north house on Robert street, and if my grandson John grows up a good young man, that my son James will give him one house, so that he may have a house for himself," and not having yet given the grandson John one of the 4 houses, and without its being established whether or no the latter had turned out "a good young man," could, without obtaining a release from him, sell and convey one of them, was answered by Teetzel, J., in the affirmative: *Re Zimmerman and Senner*, 7 O. W. R. 275.

**Writ of Summons.]**—In *Croil v. McCullough*, 7 O. W. R. 152, the defendant, resident out of the jurisdiction, after entering an ordinary appearance, applied to withdraw it and enter a conditional appearance, as in *Burson v. German Union Ins. Co.*, 3 O. W. R. 372, alleging that the note sued on was payable (if at all) only at Montreal, but, it appearing that, on a motion for judgment, the defendant had filed an affidavit, which was his main material on this motion also, stating it to be his intention to counterclaim to have the partnership between himself and the plaintiff wound up, the Master in Chambers dismissed the motion, holding that this declaration of intention to counterclaim was an attornment to the jurisdiction of the Court, if the appearance was not, as in *Sears v. Myers*, 15 P. R. 381.

## CASES FROM WESTERN CANADA.\*

**Assessment and Taxes.]**—The contention of defendants in *Alloway v. Rural Municipality of St. Andrews* (Man.), 3 W. L. R. 13, that a vesting certificate issued pursuant to R. S. M. 1892 c. 101, was conclusive evidence of the validity of the sale and of all proceedings prior thereto and of the assessment and levy of the rate, was overruled by Perdue, J., who held that such certificate had not the evidential value which a tax sale deed has by virtue of s. 191 of the Act; and, even if the vesting certificate had such value, the effect of 55 V. c. 26, s. 7, was only to remedy irregularities, and it was still open to the plaintiff to shew that there was no legal assessment for the excess in respect of which the land was sold for taxes. The assessment for 1891, one of such years, was held void as not having been signed by the assessor and because there was not entered upon the roll a true and accurate description of the lands in question.

**Attachment of Debts.]**—The defendant's appeal in *Stimson v. Hamilton* (N. W. T.), 3 W. L. R. 72, from the order of Scott, J., 1 W. L. R. 20 (noted 25 (C. L. T. 156)), was dismissed by the full Court.

**Bank.]**—In *Canadian Bank of Commerce v. McDonald* (Y. T.), 3 W. L. R. 90, an action by a bank upon mortgages taken as collateral security for an account with a customer, Macaulay, J., considers a number of interesting and important questions. Among other things he determines that interest at a rate beyond that permitted by the Bank Act, if paid voluntarily, could not be recovered by the customer, but if simply charged by the bank to the customer could be reduced upon taking the account.

\*Short notes of the most important cases in Volume III. of the *Western Law Reporter*, No. 1, pp. 1 to 112, inclusive.

**Company.]**—The validity of the mortgage sued on in *Harris v. English Canadian Co. (B. C.)*, 3 W. L. R. 5, depended upon the regularity of two meetings of directors of the defendant company, and Martin, J., held that both were irregular: the first because it was not called on notice, and one of the directors “repudiated the statement that it was a board meeting and refused to have anything to do with the proceedings;” and the second because the same director, while he attended “voluntarily on notice” from the outset (as was done at the first meeting) objected to the presence of strangers, and, when the chairman ignored his repeated and continuous protests against the legality of the proceedings, resigned his office of director and withdrew, leaving no quorum for the transaction of business.—A purchase by a company authorized by one set of directors at a meeting called on insufficient notice to enable another set of directors to be present, with the object of keeping that other set of directors in a minority by reason of the issue of stock in payment for the property purchased, will, when the vendor is a party to this design, be set aside at the instance of a shareholder: *Madden v. Dimond (B. C.)*, 3 W. L. R. 49, a decision of the full Court.—In *Rudolph v. Macey (B. C.)*, 3 W. L. R. 52, the same Court affirmed the judgment of the trial Judge, restraining the same company and 3 of the directors thereof from calling or holding a meeting of directors for a particular purpose without proper notice to the other directors, it appearing that these directors had given misleading and inadequate notice of a meeting and thereat passed resolutions palpably conceived in their own personal interests, and that they were not acting in an honest exercise of their discretion as directors.

**Contract.]**—The full Court in *Twyford v. York (N.W. T.)*, 3 W. L. R. 74, allowed the defendants’ appeal (Sifton, C.J., dissenting) from the judgment of Scott, J., 2 W. L. R. 348 (noted ante 53), and set aside the judgment entered on the claim of the plaintiff Charlotte Twyford, on the grounds

that the covenants in the agreement between the parties were interdependent; that there was no breach by the defendant of his undertaking to procure an order for the delivery of the horses to the plaintiff Hugh Twyford, and, even if there were, the measure of damages for such breach would be different and depend on different considerations from the damages to be allowed in the action as launched; and that, while Charlotte Twyford might have waived such breach, if any, she had not done so, or, at least, had not notified the defendant before action brought.

**Costs.]**—It was held by the Supreme Court of British Columbia in *Re Sam Kee* (B.C.), 3 W. L. R. 8, upon an appeal from an award under the Dominion Railway Act, 1903, that the costs of the appeal did not form part of the costs of the arbitration, distinguishing *Holliday v. Mayor of Wakefield*, 20 Q. B. D. 720. Section 168 of the Railway Act, which confers the right of appeal, provides that upon the appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of an inferior Court. Duff, J., who delivered the majority judgment, had some difficulty in satisfying himself that this language was broad enough to give the Court power to award costs, but, finding that the Courts of Ontario have since 1877 uniformly acted upon the view that the language was sufficient for this purpose, he thought that this course of judicial practice, coupled with the fact that the form of the legislation had during the same period remained unaltered, was a sufficient ground for maintaining the jurisdiction. The power to dispose of the costs of the appeal being thus assumed, a further question of great importance arose. The appeal was from an award of \$12,000, with interest at 6 per cent. from a certain date. The appeal failed upon the main grounds, but succeeded as to the rate of interest, which was reduced to 5 per cent. Section 100 of the British Columbia Supreme Court Act provides that the costs of every appeal to the full Court shall follow the event. What was the event in this

case? The majority of the Court, following *Myers v Defries*, 5 Ex. D. 180, read "event" as "events," and distributed the costs according to the divided success, but Irving, J., perhaps more logically, was of opinion that that was nullifying the Act of the Legislature, and recorded a reluctant dissent. —The construction of s. 100 was again considered by the full Court (differently composed) in *Hopper v. Dunsmuir*, 3 W. L. R. 35, where it was held that the Court had no power to order costs of an appeal to be paid out of the estate, the action being to declare a will void for undue influence and lack of testamentary capacity; but again the Court pronounced in favour of two "events," the appellants having been successful upon a preliminary point as to an amendment, while unsuccessful on the main appeal. —The successful plaintiff in an alimony action was awarded costs as between solicitor and client by Martin, J., in *Mellor v. Mellor* (B.C.), 3 W. L. R. 34, notwithstanding s. 83 of the Legal Professions Act (R. S. B. C. c. 24), by virtue of Rule 800, which was held not to have been repealed by s. 83.

**Crown Lands.]**—An appeal by the suppliant in *Cartwright v. The King* (B.C.), 3 W. L. R. 47, from the judgment of Hunter, C.J., 1 W. L. R. 103 (noted 25 C. L. T. 228), was dismissed by the full Court.

**Master and Servant.]**—The proof made by the complainant in *Rex v. Pinkiert* (Y.T.), 3 W. L. R. 88, a proceeding for non-payment of wages under c. 46, C. O. Y. T., tended to shew that the defendant simply asked the complainant to protect him against an attack threatenel to be made against him. Without adjudicating on the question of fact raised by the defendant's denial, Dugas, J., held that the complaint should be dismissed. on the ground that complainant did not come within the purview of the Act, since it was clear that the nature of the contract alleged by him would not subject him to the penalty provided by s. 2 for any negligence thereunder, and that the relation of master and servant as defined



in Bouvier's Law Dictionary and *Sadler v. Henlock*, 24 L. J. Q. B. 138, "The real test as to relations between master and servant is whether the employer has any control over the person employed," did not exist.

**Mechanics' Liens.**]—In *McArthur v. Martinson* (Man.), 3 W. L. R. 2, it was held by Dubuc, C.J., that, while the owner of a building in course of erection may, under s. 10 of the Mechanics' Lien Act (R. S. M. c. 110), make payments to workmen for wages or to persons furnishing materials, such payments must not have the effect of reducing the percentage to be retained by him under s. 9, and are, in this respect, made at the owner's risk.

**Mortgage.**]—The purchaser from the mortgagor of lands subject to a mortgage given to secure advances made upon certain shares subscribed for by the mortgagor in the Canadian Mutual Loan and Investment Co., mortgagees, was held by Scott, J., in *Re Kelly and Colonial Investment and Loan Co. (N.W.T.)*, 3 W. L. R. 62, to be entitled, on payment to the successors in interest under 63 & 64 V. c. 95, of the mortgagees, of all moneys secured by the mortgage without surrender of the certificate for shares, pass book, and withdrawal receipt, to a discharge of the mortgage, and this notwithstanding provisions therein that the mortgagor would obey the rules and by-laws, for the time being, of the mortgagees, and that the mortgagees should have a lien upon all shares of their capital stock held or subscribed for by the mortgagor, and even if the advance was actually made upon the shares with the mortgage as collateral thereto. Quære, whether a covenant by a mortgagor in a mortgage to observe all the rules and by-laws of a loan company would have the effect of incorporating them in the mortgage.

**Municipal Corporations.**]—The plaintiffs' premises in Cardston, built at a spot some years before a slough or lake, and a foot or 18 inches lower than the street, which, at the

time the premises were erected was on the same level, but had since been raised, having been flooded during a storm of unusual severity, greater in fact than any for some years, by reason of the stopping up of a near-by culvert, for all ordinary purposes of sufficient size, by logs and débris carried there by the water, Harvey, J., considered the facts in the case so similar to those in *Garfield v. City of Toronto*, 22 A. R. 128, as to warrant the same conclusion arrived at in that case and dismissed the plaintiffs' action against the municipality for damages for the flooding: *Cardston Drug and Book Co. v. Town of Cardston (N.W.T.)*, 3 W. L. R. 64.

**Pleading.]**—The plaintiff in *Coates v. Pearson (Man.)*, 3 W. L. R. 1, joined with his claim for malicious prosecution a claim for trespass. The Referee in Chambers refused an application to strike out the paragraphs of the statement of claim relating to trespass as embarrassing, s. 59 of the King's Bench Act requiring actions for malicious prosecution to be tried with a jury and actions for trespass without a jury, unless otherwise in such cases respectively agreed or ordered; and Mathers, J., in dismissing an appeal, held that, the plaintiff had a right under Rule 257 to join these causes of action, and that the defendant had no right to apply under Rule 263 to exclude one of the claims until the action was at issue, and the plaintiff had had an opportunity to apply to have the claim for trespass tried by a jury.

**Railway.]**—The defendants' appeal in *Sayers v. British Columbia Electric R. W. Co. (B.C.)*, 3 W. L. R. 44, from the judgment of Duff, J., 2 W. L. R. 152 (noted 25 C. L. T. 637), was dismissed by the full Court.

**Security for Costs.]**—In *Hutchinson v. Twyford (N.W.T.)*, 3 W. L. R. 66, Scott, J., dismissed an application to extend the time limited by an order for giving security for costs, made after the time within which the security should

have been given had expired. Reference to Rule 548, and *Carter v. Stubbs*, 6 Q. B. D. 116, and Order 57, Rule 6, of the English Rules.

**Service out of the Jurisdiction.]**—Where the plaintiff, resident at Calgary, sued the defendants, resident in Scotland, for expense money and commissions on the sale of the defendants' goods pursuant to the terms of an agreement between the parties by which the plaintiff was to act as the defendants' agent and push the sale of their goods and promote their interests in Canada, Scott, J., deeming the contract, on the part of the defendants, in so far as it related to the payment of the plaintiff's expenses and commissions in connection with business done by him in the North-West Territories, to be one that ought to be performed there, and that the Court to that extent had jurisdiction, dismissed an application to set aside a writ of summons for service out of the jurisdiction: *Dickson v. McInnes* (N.W.T.), 3 W.L.R. 60. —In *Cuthbertson v. Canada Radiator Co.* (N.W.T.), 3 W.L.R. 86, an action for damages for breach of contract by the defendants for the sale of goods, it being impossible to ascertain from the conflict of evidence whether the first carload of goods were sold by the defendants' traveller f. o. b. Port Hope, Ontario, or by one McGuire at Edmonton for delivery there, Scott, J., notwithstanding that the plaintiffs were to pay the freight, refused an application to set aside an order for service out of the jurisdiction, but struck out a claim for the second shipment, consisting of a steam boiler for the "Chisholm Block," the plaintiff Cuthbertson admitting that the defendants were to ship it at Port Hope to the plaintiffs at Edmonton.

**Vendor and Purchaser.]**—"March 17th, 1902. Received from Will Berry fifty dollars to apply on equity on Canadian Pacific R. Co. land, S. E.  $\frac{1}{4}$  sec. 15, Twp. 45, Range 24, W. 4th Meridian, at \$5.50 per acre. M. E. Scott." This was the memorandum relied on by the plaintiff in *Berry v. Scott*

(N.W.T.), 3 W. L. R. 84, to satisfy the Statute of Frauds, in his action for specific performance. Scott, J., however, held that, assuming that the memorandum sufficiently stated the purpose or object of the payment to shew a sale or agreement to sell, it did not shew an agreement to sell on the terms alleged by the plaintiff, viz., that the amount due to the railway company was to be deducted from the named price of \$5.50 per acre, but merely a sale of the defendants' interest or equity therein at that price.

**Will.]**—Giving effect to the considerations that, of the witnesses called to impeach the will in controversy in *Hopper v. Dunsmuir* (B.C.), 3 W. L. R. 18, excepting the plaintiff herself, all had known the deceased but a short time or spoke only as to isolated occasions when he was intoxicated, and that none of them had dealings with him when sober; that, in support of the will, eliminating all parties in interest, relatives, and solicitors, there were at least a score of fair-minded and credible witnesses, whose business, social, and personal acquaintance with the deceased extended over a long period of time, and most of them had had business dealings with him during the last two years of his life; that the business correspondence of the deceased shortly before his death shewed testamentary capacity; and that, except in the evidence of the plaintiff herself, there was no place for the speculations of the alienists called to dispute and support the sanity of deceased: the full Court, considering that the case did not come within the class of cases requiring affirmative proof from one who procures a will; that, even if it did, the onus had been discharged: and, on the authority of *Winans v. Attorney-General*, [1904] A. C. 287, that it was not established that deceased had changed his domicil of origin: dismissed the plaintiff's appeal from the judgment of the trial Judge in favour of the defendant.

## EDITORIAL REVIEW.

**Election of Benchers.**

The members of the Ontario Bar are now engaged in a general election. Like the House of Commons of Canada, the parliament which sits in the east wing of Osgoode Hall is elected every five years, and the quinquennial election of Benchers of the Law Society is now "on." The proceedings are not without interest, but they strike one as being rather hap-hazard in their nature. There is no representation of districts; each voter may vote for the whole number (30) of representatives to be elected, and the 30 who are found to have received the largest number of votes, when the names on the signed voting papers are counted, are declared elected. There are no nominations, and every duly qualified voter is also qualified for election as Bencher. From this brief summary of the general provisions of the statute (R. S. O. 1897 c. 172) it would appear inevitable that the vote should be a scattering one. But informal arrangements for the representation of districts are in fact made. Local Bar associations nominate men and send out circulars, which often bring in votes. This does not work evenly, however. Some districts are quite unrepresented. Of the large tract of the province lying between Toronto and Kingston there is at the present time only one representative; and there is only one from the north; while Toronto itself has 13, Kingston and east of Kingston 5, and the west, including places so near Toronto as Hamilton and Guelph, 10. Although there are no nominations, the equivalent, in the case of the retiring Benchers, is supplied by s. 11 of the statute, which provides that there shall be sent out with the voting papers a list of those whose term of office is about to expire. The records of previous elections shew that a large majority of the old Benchers are usually re-elected: they are all in effect nominated for re-election.

Other gentlemen willing to stand for election, and not nominated by local Bar associations, have their names brought before the electors by informal methods. It may be said that the men whose names are best known have the best chance of success. Men who have been useful Benchers have occasionally been defeated because they were not well known to the electorate. The most useful Benchers are probably not always those whose names are most before the public and profession as leading counsel; it is natural that they should not all find time for the constant service which some most faithfully and unselfishly yield. It would be a misfortune if certain of the old Benchers were not re-elected; the continuance of their services is most important to the welfare of the Law Society.

#### **Hardships of the Law.**

Would it not be possible and desirable, asks the *London Law Times*, especially as the Cabinet contains so many lawyers, for the new Parliament to extinguish or mitigate the hardships of those absurdities of our law, as settled by decided cases, which are, generally speaking, known to lawyers only, but which may at any time be productive of grave injustice to innocent and ignorant laymen? Amongst them may be mentioned the following:—

Bankers, by virtue of the Limitation Act, 1623, become owners of the money of customers not drawn upon for six years: see *Foley v. Hill*, 2 H. L. Cas. 36.

Both executors and trustees in bankruptcy are personally liable on the repairing covenants of leases in event of the assets of the testators or bankrupts proving insufficient: see *Tremeere v. Morison*, 1 B. N. C. 89, and *Titterton v. Cooper*, 46 L. T. Rep. 870, 9 Q. B. D. 473.

The liability of a guarantor of rent is determined by a disclaimer of a lease in bankruptcy: see *Stacey v. Hill*, 84 L. T. Rep. 410, [1901] 1 K. B. 660.

An agreement to take a lesser sum than that due for a debt is void, unless it be by deed, or to take the lesser sum by

cheque or other negotiable instrument: see *Foakes v. Beer*, 51 L. T. Rep. 833, 9 App. Cas. 605.

Although an insuring tenant is bound to expend insurance money on rebuilding, an insuring landlord is not: see *Lofft v. Dennis*, 28 L. J. Q. B. 168.

A master (except in Ireland) is not bound to give a servant a character, however long and faithfully he may have served: see *Carroll v. Bird*, 3 Esp. 20, 6 R. R. 824.

Although a promise in consideration of marriage must be in signed writing by the Statute of Frauds, the promise to marry need not: see *Cork v. Baker*, 1 Str. 34.

#### Obligations of Executors.

An executor is under no legal obligation to disclose to beneficiaries under a will the contents of the will or the extent and character of their benefits under it. Such seems to be the result of *Re Mackay*, *Mackay v. Gould*, 93 L. T. Rep. 694, and of *Lewis v. Lewis*, 91 L. T. Rep. 242. But we cannot but consider this to be an unsatisfactory state of the law, and we think that it should be altered by legislation obliging an executor to make all reasonable disclosures, and expressly empowering him to charge the expenses on the legatees. The present law appears to assist a dishonest executor in converting other people's property to his own use. (*The London Law Times*.)

#### English Notes.

The appointment of Mr. Fletcher Moulton to the vacancy in the Court of Appeal is one of those, says *Truth*, which are above criticism in every respect. Mr. Moulton has had a most distinguished career at the Bar, and for the last few years has been without a rival in his own particular line. It is a remarkable circumstance that, as the result of his promotion to the Bench, one half of the Court of Appeal—and the equity half exclusively—consists of Senior Wranglers, the others besides the new Lord Justice being Lords Justices Romer

and Stirling. This state of things takes all sting, for the present at least, out of the old gibe that no Senior Wrangler is good for anything in life but higher mathematics.—Sir John Day, who will be eighty years of age on the 20th June next, has recently purchased a house at Newbury, where he is building a picture gallery. It is gratifying to learn that Sir John is in the enjoyment of good health, and it may be recalled that during the time he was one of the Judges of the High Court—a period of nearly twenty years—he never missed one day's work either in London or on circuit on account of illness. He is now adding to his valuable collection of pictures, and making further purchases for his library.

#### **Recent American Decisions.**

*Equitable Relief against Forfeiture.*—That equity will not prevent a forfeiture of an estate for breach of a condition subsequent is held in *Maginnis v. Knickerbocker Ice Co.* (Wis.), 69 L. R. A. 833, where the performance of the condition was made of the very essence of the contract, and the damages for the breach cannot be measured in money, while the failure to perform was not caused by mistake, nor the result of mere negligence. With this case is an extensive note on equitable relief against forfeiture of estate.

*Fixtures.*—The mere finishing material, such as doors, mantels, casings, etc., which have been purchased for an unfinished building and placed therein, but not affixed thereto, is held, in *Blue v. Gunn* (Tenn.), 69 L. R. A. 892, not to pass by a sale of the real property under a mortgage foreclosure, where it is not mentioned or deemed a part of the sale.

A mortgage of a lot on which stands a partly completed building is held, in *Byrne v. Werner* (Mich.), 69 L. R. A. 900, to pass cut stone and structural iron prepared for the building, and located on the lot mortgaged and that adjoining, if the intention of the parties is that the building shall



be speedily completed with the material at hand. The question, Are things placed on land with the intention of annexing them, fixtures where they are never actually attached?— is the subject of a note to this case.

*Husband and Wife.*—The liability of a husband for the support of his wife at an asylum for the insane, to which she has been removed by due process of law, is denied in *Richardson v. Stuesser* (Wis.), 69 L. R. A. 829, in the absence of a statute expressly imposing such liability.

*Insurance.*—An open mortgage clause attached to a policy of fire insurance, which merely provides that loss, if any, shall be paid to the mortgagee as his interest may appear, is held, in *Collinsville Sav. Soc. v. Boston Ins. Co.* (Conn.), 69 L. R. A. 924, not to create any contract relations between the mortgagee and insurer, or to give the mortgagee a right to participate in arbitration proceedings to fix the amount of loss; and that, therefore, he will be bound by the award, although he was given no opportunity to be heard.

*Master and Servant.*—The liability of an employer to an employee for injuries caused by negligence in the handling of a boiler upon the premises, by a co-employee, an engineer who is conceded to have been competent, is denied in *Service v. Shoneman* (Pa.), 69 L. R. A. 792.

A corporation operating a "logging railroad," not as a common carrier, but exclusively for its own private business, is held, in *Schus v. Powers-Simpson Co.* (Minn.), 69 L. R. A. 887, to be subject to the provisions of a statute making railroad corporations liable for injuries to servants caused by the negligence of fellow servants.

The failure to box, or otherwise protect, a rapidly revolving upright shaft coming up through the floor in an alley or passageway where an inexperienced girl is required to sweep, who is not warned of the danger, is held, in *American Tobacco Co. v. Strickling* (Md.), 69 L. R. A. 909, to be properly

found by the jury to constitute negligence which will render the employer liable for injuries to her when her clothing is caught and wound upon the shaft.

*Nuisance.*—The characteristic noises and odours issuing from a chicken house and yard, which are maintained in a cleanly manner and cared for so as not injuriously to affect the health of any normal person in the neighbourhood, are held, in *Wade v. Miller* (Mass.), 69 L. R. A. 820, not to be a nuisance, although they may make neighbouring property uncomfortable as a residence for invalids.

*Railway.*—A railway company which expressly or by implication invites its passengers to use a stile over a wire fence in leaving its grounds is held, in *Cotant v. Boone Suburban R. Co.* (Iowa), 69 L. R. A. 982, to be bound to use at least ordinary care in seeing that it is fit for the purpose intended, although the stile was not erected by it, and the defective part is not on its property, but on property where it has no right to go to make inspection or repairs.

*Sale of Goods.*—That no implied warranty of fitness of an article for a particular purpose arises out of a contract to make or supply a described and definite article, is declared in *Davis Calyx Drill Co. v. Mallory* (C. C. App. 8th C.), 69 L. R. A. 973, although the vendor knows that the vendee is purchasing it to accomplish a specific purpose, because the essence of this contract is the delivery of the specific article, and not the accomplishment of the purpose.

*Will.*—The granting of an absolute divorce is held, in *Re Jones* (Pa.), 69 L. R. A. 940, not to revoke, by implication, a legacy in the will of the husband in favour of the wife. The other cases on effect of divorce to revoke gift by will are collated in a note to this case.

## BOOK REVIEWS.

**Matthews on the Law of Money Lending Past and Present:** Being a Short History of the Usury Laws in England, Followed by a Treatise upon the Money-Lenders Act, 1900. By John Bridges Matthews, of the Middle Temple and of the Oxford Circuit, Barrister-at-law. London: Sweet and Maxwell, Limited: 1906.

This book has a special interest at the present time, in England, where usury is much discussed, and in Canada, especially in Toronto, where prosecutions of money lenders for the alleged extortion of interest at usurious rates are being carried on. The author's historical sketch of the Usury Laws is readable and suggestive. The Money-Lenders Act, 1900, has been much criticised. It enables the Court in which proceedings are taken by any money-lender (as defined by the Act) for the recovery of money lent, where there is evidence that the interest charged is excessive, and that the transaction is harsh and unconscionable, to open it up and reform the contract upon an equitable basis. The statute is open to the obvious criticisms that "excessive" and "harsh and unconscionable" are too vague, and that the operation to be beneficial should not be confined to money-lenders as defined by the Act, viz., persons whose business is that of money-lending or who hold themselves out as carrying on that business, not including pawnbrokers, friendly societies, incorporated loan companies, bankers, etc. The reported decisions upon the Act are few, and the author has taken pains to rescue some unreported cases from oblivion. In one of these, *Samuel v. Miles* (8th August, 1903), Mr. Justice Darling tersely pointed out the difficulty of applying the

statute. The defendant borrowed money at the rate of about 55 per cent. per annum, but gave no security, unless his own promissory note could be termed such. Darling, J.—“ I do not think the rate of interest can be said to be excessive, because I really do not know what standard to set up. If a person lends money upon no security at all, I do not know what would be the normal interest—I cannot find out. If I cannot find out the normal interest, I cannot find out what would be the excessive interest. I have nothing to judge it by, therefore I cannot say that it is excessive in the circumstances. . . . Suppose it were excessive, even then I should have to say the transaction is harsh and unconscionable. . . . There is nothing to shew it is harsh, because he was not in the least in the power of the money-lender. It was the first transaction. Is it unconscionable? . . . If it is unconscionable to send a circular and ask a man to borrow money, then it is unconscionable to send a circular and ask a man to buy wine.”

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## PERIODICALS.

**Harvard Law Review** (March, 1906). Leading articles on "Equitable Conversion" (VII.), by C. C. Langdell; "State and Official Liability," by Edmund M. Parker; "The Genesis of the Corporation," by Robert L. Raymond.

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**Case and Comment** (Rochester). January and February issues. "Phonographs as Evidence" is one of a number of short articles of interest.

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**Chicago Law Journal** (2nd March, 1906).

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**Madras Legal Companion** (September and October, 1905). "Can the Plea of Res Judicata not Available during the original Suit be Raised during Appeal?" "Restrictive Covenants." "The Rule against Perpetuities."

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**Criminal Law Journal of India** (Lahore): 15th January, 1906. "The Criminal Liability of an Inciter or Abettor of Suicide." "Parental Liability for Children's Crime." "Assault—Surgical Operation Unauthorized." "Right of a Convict to Contract." "Victims of Acquittal."

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**Calcutta Weekly Notes** (29th January, 1906).

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**Punjab Law Reporter** (December, 1905).

ONTARIO.]

[21st FEBRUARY, 1908.]

## GRAND TRUNK R. W. CO. v. CITY OF TORONTO.

*Highway—Dedication—Acceptance by public—User.*

An action was brought by the corporation of the city of Toronto against the Grand Trunk Railway Company to determine whether or not a street crossed by the railway was a public highway prior to 1857, when the company obtained their right of way. It appeared on the hearing that in 1850 the trustees of the general hospital conveyed land adjoining the street, describing it in the deed as the western boundary of allowance for road, and in another conveyance made in 1853 they mentioned in the description a street running south along said lot, being the street in question. Subsequent conveyances of the same land prior to 1857 also recognized the allowance for a road.

*Held*, IDINGTON, J., dissenting, that the said conveyances were acts of dedication of the street as a public highway.

The first deed executed by the hospital trustees and a plan produced at the hearing shewed that the street extended across the railway track and down to the river Don, but at the time the portion between the track and the river was a marsh. Evidence was given of use by the public of the street down to the edge of the marsh.

*Held*, IDINGTON, J., dissenting, that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to shew an acceptance by the public of the highway.

Judgment of the Court of Appeal in *City of Toronto v. Grand Trunk R. W. Co.*, 4 O. W. R. 491, reversing judgment of MACMAHON, J., 2 O. W. R. 3, affirmed.

W. Cassels, K.C., for the appellants.

J. S. Fullerton, K.C., and W. Johnston, for the respondents.

# THE CANADIAN LAW TIMES.

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APRIL, 1906.

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## WOODMEN'S LIEN LAW IN NEW BRUNSWICK.

THE Act providing for Woodmen's Liens in the Province of New Brunswick is c. 148 of the Consolidated Statutes of New Brunswick, 1903. This chapter is a re-enactment of c. 24 of the New Brunswick Acts of the year 1894, which came into force on the first day of August of that year.

The section of the Act which gives a labourer a lien is s. 3 and is as follows: "Any person performing any labour or services in connection with any logs or timber intended to be driven down rivers or streams, or hauled directly from the woods, or brought by railway to the place of destination, shall have a lien thereon for the amount due for such labour, service, or services, and the same shall be deemed a first lien or charge on such logs or timber and shall have precedence over all other claims or liens thereon, except any lien or claim which the Crown may have upon such logs or timber, for or in respect of any dues or charges, or which any owner of lands may have for the stumpage upon such logs or timber, or which any streams improvement company or boom company or person owning streams improvements or booms may have thereon for or in respect of tolls."

In the interpretation of the words "labour or services" given in the above section, the Act provides that these words shall mean and include "cutting, skidding, felling, hauling,

scaling, barking, driving, rafting, or booming any logs or timber and any work done by cooks, blacksmiths, artisans, or others used or employed in connection therewith."

It would seem quite evident from the above section—keeping in mind the interpretation placed upon the words "labour or services"—that any person performing the labour mentioned in the section would have a lien on the logs or timber. It has been urged, however, that this statement is not accurate, that is to say, it has been argued that a labourer would have a lien; but a person performing the services under a contract, entered into for that purpose, would not have a lien. Such a statement does not shew much knowledge of the history of the Acts giving labourers liens, or of the judicial interpretations of the same. Test this statement first by the light of reason: A labourer performing the services without a contract would be in the position of a trespasser or volunteer, and it would be far from right law to say that a trespasser or volunteer would have a lien. The contract gives the labourer the right to perform the services; the performance of the services creates the lien; and the existence of a contract in no way deprives him of that lien.

Boiset on Mechanics' Liens, at p. 791, says: "The lien upon logs in favour of persons performing labour upon them created by statute is essentially dependent upon the existence of a contract and the obligation of debt arising out of the performance of the stipulations thereof." Jones on Mechanics' Liens, at p. 1235, states the law to the same effect.

It was decided by the Supreme Court of the State of Maine in the case of Frost v. Ilsley, 54 Me. 345, that "the lien is the creature of the statute. It is no part of the contract, but a mere incidental accompaniment, deriving its validity only from positive enactment, and liable always to be controlled, modified, or taken away by subsequent enactment, and such modification or removal cannot be considered as in any degree impairing the obligation of the contract itself. The lien is but a means of enforcing the contract, a



remedy given by law, and, like all matters pertaining to the remedy and not to the essence of the contract, until perfected by proceedings whereby rights in the property over which the lien is claimed have become vested, is entirely within the control of the law-making power in whose edict it originated."

The same Court, in the case of *Cole v. Clarke*, 85 Me. 336, dealing with ss. 30 and 32 of c. 91 of the Revised Statutes of Maine, said: "The mechanics' lien, though arising by virtue of express statute, is obviously dependent upon the existence of contract and the obligation of debt. The contract is the principal thing, and the lien the incident following the legal liability to pay. Hence there can be no lien in favour of a party who voluntarily performs a service without an express or implied promise to pay." In the case of *Black v. Appolonio*, 1 Mont. 342 (1871), the Court, in delivering judgment, said: "Considering the character of this statute securing to mechanics and others liens, and the class of the community intended to be protected by it, we can see no difference in principle in the construction of the ~~statute~~ whether the claim for a lien was on an express or ~~implied~~ contract." Again in the case of *Hoffa v. Person*, 1 Pa. Superior Court 367 (a note of which is found in the *American Digest*, 1896, at p. 3385), it was decided that "persons who contract for the cutting, skidding, and hauling logs and peeling bark for which they are to be paid by the thousand for the cutting, skidding and hauling logs, and by the cord for hauling the bark, are labourers entitled to a preference when they participate in the actual labour contracted to be performed, and the fact that they employ assistants does not affect their standing as labourers."

The length to which Courts will go in favour of the labourer for whose benefit these Acts were manifestly enacted, is well illustrated in the case of *King v. Kelly*, 25 Minn. 522 (1879). The Act under consideration was Laws, 1876, c. 89, being "An Act providing a lien for labour upon logs and timber." Mr. Justice Berry delivered the judgment of

the Court, which is as follows:—"Laws, 1876, c. 89, which is entitled 'An Act for providing for a lien for labour upon logs and timber,' enacts in s. 1. that any person who may do or perform any manual labour in cutting, banking, driving, rafting, cribbing, or towing any logs or timber in this State, shall have a lien thereon as against the owner thereof and all other persons, except the State of Minnesota, for the amount due for such services, and the same shall take precedence of all other claims thereon. Section 14 declares that 'this Act is intended only for the protection of labourers for hire, and shall not enure to the benefit of any person interested in contracting, cutting, hauling, banking, or driving logs by the thousand.' We are of the opinion that the design and effect of these provisions of the statute are to give the lien mentioned to every person performing the specified kind of manual labour (that is to say, labour with his own hands) upon logs or timber. It is apparent that s. 1 standing alone would have this effect at least, but that section is explained and possibly limited by s. 14. which declares that the Act is intended for the protection of those who do labour or work in person. This is an explicit declaration that all such labourers are within the Act and entitled to the lien for which it provides. It is not reasonable to suppose that it could have been the intention of the legislature to impair this explicit declaration (made by the way of explanation and construction) by the latter provisions of the section in which it occurs. This latter provision should, therefore, if possible, be so read as to be consistent with the explicit declaration mentioned. It is obviously inserted for the purpose of distinguishing the contractor, that is to say, the person who takes contracts for the performance of work which he employs others to do, from a labourer who works himself. We think that the latter provision of s. 14 is to be read by omitting the comma found in the printed statute after the word 'contracting;' this is equivalent in sense to inserting the word 'for' after the word 'contracting,' so that the provision would read that the Act 'shall

not enure to the benefit of any person interested in contracting for cutting, hauling, banking,' etc. The punctuation of a statute is of little or no consequence, being ordinarily the work of clerks and printers, and the reading which we suggest not only makes sense, but is consistent with the provisions and the general spirit of the Act. We think it sufficiently appears from the admission of the plaintiff and the findings of the Court that the work in this case was performed by the plaintiff as a labourer and not as a contractor. It follows that the plaintiff is entitled to the lien prayed for in his complaint, and the judgment appealed from is accordingly directed to be modified so as to adjudge the same to him."

From these authorities it is quite clear that a person, performing the services mentioned in the Act, has a lien, and that the fact of having a contract does not in any way impair the right to such lien, even though the person having the contract employs assistants. On the other hand, it is evident that a bare contractor, that is to say, a person who takes a contract for the performance of work which he employs others to do and does no work himself, has no lien, for the reason that the right to the lien is based on the performance of the labour and service mentioned in the Act.

In *Kennedy v. Baxter*, 35 N. B. R. 179, the question whether a contractor, who actually performed labour in person, as distinguished from a labourer, would have a lien, was considered.

The Act then in force was c. 24 of the provincial Acts of the year 1894, and is the same as c. 148 now under consideration.

This is the only case in New Brunswick where this question has been discussed, and it was there decided by 4 Judges out of 6 that a contractor had no lien as provided by s. 3 of the Woodmen's Lien Act. This decision is contrary to the American authorities above referred to, and does not in any way, except as is stated on p. 195 of this case, discuss any

of the American authorities interpreting Acts creating liens similar to the New Brunswick Act. Not one of the other cases cited in support of this contention discusses or considers Woodmen's Lien Acts or the judicial interpretation of such Acts. Hanington, J., delivered the opinion of the majority of the Court and based his judgment on the case of *Ingram v. Barnes*, 7 E. & B. 115; and on p. 193 says: "This case seems to me conclusive of this case." By referring to the case of *Ingram v. Barnes* it will be seen that it was interpreting the Truck Act of England, 1 & 2 Wm. 4 c. 37, being an Act imposing a penalty for paying the wages of artificers in anything other than the current coin of the realm. This is clearly a penal statute, whereas the Woodmen's Lien Act is a remedial statute. Penal statutes are to be construed strictly, while remedial statutes are to be construed liberally. Penal statutes must be so construed that everything shall be excluded from the operation of the statute which does not clearly come within the meaning of the language used, while remedial statutes should be so construed as to effectuate the manifest intention of the legislature.

In *DeMorris v. Wilbur Lumber Co.*, 74 N. W. Repr. 107 (1898), Mr. Justice Marshall, in delivering the opinion of the Court respecting woodmen's liens, said; "If the statute giving a lien for labour on logs and timber were so strictly construed as to limit the lien upon each part of the property to the work done on such part, it would defeat the entire scheme designed to protect a favoured class of labourers for reasons sufficient to satisfy the legislature of its wisdom. No such construction was intended, as is abundantly evidenced by the history of legislation on the subject, all tending in the one direction of securing, so far as practicable, to labourers on logs and timber security against any probability of losing their wages. This Court has responded to the manifest legislative intent by constantly applying liberal rules of construction to such statutes." On p. 195 of the case of *Kennedy v. Baxter*, Hanington, J., says: "It is stated in

13 Am. and Eng. Encyc. of Law, 1041, 1st ed., when discussing logs and lumber and liens thereon and sub-contractors, the Courts hold that the purpose of legislation in enacting these statutes was to protect only those who actually perform the labour upon the logs and lumber." The case referred to on p. 1041 of 13 Am. and Eng. Encyc. of Law, 1st ed., is King v. Kelly, 25 Minn. 522, and in order to understand the case correctly one must read it throughout; and it will then be seen that this case decides that if a person, although being a contractor, actually does the labour in person, he is entitled to the lien provided for by the Act. The note of this case as reported on p. 1041 of 13 Am. and Eng. Encyc. of Law, 1st ed., says: "The purpose of the legislature in enacting these statutes was to protect only those who actually perform the labour upon the logs and lumber." This does not decide, as one would be led to believe by the interpretation given to it in the case of Kennedy v. Baxter, that a contractor has no lien. The most that it does decide is that a bare contractor, that is to say, a person who takes a contract for the performance of work which he employs others to do and does no work himself, has no lien; but it does distinctly decide that a person performing the services mentioned in the Act, has a lien. The fact of having a contract does not in any way impair the right to such lien, even though the person having the contract employs assistants, as is stated in the case of Hoffa v. Person, above referred to.

Having established what persons are entitled to the lien provided by this Act, logically, the next question that suggests itself is: What is the subject matter of the lien? By referring to the section above mentioned it will be noticed that the lien is given upon "logs or timber." It might here be said that it is generally understood what the word "logs" will include; but this cannot be said of the word "timber," as many persons have hazy ideas of what the word "timber" really does include. In construing the words "logs or timber," s.-s. (1) of s. 2 of the Act says the words "logs

or timber" shall mean and include what is ordinarily known as logs or timber, and shall not include cedar posts, telegraph poles, cordwood, railroad ties, tan-bark, or shingle bolts or staves." From this one might quite naturally conclude that "timber" would include all classes of wood manufactured or unmanufactured, excepting those classes especially excepted by this sub-section; if it does not, then we must ascertain the meaning of this word through the channel of the usual authorities, and it must be said that its meaning should not be restricted to the usage of any one class of people: that is to say, the very broadest meaning should be given to it, including within such signification what all classes would understand the word "timber" to mean and include.

The Standard Dictionary defines "timber" as "wood of suitable size and quality for building and allied purposes, cut, squared, or otherwise prepared for use, especially the larger forms of lumber adapted for beams, scantling, etc." The Century Dictionary defines timber as "wood suitable for building houses or ships, for use in carpentry, joinery, etc. Trees cut down and squared or capable of being squared and cut into beams, rafters, planks, boards, etc." Webster's Dictionary says "timber" is "that sort of wood which is proper for buildings, tools, utensils, furniture, carriages, fences, ships, and the like. We apply the word to standing trees which are suitable for the uses above mentioned, as a forest contains excellent timber, or to beams, rafters, scantling, boards, planks, etc., hewed or sawed from such trees." Now in order to make the proof the stronger: reverse the process and see if "planks, boards, deals, and scantling," the usual classifications of the material into which logs or "timber" is sawed, are defined as "timber." The Standard Dictionary says a "plank" is "a broad piece of sawed timber differing from a board only in being thicker." The Century and Webster's Dictionaries define the word in the same manner. A board is defined by the Century Dictionary

as "a piece of timber sawed thin. The name is usually given to pieces of timber (in this and similar forms called lumber in the United States), more than  $4\frac{1}{2}$  inches wide, and less than 2 inches thick." The Standard Dictionary says a "board" is "a broad flat piece of timber usually sawed." The meaning of the word "deal" according to the Standard Dictionary is "a board or plank of varying dimensions." "Scantling" is defined by the Standard Dictionary as "a timber less than 5 inches in breadth and thickness, used for studding tie-beams, etc., also such timber collectively: the dimensions of timber in breadth and depth but not in length." Webster's Dictionary says "scantling" is "timber sawed or cut of a small size as for studs: the dimensions of a piece of timber with regard to its breadth and thickness." And Worcester's Dictionary says "scantling" are "small timbers, as the quartering for partitions, rafters, etc."

In the case of *United States v. Stores*, 14 Fed. Rep. 824, Mr. Justice Locke says: "The term 'timber' as used in commerce refers generally only to large sticks of wood squared or capable of being squared for building houses or vessels, and certain trees only having been formerly used for such purposes namely, the oak, the ash, and the elm, they alone were recognized as timber trees, but the numerous uses to which wood has come to be applied and the general employment of all kinds of trees for some valuable purpose, has wrought a change in the general acceptation of terms in connection therewith, and we find that Webster defines 'timber' to be that sort of wood which is proper for buildings or for tools, utensils, furniture, carriages, fences, ships, and the like. This would include all sorts of wood from which any useful articles may be made or which may be used to advantage in any class of manufacture or construction."

The Legislature of New Brunswick, in s. 2 of c. 8 of the Acts of 1893, defined "timber" to mean "logs or other parts of trees manufactured or unmanufactured." Now one of the universal rules in the construction of statutes

is that statutes in *pari materia* should be construed together and effect be given to them all, although they contain no reference to one another and were passed at different times. See 23 Am. and Eng. Encyc. of Law, 1st ed., p. 311, and following pages; *Rex v. Loxdale*, 1 Burr. 444 at 447; *Hodgson v. Bell*, 24 Q. B. D. 525 at 528; *Mersey Docks v. Cameron*, 11 H. L. Cas. 443 at 480; *Regina v. Ellis*, 68 L. J. Q. B. 103 at 107.

In this last mentioned Act, the legislature was dealing with the forest product of this country, as it was in the *Woodmen's Lien Act*, and, applying this construction to the Act now under consideration, the word "timber" in this Act should mean and include logs manufactured or unmanufactured as it was defined to mean and include in c. 8 of the Acts of 1893.

In the case of *Young v. Canning Jarrah Timber Co.*, in the High Court of Justice before Mr. Justice Bingham, reported in "The Timber Trades Journal," on p. 104 of the issue of 28th January, 1899, action was brought upon a charterparty for the carriage of a cargo of "timber" known as jarrah from Freemantle in Western Australia to the United Kingdom. In this case it will be noticed that the charterparty provided that the cargo was to consist of 9 by 3-in. planks. This shews that timber merchants and shippers of timber use the word "timber" to include planks.

At a conference of the Institute of Civil Engineers held in London in the month of June, 1899, devoted to harbours, docks, and canals, Mr. W. H. Hunter, M. Inst. C.E. and engineer to the Manchester Ship Canal Company, read a paper devoted to the discharging and loading of large steamers. Dealing with the timber traffic, Mr. Hunter said "there was not a week without a ship coming with a cargo such as he suggested, including a large quantity of timber, mostly deals, from the American Continent." In *Haworth's Practical Timber Measurer*, a book recently published by Alfred



Haworth, editor of the "Timber News," will be found a very full and correct method for the measurement of timber. This book sets forth with great clearness the information necessary for the purpose of measuring timber, including the rules for "round timber," "square timber," "boards," "deals," "planks," and "scantling."

As already remarked, the Act states that the word "timber" shall mean what is ordinarily known as "timber," and these illustrations are given to shew how the word is ordinarily used and understood by persons engaged in different callings, but especially by those familiar with the timber trade.

From all these various sources of information it seems quite clear that the word "timber" is sufficiently broad to include the tree growing in the forest, the log, square timber, boards, deals, planks, and scantling. that is to say, the tree and the various products of the same when cut into boards, deals, planks, and scantling.

Although the word "timber" is broad enough to include the product of the tree, it might be of advantage to inquire whether or not a labourer would have a lien on the product when the labour performed by him consisted in cutting the timber in the woods only, or, in other words, does the cutting of the logs or round timber into deals, planks, boards, and scantling, or timber of other dimensions, by some party or person other than the labourer who cut the trees in the woods, destroy the labourer's lien? Some wise souls have said that the word "timber" in this Act means and includes "square timber" only, and does not include timber of other dimensions such as boards, scantling, and deals, and further that a labourer would have a lien on the stick of timber when sawed into square timber, but not when it was cut into smaller dimensions.

In order to determine whether or not this is correct, let us look at the situation from the practical standpoint. In the ordinary process of sawing logs in this country it takes four

“cuts of the saw” to convert a log into a square stick of timber, or, in other words, the saw must be run through the log four times in order to cut it into a square stick. According to the statement above, at this stage a labourer would still have his lien, but he would lose his lien in case the saw was put through the stick of timber for the fifth time, and the stick became converted into timber of smaller dimensions. The bare statement of this shews its absurdity.

In the case of *Sands v. Sands*, 74 Me. 239 (1882), Mr. Justice Virgin delivered the opinion of the Court, which is as follows: “We are of the opinion that cedar shingle rift cut four feet in length and then hauled to mill is embraced by Rev. Statutes of Maine, c. 91, s. 38, giving a labourer a lien on logs or lumber for cutting and hauling the same. If felled and hauled whole, there could be no question about it, and sawing the logs into four feet sticks for convenience in hauling and handling cannot destroy the lien.”

In *Munroe v. Sedro Lumber and Shingle Lumber Co.*, 16 Wash. 694 (1897), it was held that “labourers getting out shingle blocks for one company were entitled to liens on shingles manufactured therefrom by another company which still retained possession thereof under laws 1893, p. 428, s. 2, where such shingles had been manufactured under the existing contract between the two companies whereby one was to furnish a specified number of shingle blocks per month, and the other was to cut said blocks into shingles at a specified rate per month, and payment was to be made monthly to the company furnishing the blocks in accordance with the number of shingles sold the previous month.” Chief Justice Scott delivered the judgment of the Court, which is as follows:—“One of the contentions upon the part of the appellants is that such labourers were not entitled to any lien against the shingles, that at most they could only enforce a lien against the shingle bolts while in the possession of Kirby, Hightower, & Co. (one contractor) under the Statute Laws, 1893, p. 428, s. 2, which is as follows: ‘Every person performing work or labour or assisting in manufacturing saw

logs and other timber into lumber and shingles, has a lien upon such lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer, whether such work or labour was done at the instance of the owner of such logs, or his agent, or any contractor or sub-contractor of such owner. The term lumber shall be held and be construed to mean all logs or other timber sawed or split for use, including beams, joists, planks, boards, shingles, laths, staves, hoops, and every article of whatsoever nature or description manufactured from saw logs or other timber.' But, whatever the law may be generally under this statute, where possession of such property has been transferred, we are of the opinion that the rule contended for ought not to apply in this case, for these shingle bolts were manufactured by Kirby, Hightower, & Co. for the Sedro Lumber and Shingle Company, under an existing contract whereby Kirby, Hightower, & Co. were to furnish to the Sedro Lumber and Shingle Company shingle blocks sufficient from which to manufacture shingles at the rate of 140,000 a day for twenty-two days in each month, at a stated price. The contract provided that the Sedro Lumber and Shingle Company should cut said blocks into shingles at the rate of 140,000 a day for twenty-two days in each month during the continuance of the contract, and should pay to Kirby, Hightower, & Co., on the 5th day of each month, the amount due on all shingles shipped the previous month manufactured from said shingle blocks. The contract seemed to contemplate a division of certain of the shingles between said parties, and it does not appear from the findings just what shingles the particular moneys the Court found Kirby, Hightower, & Co. were entitled to under the contract were the proceeds of, but, independent of this and conceding that the shingles belong to the Sedro Lumber and Shingle Co., in view of the existing contract, we are of the opinion that the labourers who got out the shingle blocks, although under the employment of Kirby, Hightower, & Co., could enforce a lien against the shingles while the same were at the mill

where they were manufactured as these were, and were also under the control of the manufacturer or its receiver."

In *Campbell v. Sterling Manufacturing Co.*, 11 Wash. 204 (1895), an action was brought to enforce a labourer's lien under the same section as stated in the last case. Mr. Justice Dunbar in giving judgment said: "We think it is too narrow a construction of this Act to hold that the lien should have been filed against the shingle bolts, instead of the manufactured article, as long as the shingles were under the control of the manufacturer. It was evidently the intention of the legislature to provide a more adequate and general remedy for the persons performing labour upon timber of this kind. We think that there can be no doubt that the Court below properly construed the law in allowing the liens upon the shingles in this case."

Section 25 of the Woodmen's Lien Act provides that "no lien under this Act shall be held to be waived or discharged merely by the taking of a note or due bill from the person liable for the debt in respect of which the lien is claimed, or from the owner of the lumber or any person acting on his behalf, until such note or due bill has been paid." In the interpretation of terms, Consolidated Statutes of New Brunswick, 1877, at p. 949, this word "lumber" is construed to include inter alia "deals, planks, boards, and scantling." These Consolidated Statutes were in force at the time that "The Woodmen's Lien Act, 1894," was enacted and at the time that the case of *Kennedy v. Baxter* was argued. Now, the word "lumber" in this last mentioned section was used by the legislature in the same sense as the word "timber" in the 3rd section, or it was not. If in the same sense, then "lumber" and "timber" meaning the same thing, timber would include deals, planks, etc. If it was not, then, as the word "lumber" includes deals, planks, etc., the legislature must have had the idea that the "cutting up" of the timber did not destroy the

lien, as in cases where the timber had been converted into deals, planks, etc., the owner of the same would be an owner of lumber within the meaning of s. 25, and by force of this section the giving of a due bill or note by him does not destroy the lien, it does appear that the legislature must have intended that the labourer's lien would hold, even though the logs or timber were manufactured into deals, etc.

Furthermore, it is a universal rule that a lien cannot be displaced but by some act of the party holding it: *Parker v. Kelly*, 18 Miss. (10 Smedes & Marshall's Reports) 184. This being so, and it only seems reasonable and just, the cutting of the timber into deals, planks, boards, and scantling by the owner or his agents would not impair the labourer's right.

In *Kennedy v. Baxter*, above referred to, the question whether the words "logs and timber," as employed in s.-s. (1) of s. 2 of the Woodmen's Lien Act, included "deals or other manufactured lumber," was argued before the Supreme Court of New Brunswick, consisting of six Judges, on the 15th June, 1900. Two Judges held that the words "logs and timber" did not include "deals or other manufactured lumber;" the Chief Justice held that the words "logs and timber" did include "deals and other manufactured lumber;" while the other three Judges expressed no opinions. It will therefore be seen that there has been no final decision on this subject in New Brunswick. It should be noticed that the two Judges who held that the words "logs and timber" did not include "deals or other manufactured lumber," did not in their judgments discuss any of the various American Acts giving labourers liens on logs or timber, being the Acts from which the New Brunswick Act was largely copied, nor refer to any of the judicial decisions interpreting these Acts. One would almost conclude, however, that the New Brunswick Courts would be inclined to follow the American decisions giving

the labourers liens upon the product of the logs and timber, as they are the only decisions that can be found which interpret Acts creating liens similar to the New Brunswick Act, and particularly so as they are based upon good reasons and principles.

Sections 4, 5, and 9 of the Act make provision for the enforcement of the lien. It will be noticed that ss. 5 and 9 provide that the forms in the schedule of the Act, or those of like effect, may be used. This is almost a clear statement on the part of the legislature that a substantial compliance with these sections is sufficient.

In the case of *Durling v. Gould*, 83 Me. 134 (1890), it was decided that under ss. 30 and 32 of c. 91, Rev. Statutes of Maine, "where a labourer has once acquired a statute lien on a building, for labour performed thereon, with the consent of the owner, that section of the statute requiring notice of the lien to be given should be construed liberally in favour of the labourer so far as the form of the notice is concerned. If from the notice filed it can be fairly and reasonably inferred, (1) that a lien is claimed, (2) by whom it is claimed, (3) what is the balance due and that no credits are to be given. (4) what is the particular building upon which the labour was performed, and to which the lien has attached, (5) that the name of the owner is not known to the claimant, where no owner is given and the notice is verified by the signature and affidavit of the claimant, it is sufficient though not symmetrical in form. The purpose of s. 32 is to secure to owners and prospective purchasers of the property notice of the amount and nature of the lien to which it is subject, and in whose favour the lien has accrued. If that notice is fairly and fully given under the sanction of the claimant's signature and affidavit, the interests of others are protected and the purpose of the section is fulfilled. It would be too rigorous to insist upon formal and technical accuracy from a labourer in giving such notice."

In *Westcott v. Bunker*, 83 Me. 499 (1891), the same Court, dealing with the same sections of the Act, decided that "the words of the certificate being considered together, the statement is neither indefinite nor its meaning obscure. Trifling discrepancies between the different parts of the certificate are not to be regarded when the import of the whole is plain and obvious. It was not intended by the legislature that these statements should be strangled by technicalities."

In form I. of the schedule of the Act, it will be noticed that the words of the form are "which work was done at so much per month or day as the case may be." It has been urged that, according to this provision, if a labourer was to be paid by the thousand, rather than by the month or by the day, he could not claim the benefits of this Act. It would seem that, by the use of the words "or as the case may be," the intention was to give the labourer protection irrespective of the manner in which his wages are calculated. *Seider's Appeal*, 46 Pa. Super. Court 61, says: "Labourers are protected whether the wages agreed to be paid are measured by the time, or by the ton, or by the piece, or any other standard."

In 28 Am. & Eng. Encyc. of Law, 1st ed., p. 513, it is said: "The word 'wages' does not imply that the compensation is to be determined solely upon the basis of time spent in service; it may be determined by the work done. It means compensation estimated in either way." See also the case of *Hoffa v. Person*, 1 Pa. Super. Court 367, where it was held that a labourer was entitled to his lien even though he was to be paid by the thousand for cutting and hauling.

In looking over this Act one of the main points to be considered is, how is the Act as a whole to be construed. It is of course a remedial statute, that is, a statute giving a remedy which did not exist at common law. Blackstone, on p. 87 of his Commentaries, in discussing the construction of all remedial statutes, says: "It is the business of the

Judges so to construe the Act as to suppress the mischief and advance the remedy."

In *Pluredé v. Levasseur*, 89 Me. 172 (1896), it was held that "the statute should be construed with reference to the mischief to be remedied and the object to be accomplished. It has been seen that the great purpose of it evidently was to afford security to the labourer against the irresponsible employer." In *Shaw v. Bradley*, 59 Mich. 199 (1886), the Court, dealing with logging liens, said: "The statute is remedial, and was enacted to provide additional security to the labourer, and should be liberally construed to effectuate that object." In *Durling v. Gould*, 83 Me. 134 (1890), the Court, dealing with mechanics' liens, said: "Mechanics' liens on buildings and land, though recognized and favoured by the civilians, had no place in the common law, which from its feudal character was reluctant to subject realty to the payment of any claims other than feudal. They were introduced into the law by positive statute in this country. These statutes were naturally at first deemed by the Courts to be in derogation of the common law, and hence to be construed narrowly and strictly. They have now, however, become an integral part of our law, and their justice and beneficence have become apparent. They now form recognized principles of remedial justice and should receive broad and liberal construction. A lien once acquired by labour on a building by the consent of the owner should not be defeated by technicalities when no rights of others are infringed and no express command of the statute is disobeyed."

On p. 467 of volume 2 of the *Harvard Law Review* it is stated: "The object of the Mechanics' Liens Laws is to make the pay of those whose labour has gone to enhance the value of the erection prompt and secure in all cases against both the misfortunes and the possible dishonesty of their employers, and the construction to be adopted is that which, without violating the true signification of the language employed, shall best promote the object and efficiency of the statute."



In *Winslow v. Urquhart*, 39 Wis. 268 (1875), it is stated that "the statute under consideration was enacted in the interests of labour, and a sound policy requires that it be liberally construed. The construction contended for is too narrow, and if adopted would go far to defeat the purposes of the statute."

Other cases that recognize the same principle of construction are *Black v. Appolonio*, 1 Mont. 342 (1871); *Kallock v. Parcher*, 52 Wis. 399 (1881); *Jacubeck v. Hewett*, 61 Wis. 36 (1884); *Shaw v. Bradley*, 59 Mich. 199 (1886); *Corbett v. Chamber*, 109 Cal. 178 (1895); and *Springer Land Association v. Ford*, 168 U. S. 513.

EDWARD P. RAYMOND.

St. John, N.B.,

8th February, 1906.

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## RECENT CASES FROM THE TIMES REPORTS.\*

**Bailment.]**—*Bullen v. Swan Electric Engraving Co.*, 22 T. L. R. 275, deals with rather a nice point as to a bailee's responsibility for the safe-keeping of the articles intrusted to him. The defendants were printers, and, after printing from a set of plates illustrations for a book, locked the plates with many others in a cupboard in their premises. The plates were stolen, or lost in some unascertainable way, although reasonable precautions for their safe-keeping were shewn to be in force. The defendants' duty was held to be to take that care which a reasonable man would take of his own goods, and to have been in the circumstances fulfilled.

**Club.]**—It was held in *Thellusson v. Viscount Valentia*, 22 T. L. R. 319, that there was nothing in the constitution of a club formed to provide a ground for "pigeon shooting, polo, and other sports," to make invalid a resolution duly passed by the members thereof to discontinue pigeon shooting.

**Company.]**—In *re British Power Traction and Lighting Co.*, 22 T. L. R. 268, deals with the powers of a manager of a company appointed in a debenture holder's action, and decides that when power is given to him by the Court to borrow a specific sum for the purposes of the company, he has no general right to incur further liabilities, and cannot ask for indemnification in respect of them out of the assets, unless he can shew some special necessity and justification. His proper course is to apply to the Court for leave before incurring further liabilities.—The plaintiffs in *Peat v. Clayton*, 22 T. L. R. 312, were assignees for the benefit of

\* Including the cases in No. 16, Vol. 22, week ending March 6th. 1906.

the creditors of a debtor who held shares in two companies. The debtor stated that the share certificates were in Africa, and therefore could not be given to the plaintiffs, who, however, notified the two companies of the assignment. The debtor in fact had the share certificates, and sold the shares through brokers, who, upon transfers being refused by the companies because of the assignment, had to make good the loss to the purchasers. It was held that the brokers had only an equitable claim to the shares, and that the prior equitable claim of the plaintiffs as assignees was entitled to prevail.—The mode of reconstruction of a company in question in *Bisgood v. Nile Valley Co.*, 22 T. L. R. 317, was held to be ultra vires, and an injunction to restrain the company from carrying it out was granted. It was proposed to form a new company to take over the assets, the shareholders in the old company to have the option of receiving shares in the new company to the nominal value of those held by them respectively, but only paid up to the extent of eighty per cent., or in case of refusal to take shares in the new company to receive whatever their shares might bring if sold. This was held to be an unfair and improper way of treating the possible dissentient shareholders.

**Contract.]**—*Griffiths and Millington v. Mayor of Southampton*, 22 T. L. R. 301, deals with the construction of a special contract by which the plaintiffs had the right to place advertisements in electric tramcars, paying an annual rent “for each and every regular running electric tramcar,” and this was held to mean each tramcar which was part of the rolling stock intended for regular use, such a car not being taken out of the category because of occasional withdrawals for repairs.

**Divorce.]**—In *Armitage v. Attorney-General*, 22 T. L. R. 306, a divorce obtained, on the grounds of cruelty and desertion, by a wife domiciled in South Dakota from her husband domiciled in New York, and valid according to the

law of the latter State, was recognized in England as binding. The case is a peculiarly strong one on the point of recognition of foreign status, for by English law the wife could not have acquired a domicile different to that of the husband, and could not have obtained a divorce either in England or New York for the causes assigned.

**Discovery.]**—In the libel action of Plymouth Mutual Co-operative Society v. 'Traders' Publishing Association, 22 T. L. R. 266, the defendants were ordered to answer an interrogatory as to the information they had when they published the words complained of, that being relevant to the defence of fair comment, but they were held not bound to give the source of the information, the general rule being held to be that a newspaper setting up the defence of fair comment is not bound to disclose the name of the informant. Compare with this Massey-Harris Co. v. De Laval Separator Co., 7 O. W. R. 59, where a number of the cases considered in the English case are cited.

**Exemptions.]**—Lavell v. Ritchings, 22 T. L. R. 316, is an interesting decision as to exemptions. The Act in question exempted from seizure the wearing apparel, etc., of the debtor, "and the tools and implements of his trade to the value of £5." The debtor was a cab-driver, and had hired a cab worth £25, which was the only chattel upon the premises which could in any view be seized. It was held that the exemption applied. It was unsuccessfully contended that the test was whether the debtor could carry on his trade without the thing seized, and that in this case the debtor's skill as a driver was the essential qualification, not the possession of a hired cab, which could be replaced by another hired cab. It was also argued that the exemption clause did not apply because the cab was over £5 in value, but it was held that, as there were not without the cab tools or implements to make up the exempted value of £5, the protection held good.

**Jury.]**—At the close of the plaintiff's case in *Campbell v. Hackney Furnishing Co.*, 22 T. L. R. 318, the jury intimated that they were prepared to give a verdict for the plaintiff. The defendants' counsel complained that the jury were shewing partiality, and refused to proceed, contending that there should be a new trial. The trial Judge insisted on the case going on, and, no further part being taken by the defendants, summed up the case and entered judgment on a verdict given in the plaintiff's favour. In so doing a Divisional Court held he was right, pointing out in soothing yet plain enough terms how ill-advised the defendants' counsel had been in not tactfully trying to lead the jury to a different conclusion.

**Landlord and Tenant.]**—The defendants in *Frederick Betts Limited v. Pickfords Limited*, 22 T. L. R. 315, leased land to the plaintiffs for building purposes, the plans, which were approved by them, shewing several intended windows in one of the side walls. The land adjoining on this side was also owned by the defendants, who, in effect, proceeded to use it in such a way as to make the plaintiffs' side wall a party wall and to necessitate the blocking up of the windows. It was held that the use of the wall as a party wall was not only a trespass, but also a derogation from the defendants' grant, the principle being that when a landlord demises part of his property for the carrying on of a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on that business in the way in which it is ordinarily carried on.

**Liquidated Damages.]**—The old dispute as to penalty or liquidated damages comes up in *Pye v. British Automobile Commercial Syndicate*, 22 T. L. R. 287, in a to some extent altered form. The general rule is that where in a contract a sum of money is made payable upon the happening of any

one of several possible breaches of varying degrees of importance, that sum is to be treated as a penalty. This rule was held in the case in hand not to apply where one of the parties to the contract had deposited with the other a sum of money and had agreed that it should be forfeited as liquidated damages upon the breach of any one of several stipulations of varying importance. An incidental point of some importance is that the forfeiture clause was held to apply in the case of breach of a provision which had as to mode of performance been modified by mutual consent after the formal contract had been entered into.

**Master and Servant.]**—The doctrine of common employment is founded on voluntary agreement to do the master's work, and does not apply where there is compulsion. Therefore in *Tozeland v. Guardians of West Ham Union*, 22 T. L. R. 300, an inmate of a poor house who was injured by the negligence of a fellow-labourer was held entitled to damages, as he was working under orders so to do and under pain of punishment in the event of refusal. It was held also that, as the work in question was not being done as part of the ordinary administrative duty of the board, they were liable for the negligence of their servant.—The defendants in *Dewar v. Tasker and Sons*, 22 T. L. R. 303, were the owners of an engine which they had rented to a company for use. They supplied a driver and paid his wages, and also supplied oil and kept the engine in repair; but had no control over the work, all orders being given by the hiring company. The plaintiff was injured owing to the negligence of the driver while the latter was doing work for the hiring company. It was held that the defendants were not liable.

**Notary.]**—In *re Champion*, 22 T. L. R. 264, is, from an academic point of view, a case of some interest, dealing as it to some extent does with the institution of the office of notary, but the point decided, viz., that the Court of Facul-

ties has power to remove a notary from the roll for misconduct, has no application to the statutory appointment of an Ontario notary, under R. S. O. 1897 c. 175.

**Patent.]**—In *Badische Anilin und Soda Fabrik v. Isler*, 22 T. L. R. 326, an attempt was made to restrain the defendants from selling patented goods purchased by them from the patentees' vendee, the contention being that the sale by the patentees had been made on the condition that the patented goods should be resold only to consumers. That this condition had been imposed was not made out in fact, the indorsement of the condition on the package in which the goods had been delivered by the patentees to their vendee not being, it was held, by itself sufficient to make the condition take effect. In the absence of express condition to the contrary agreed to, or at least known by, him, the purchaser of patented goods has power to deal with the goods as he pleases. A patentee can, however, attach to a license any condition he pleases, and a purchaser from the licensee is bound by that condition, whether he knows of it or not.

**Railway.]**—The judgment of the Judicial Committee in *Miller v. Grand Trunk R. W. Co.*, reversing that of the Supreme Court, 34 S. C. R. 45, is reported 22 T. L. R. 297. The decision turns upon the distinction between the English law and that of Quebec, as to the nature of the right of action of the relatives of a person killed by negligence. Under the English law the right is a representative one, and may be lost by the deceased's contract; under the Quebec law it is a new and distinct right accruing to the relatives by virtue of the negligent act. In the result a by-law of the company's benefit society was held not to be a bar to the action.—The Judicial Committee in *Attorney-General for British Columbia v. Canadian Pacific R. W. Co.*, 22 T. L. R. 330, affirm the judgment of the Supreme Court of British Columbia upholding the validity of the Act of the Dominion Parliament authorizing the railway to use provincial Crown lands.

**Receiver.]**—*Goldschmidt v. Oberrheinische Metallwerke*, 22 T. L. R. 285, is a useful decision, the Court of Appeal holding that a judgment obtained in England against a foreign firm might be enforced by the appointment of a receiver to collect in England debts due to the foreign firm by English customers for goods sold and delivered. The plaintiff knew who some of the customers were, but did not know whether debts were due by them, and therefore could not obtain an attaching order. It was held that the special circumstances made it "just and convenient" to grant the order, and the plaintiff was appointed receiver without remuneration and without security to receive debts to a named amount.

**Time.]**—By s. 46, s.-s. 6, of the Local Government Act, 1894, a member of a council forfeits his seat by absence from meetings of the council for more than six months consecutively. In *Kershaw v. Mayor of Shoreditch*, 22 T. L. R. 302, it was held that the time began to run, not from the day of the last meeting attended, but from the day of the first meeting not attended.

**Trade Union.]**—The further progress of *Greig v. National Amalgamated Union of Shop Assistants*, 22 T. L. R. 274, will be watched with interest, involving as it does an important question as to the liability of a trade union or association of that kind. In consequence of some proceedings in connection with his dismissal, a servant brought an action for libel against his master, this being done with the approval and at the expense of the union to which he belonged, one of the rules of the union providing that legal aid should be given to members when necessity arose in their relations with employers. The libel action having been dismissed, the defendant therein was held not entitled to recover his costs from the union, they having, it was held, no common interest in the libel action with the plaintiff. The result would have been different in the case of a bona fide dispute as to some



question of general importance to members of the union.—It was held in *Ward Lock and Co. v. Operative Printers' Assistants Society*, 22 T. L. R. 327, that it is not an offence within s. 7, s.-s. 4, of the Conspiracy and Protection of Property Act, 1875 (in effect the same as s. 523 of the Criminal Code), to station pickets to meet workmen for the purpose of inducing them to leave, after proper notice, the master's employment, with the object of thus compelling the master to employ union men.

**Trustee.]**—In *Grove v. Search*, 22 T. L. R. 290, a sale by trustees of a house at a sum considerably less than it had been valued at for probate and without notice to the beneficiaries, was upheld, the advice of competent estate agents and of reputable solicitors having been taken and the good faith of the trustees not being impeached.

**Will.]**—In the will in question in *In re Vere*, 22 T. L. R. 273, made five days before the testator's death, there was a direction that the residue of the estate should be employed "in founding a technical school for all trades connected with the building and fitting out of steam and sailing ships." It was held that this involved the acquisition of land and the building thereon of a school house, and that the gift was therefore void. But see the Mortmain Act, R. S. O. 1897 c. 112.—Under the special circumstances and wording dealt with in *In re Loveland*, 22 T. L. R. 321, a gift to the "children" of a named person with whom the testator had gone through the form of marriage, was held to vest in the illegitimate child of this person by the testator in esse at the time of the testator's death.—While peculiar in its facts *Baudanis v. Richardson*, 22 T. L. R. 333, is an important case as giving the approval of the Judicial Committee to the principle laid down in *Wingrove v. Wingrove*, 11 P. D. 81, that in order to constitute undue influence there must be something amounting to coercion, something making the testator do that which he did not really wish to do.

Wrong or unreasonable motives, or degrading or pernicious persuasion, are not enough.

**Writ of Possession.**]—It was held in *Dartford Brewery Co. v. Moseley*, 22 T. L. R. 304, that the costs of a writ of possession could, on an application for that purpose, be awarded against the defendant, the jurisdiction so to do being given by s. 5 of the Judicature Act, 1890, which provides that the costs of “all proceedings in the Supreme Court . . . shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid.” Apart from this section there would have been no power to allow the costs. See the corresponding section, O. J. A., s. 119.

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## THE LATEST ONTARIO DECISIONS.\*

**Carriers.]**—*Smith v. Canadian Express Co.*, 7 O. W. R. 404. was an action by the consignors of a parcel of trees to recover damages for non-delivery and conversion of the trees. A Divisional Court held that, the consignee Conroy having testified that he absolutely refused to receive the trees, and the only other evidence on the point being that of the defendants' agent at Ottawa (Blair), who testified that Conroy had refused to look at the trees and said he would not accept them till he saw one Farrell, and promised thereupon to come back and advise the defendants about the shipment, but failed to do so, there was at Ottawa at least such conditional refusal to accept the goods and that this absolved the defendants from going through the form of a proffer at Aylmer, to which place the goods were consigned; and that, as a matter of law, the defendants not knowing any one other than Conroy in this transaction, the latter might be presumed to be the owner, and the defendants were at liberty to accept directions from him at any stage of the journey, including an acceptance or refusal of the goods, and the conditional refusal of Conroy to accept the goods dispensed with any further tender.

**Constitutional Law.]**—In refusing leave to appeal under s. 744 of the Criminal Code, in *Rex v. Walton*, 7 O. W. R. 312, the Court of Appeal overruled both contentions put forward on behalf of the prisoner, viz., that s. 662 (2) of the Criminal Code, in so far as it enacted that a true bill might be found by 7 grand jurors, instead of 12 as heretofore, was ultra vires of the Dominion Parliament, and that s. 103 of the Jurors Act, as amended, in so far as it authorized the

\*Short notes of the most important cases in Volume VII. of the *Ontario Weekly Reporter*, Nos. 8, 9, 10, pp. 305 to 424, inclusive.

adding of talesmen, or of talesmen taken from the petit jury panel, was ultra vires of the Ontario legislature.

**Contempt of Court.]**—On motion by the plaintiffs in *Copeland-Chatterson Co. v. Business Systems Limited*, 7 O. W. R. 319, to commit two of the defendants for contempt of Court in sending a telegram to a person at Winnipeg asking him to suppress a certain letter material to the plaintiffs' case, Magee, J., held that, as the pending litigation was here, the wrongful act here, and the object the obstruction of justice here, there was a contempt of Court, although he accepted the explanation of the chief actor that his object was to prevent the plaintiffs by means of the letter from obtaining other information than that material to the plaintiffs' case, since he must have known that the destruction of the letter would not only keep from the plaintiffs the information he wished to conceal, but also that to which they were entitled, and thus the defendant, though relieved of other punishment, was ordered to pay the plaintiffs' costs of the motion. As the other defendant moved against was not shewn to be a party to the sending of the telegram, the plaintiffs failed as against him, but his answers on his examination not being satisfactory, he was not allowed the costs thereof.

**Copyright.]**—The chief point decided by Teetzel, J., in *Life Publishing Co. v. Rose Publishing Co.*, 7 O. W. R. 337, was that, in the present state of the copyright law, the works of a foreign author, at the time of production and publication outside of the British dominions, copyrighted with his authority by a British publisher, are entitled to protection. Other conclusions to be found in an instructive judgment on this most involved subject, are that the publication called "Comic Pictorial Sheet," containing 8 cartoon drawings and the accompanying titles and letter press prepared by the celebrated artist Charles Dana Gibson, was a "book" within s. 2 of the Imperial Copyright Act, 5 & 6 V. c. 45; and that the fact that the defendants copied from the collection of drawings published by Gibson under a license reserved from

the proprietor of the "Comic Pictorial Sheet," did not justify them in contending that such was not an infringement upon the plaintiffs' copyright.

**Costs.]**—The costs of an interlocutory Chambers motion, which were reserved to be disposed of at the trial, but were not then disposed of, were disallowed by the local Judge in Admiralty (Hodgins) in *Tucker v. The "Tecumseh,"* 7 O. W. R. 378, an appeal to the Exchequer Court having been decided before the application was made. Even had there been no appeal, such costs would only be allowed after the trial under very special circumstances.

**Criminal Law.]**—In *Rex v. Blais*, 7 O. W. R. 380, the prisoner was jointly indicted with one F. for rape, but the prisoner was tried separately. In his charge to the jury the trial Judge commented upon the fact that F., who was shewn by the evidence to have been an associate of the prisoner, and to have taken part in aiding the latter to commit the outrage for which he was tried, had not been called as a witness. The Court of Appeal held that F. was not a "person charged," within the meaning of s. 4 of the Canada Evidence Act, 1893, and therefore comment upon his failure to testify was not forbidden by s.-s. 2.—In *Rex v. Finnessey*, 7 O. W. R. 383, the prisoner was indicted for aiding and assisting another man to commit a rape. In cross-examination the prosecutrix was asked whether one B. had any connection with her earlier on the night of the alleged offence. The trial Judge ruled that she might refuse to answer if she liked. B. was called as a witness for the Crown, and was asked on cross-examination a question to the same effect. The trial Judge ruled that the witness was not obliged to answer. The Court of Appeal held that the first ruling was right, but the second, in the peculiar circumstances of the case, was wrong. The question put to B. was more than a question to credit—the purpose being to ascertain whether from his relations with the prosecutrix he was likely to be biassed or unfavourably affected towards the prisoner. It

was considered, however, that no substantial wrong or miscarriage was occasioned by permitting B. to refuse to answer the question; and the conviction was affirmed.—A new trial was ordered by the Court of Appeal on a Crown case reserved in *Rex v. De Marco*, 7 O. W. R. 387, on the ground of misdirection by the trial Judge, in that, in effect, he told the jury to disregard the evidence of one Pollikofskey. One Manzetto had sworn that there were present, when the stabbing which resulted in the death of Hoban took place, himself, the prisoner and another Italian, and that the latter inflicted the wound. And according to Pollikofskey there was in the vicinity of some of the parties present an Italian with a knife displayed, who was neither Manzetto nor the prisoner, and, while at this time 20 or 25 feet away from the others, was advancing towards them in a threatening attitude, and there was plenty of time for him to have got over to where the others, of whom Hoban was unquestionably one, were, and struck the blow, before Pollikofskey emerged from Glionna's tavern, which he said he entered not wishing to see the fight with a knife.

**Discovery.]**—A defendant in a libel action, on his examination for discovery, was held by Mulock, C.J., in *Chambers v. Jaffray*, 7 O. W. R. 371, bound to answer relevant questions although his answers might tend to incriminate him: Canada Evidence Act, 1893; 61 V. c. 53 (D.); 1 Edw. VII. c. 36 (D.); and 4 Edw. VII. c. 10, s. 21 (O.)

**Division Courts.]**—A motion by the defendants in *Re McGregor v. Union Life Ins. Co.*, 7 O. W. R. 423, to remove an action from a Division Court into the High Court in order that they might set up a claim which they wished to make against the plaintiff, was refused by Boyd, C.: "Plaintiff's cause of action is within the competence of the Division Court. That is the proper forum for its trial, and plaintiff, as dominus litis insists upon that as his right. The burden is cast upon defendants to establish good, substantial

reason for involving plaintiff in a much more expensive, complicated, and lengthened controversy in another Court. They have to make out (in words judicially used with reference to the requirements of a statute in England like our R. S. O. c. 60, s. 82), that the case is one which 'ought' to be tried in a higher Court—one in which it is 'more fit' to be tried than in an inferior Court: *Bunker v. Hollingsworth*, [1893] 1 Q. B. 442."

**Extradition.]**—Once more Harsha, in his persistent fight against extradition, applied for a writ of habeas corpus, *Re Harsha*, 7 O. W. R. 398, on three grounds: (1) that the warrant of committal was void, being addressed "to the chief constable or other peace officer of the city of Toronto, and to any constable or other peace officer in and for the county of York, and to the keeper of the common gaol," and not to some particular and named constable; (2) that the charge of forgery on the face of the warrant was insufficient, because it was not stated that the act was done "with intent to defraud;" and (3) that the evidence did not shew that the matter complained of was a crime in the foreign locality (the State of Illinois). In refusing the application Boyd, C., applied to the first objection (allowing that there was any force in it by reason of the forms prescribed by the Act, his opinion being to the contrary), the common law rule that a warrant may be addressed to any number of persons by name or description of office and be validly executed by any one of them; as to the second, besides that the warrant contained all the ingredients of forgery as defined by s. 422 of the Criminal Code, it was pointed out that, being a warrant for detention merely, it was not to be construed with the same nicety as a warrant in execution; and the third failed on the facts, the ticket in question, though it had to be exchanged for another, being none the less a ticket for admission to an entertainment for which a consideration was required.

**Fire Insurance.]**—The plaintiffs' appeal from the judgment of Clute, J., in *Canadian Pacific R. W. Co. v. Ottawa Fire Ins. Co.*, 5 O. W. R. 496, 9 O. L. R. 493, noted 25 C. L. T. 283, was dismissed by the Court of Appeal, 7 O. W. R. 353.

**Limitation of Actions.]**—Had the location of a certain wire fence, described as temporary and irregular, which fenced in with the lands of the defendant in *Hurworth v. Clemmer*, 7 O. W. R. 305, a narrow strip of the plaintiff's lands cultivated by the defendant along with his own lands, been ascertainable, the junior Judge of the County Court of York (Morgan) considered that the defendant would have established possession sufficient to satisfy the statute, and defeat the plaintiff's claim to possession. The novel feature of the case, however, was that in 1896 and 1898 there were tax sales of property including the strip in question, which were afterwards validated by 2 Edw. VII. c. 66, s. 6, at which the plaintiff or his predecessors in title bought it in, the effect of which, in the opinion of the Court, was to create a new root of title, with reference to which s. 4 of the Real Property Limitation Act must be read.

**Municipal Corporations.]**—The Chancellor, by whose direction the parties in *Re Local Offices of High Court*, 7 O. W. R. 316, had agreed to abide, in deciding under the Municipal Act, 3 Edw. VII. c. 19, s. 506, that it was not the duty of a county council to furnish the Master's office with a copy of Holmsted and Langton's Judicature Act and Rules, made it clear that his decision was not to be considered as calling in question the desirability of that volume as a very necessary part of official equipment, but as turning upon the proper construction of the word "furniture" in the premises, because books, while obviously necessary to the furnishing of the mind, are not "required physically for the use of the office and the discharge of business therein." "Furniture and effects" would include books.



**Particulars.]**—On appeal by the defendant in *Moon v. Mathers*, 7 O. W. R. 422, from the order of the Master in Chambers, dismissing the defendant's motion for particulars of the statement of claim, Boyd, C., varied such order to provide that the plaintiff should be precluded from giving evidence at the trial as to persons who had heard the slander or to whom it had been uttered, and whose names had not been disclosed, unless information of the names be given a reasonable time before the trial.

**Parties.]**—*Imperial Paper Mills of Canada v. McDonald*, 7 O. W. R. 412, was an action of replevin to recover 20 horses and 7 sets of harness which the plaintiffs alleged were wrongfully sent to the defendants by one John Gray. On application by the defendants to add Gray as a defendant, on the ground that he was the real owner of the horses, and that the matters involved could not be determined without having him added as a defendant, it was contended for the plaintiffs that it was the purpose of Gray to counterclaim against the plaintiffs and to embarrass and delay them in the action. The Master in Chambers considered that while it was not necessary for a decision of the question at issue that Gray should be added, yet, unless he was in some way bound by the present action, the ownership of these chattels as between him and the plaintiffs would be still at large, and that, in the circumstances, the defendants should be allowed to bring in Gray as a third party, and that he should be allowed to defend the action, but not to counterclaim, as was done in *Eden v. Weardale*, 28 Ch. D. 333.

**Pleading.]**—In *Attorney-General v. Hargrave*, 7 O. W. R. 368, an action for the cancellation of certain mining leases of lands in the Cobalt district, the Master in Chambers struck out paragraphs 12 and 13 of the defendant's statement of defence and the whole of the counterclaim, because, except in so far as the first paragraph was a denial of any good reason for the filing of the cautions mentioned therein, the statements were irrelevant and embarrassing, in that the only issue

raised by them was the motive of the plaintiff in bringing the action, which was a matter not material to be inquired into, and that as to the counterclaim to allow it would be to enable the defendants indirectly to violate the rule that no action is maintainable against the Crown except by petition of right, for which a fiat must first be had, and that, even if the counterclaim were tenable, it was premature, being a claim for damages by reason of the registration of cautions, which could only arise after the plaintiff had failed in his action.

**Prohibition.]**—An order for prohibition was refused by Boyd, C., in *Rex v. Phillips*, 7 O. W. R. 418, where it was sought to prevent the police magistrate for the city of Toronto from proceeding with a preliminary inquiry upon a charge against the defendant of conspiring with others to defraud the public. It was held that the warrant and information, in which the charge was set out in the very words of s. 394 of the Criminal Code, were sufficient, and, bearing in mind the distinction between the case of a magistrate holding a preliminary investigation and that of a magistrate trying a case in a summary way, and the wide latitude possessed by the former, that the refusal of particulars of the deceit, etc., with dates and names was not a justification for the interference of the Court.

**Security for Costs.]**—“Without going through all the cases, I would deduce this conclusion, that to satisfy the terms of Con. Rule 1198, a corporation must be incorporated and have its head and controlling office within the jurisdiction, and where its business is carried on by its members and officers. Where it is a foreign corporation, having only a constructive residence through agents acting in its business interests and licensed so to do in a comparatively small and transient way, such a condition of affairs does not imply ‘residence’ as contemplated by the practice as to security for costs:” Observations of Boyd, C., in affirming an order for security for costs in *Ashland Co. v. Armstrong*, 7 O. W. R. 401.

**Service out of the Jurisdiction.]**—The plaintiff's appeal in *Craddock v. Bull*, 7 O. W. R. 343, from the judgment of Falconbridge, C.J., 6 O. W. R. 838, dismissing his appeal from the order of the Master in Chambers, 6 O. W. R. 715, setting aside the writ of summons, and the service thereof upon the defendant in England, where he resided, was allowed by a Divisional Court, on the ground that all that it was incumbent upon the plaintiff to do was to make out a *prima facie* case of something triable in Ontario, whereupon, if the material filed by the defendant raised a doubt on the question, the defendant could be allowed to enter a conditional appearance. It was held that it was not necessary that the plaintiff produce documentary evidence of the defendant's liability, as the Master seemed to have supposed; but, the plaintiff's material being defective, and he, being allowed by the indulgence of the Court to file further material, and thus succeeding not as a matter of right, was refused costs, which were ordered to be costs to the defendant in the cause. Objection would not lie to the non-joinder of others, if any, jointly liable with the defendant, they not being resident within the jurisdiction.

**Solicitor.]**—An extraordinary proceeding is reported in *Casselman v. Barry*, 7 O. W. R. 328. Upon an appeal to a Divisional Court a certain affidavit was filed on behalf of the defendants (appellants), long after the service of the notice of appeal and without any notice to the plaintiff. This affidavit contained serious imputations against the plaintiff's solicitor as to the terms upon which he was to conduct the litigation for the plaintiff. Upon the argument of the appeal no reference was made to this affidavit, but, judgment being reserved, the Judges found the affidavit among the papers, and caused the plaintiff's solicitor to be notified; the latter then answered the affidavit. "It is highly undesirable," said the Chancellor, "that litigation should be conducted in this way; if the affidavit impeaching the conduct of the plaintiff's solicitor was to be availed of, the point should have been brought emphatically before the Court. . . . So far as

the Divisional Court is concerned, the charge and its contradiction will remain as it is, but without prejudice to the alleged breach of professional duty being brought before the Benchers for further investigation, if either party so desires."—It devolved upon the local Master at Ottawa, on a reference to him for trial of the action of *Murphy v. Corry*, 7 O. W. R. 363, to consider upon what principles the amount of remuneration to which solicitors employed in unusual and difficult business, extending over a long period of time and involving large sums of money, and to which the Solicitors' Act does not apply, shall be fixed. In this case, the plaintiffs were employed to procure a settlement of the defendants' claims arising from changes and for extras in the performance of the defendants' contract with the Dominion Government for the construction of section No. 2 of the Trent canal, including the lift-lock at Peterborough, an unusual work, the first of its kind in America, and the largest in the world, and, therefore, quite unfamiliar to both engineers and contractors. After citing with approval the remarks on the subject in the *Am. and Eng. Encyc. of Law*, 2nd ed., vol. 3, p. 420, the Master, in a well-considered judgment, having regard to the views of those widely experienced in such matters, who were all agreed that such services were usually paid for at from 2½ to 5 per cent. of the amount in question, and that 2½ per cent. of the amount recovered in this case would be \$3,902.21, and to the amount allowed by the senior taxing officer in *Re Johnston*, 3 O. L. R. 1, and to the facts that the plaintiffs were not employed in the matter from the beginning, and that, on the other hand, nearly \$30,000 was recovered for interest and costs, a matter so difficult that 5 per cent. was considered fair remuneration for the work entailed, and considering that "the amount involved like the time occupied is only one of the elements, though perhaps the most important," and that "no hard and fast percentage can be fixed, just as no hard and fast charge per hour can be fixed," held the plaintiffs entitled to recover the amount claimed, \$3 500. On application by the plaintiffs, interest

was allowed on the amount of the judgment, the Master overruling the defendants' contention that *Re McClive*, 9 P. R. 213, lays down the rule that interest will in no case be allowed on a solicitor's bill unless a demand in writing is shewn to have been made for it, the judgment as a whole shewing that in the opinion of Wilson, C.J., a solicitor's bill does not differ as regards the question of the allowance of interest on it from any other liquidated demand, and in this case, the bill not being "a solicitor's bill," the supposed doctrine would have no application: 7 O. W. R. 392.

**Trade Mark.]**—Besides that the evidence in *Doran v. Hogadore*, 7 O. W. R. 349, established that the defendants in choosing as a trade mark for "suspenders" a button stamped "Trade B. Mark," had in mind the plaintiffs' trade mark on a similar button stamped "Trade D. Mark," and were not acting in error or ignorance, there was the further fact, shewing intention, that they had used a similar label only distinguished by the letters "B. S. Co.," instead of "D. S. Co." Apart from intention, the considerations on which Mulock, C.J., granted an injunction against the defendants were the similarity of sound as well as of shape, material, design, colour, and position of the mark, and the fact that ordinary purchasers had been deceived by the defendants' mark, purchasers not being bound to examine trademarks in a critical way.

**Will.]**—The will in question in *Re Mackay*, 7 O. W. R. 318, directed the executors to pay to each grandson of the testator who should study for the Presbyterian ministry the sum of \$500 during the time when he or they should be so studying, and by a subsequent clause directed that the residue of his estate, subject to certain exceptions, should be equally divided among his children, and that the shares of certain children should be paid within one year after his decease. Falconbridge, C.J., decided that the class of grandsons was fixed at the death of the testator, and that, as no grandson, except one, would, having regard to their respective ages and

expressed intentions, "study for the Presbyterian ministry" within the year assigned as the period of distribution, there was a good and valid bequest limited to that one.—Upon the proper construction of the following clause in the will in *Re Turnbull*, 7 O. W. R. 358, "If I predecease my wife Harriett Turnbull, I bequeath to her the whole control of my real and personal estate, as long as she lives," it was held by Teetzel, J., that the widow had only a life interest in a mortgage forming part of the testator's personal estate, with power of control during her life, and the remaining interest would fall into the testator's undisposed of estate, and go according to the Statute of Distributions, and, notwithstanding her life interest, the widow would be entitled to share.—Clause 1 of the will in question in *Re Cameron*, 7 O. W. R. 416, directing payments on the "Wright farm," was held by Britton, J., to be void for uncertainty. "There is 'uncertainty as to the object.' The words in the absence of extrinsic evidence are 'blind words' and are too vague and indefinite to be intelligently acted upon." "Neither the subject nor the object of the bequest is mentioned, and the name of the legatee is not given." "It is not a case of ambiguity, but the absence of words to make a bequest to any one." A bequest of one-third of the interest on a fund to be paid to the agent of the Ottawa Auxiliary Bible Society, and the other two-thirds to be distributed to the various schemes of a particular Presbyterian church, as the minister and the managing committee might see fit, as one "for the increase and improvement of Christian knowledge and promoting religion," was held to be good, belonging to the class of "charitable gifts not subject to the rule against perpetuity."

## CASES FROM WESTERN CANADA.\*

**Absconding Debtor.]**—On appeal by the plaintiff in *Robinson v. Graham* (Man.), 3 W. L. R. 135, from the judgment of a County Court Judge directing the ratable distribution of funds in Court as the proceeds of an attachment sued out by the plaintiff, among the creditors of the defendant, as provided by ss. 200 to 206 of the County Courts Act, the full Court, in allowing the appeal, decided that those sections had not the effect of repealing by implication the earlier enactments to be found in ss. 252 and 253 of the same Act: *City of Vancouver v. Bailey*, 24 S. C. R. 62; that creditors who had recovered judgment (by default in this case) could not, without having, within one month after the issue of the first attachment, sued out an attachment, share in the proceeds of the first attachment; and that the order in question was more in the nature of a final order than an interlocutory one, and therefore the appeal lay. The question whether a baker, making and selling bread, and incidentally candies, cakes, and confectionery, is a trader within the meaning of s. 200, was not decided.

**Advocate.]**—On motion by the Law Society in *Re Harris* (N. W. T.), 3 W. L. R. 167, to strike an advocate off the roll for breach of trust and misapplication of funds of one Lange, a client, it appeared that a sum of \$61 received by the advocate had been applied by him in the manner and for the purposes for which it had been received, with the exception of a comparatively insignificant amount which the advocate said he had overlooked. It was asserted by the advocate that a larger sum of \$297, proceeds of a cheque for

\* Short notes of the most important cases in Volume III. of the *Western Law Reporter*, No. 2, pp. 113 to 224, inclusive.

\$300, was received by him in payment of his fees for defending Lange on several charges of forgery and false pretences, but Lange maintained that the advocate was first to pay thereout the claim of one Atherton in respect of the forged cheque. The full Court held that the expression "Charles F. Harris, trustee for myself," in the indorsement on the cheque, was sufficiently explained by the fact that it was put there at the instance of the advocate, so that the bank would not retain an amount due them out of the proceeds, and without the knowledge of Lange; and that the evidence generally did not establish the truth of the charge, having regard to the character of Lange, the reasonableness of the advocate's contention, and the fact that Lange waited an unreasonable time before making demand for the moneys in question, and provided for payment of Atherton otherwise without making complaint.

**Arbitration and Award.]**—Duff, J., in *Chisholm v. Centre Star Mining Co. (B. C.)*, 3 W. L. R. 156, held that the schedule to the Arbitration Act does not apply to arbitrations under the Workmen's Compensation Act (B. C.), and that the arbitrator's fee in proceedings under the latter Act must be dealt with by a practice analogous to the practice prevailing prior to the Arbitration Act in the case of a reference directed by the Court.

**Bill of Sale.]**—Wetmore, J., in *Hennenfest v. Malchose (N. W. T.)*, 3 W. L. R. 171, an interpleader proceeding to try out the right of property in a threshing outfit, seized by the sheriff on an execution sued out by the plaintiff against Joseph Malchose, and claimed by Hubert Malchose, a brother, by purchase from Peter Malchose and Joseph Malchose, held that the evidence of the brothers did not satisfactorily meet the presumption, arising under the law of Dakota, where the bill of sale was made, that this bill of sale was made in fraud of creditors, and that a later bill of sale made in the Territories was null and void by reason of the consideration



therefor, which was the past indebtedness due Hubert Malchose, not being truly expressed therein, inasmuch as it was stated to be made for a present payment.

**Company.]**—The agreement upon which the plaintiff in *Lasell v. Thistle Gold Co. and Hannah* (B. C.), 3 W. L. R. 149, sued to recover certain shares in the defendant company was, stated shortly, that, on the defendant Hannah buying up outstanding debts of the Sutherland Gold Mining Co., Limited, of which the plaintiff was superintendent and general manager, obtaining judgment against the company, selling its property at sheriff's sale, and buying it in, he should organize a new company in which he should have a controlling interest and in which the plaintiff should have a proportionate amount of fully paid up and non-assessable shares, in consideration, as was asserted by the plaintiff, that he should refrain, as he did refrain, from taking proceedings to wind up the company, and, as appeared from the evidence, in further consideration of his standing by and assisting Hannah in carrying out his scheme. The full Court (Morrison, J., dissenting) allowed an appeal by the defendants from the judgment of Martin, J., in favour of the plaintiff, on the ground that the agreement was, at least in part, illegal and not enforceable.

**Criminal Law.]**—The request under s.-s. 2 of s. 900 of the Criminal Code for a stated case in *Rex v. Earley* (N. W. T.), 3 W. L. R. 189, was "to state and sign a case setting forth the grounds on which the said conviction is supported," whereas the requirement of the sub-section in question is that the justices should set forth the facts of the case and the grounds upon which the conviction is questioned. On the objection of the informant, it was held by Wetmore, J., on the line of authorities commencing with *Morgan v. Edwards*, 5 H. & N. 415, 29 L. J. M. C. 108, and despite *Lord v. The Queen*, 31 S. C. R. 165, that the provisions relating to stated cases, as provisions creating an entirely new jurisdiction, are conditions precedent to the exercise of such

a jurisdiction and must be complied with and cannot be waived by the justices.

**Crown Patent.]**—In *MacCrimmon v. Smith* (B. C.), 3 W. L. R. 154, the plaintiff MacCrimmon, who was the grantee from the Crown of certain lands with a reservation, under ss. 14 and 15 of the Dominion Land Regulations, c. 100 of the Consolidated Orders in Council, of all merchantable timber, mortgaged the same to the plaintiffs Pelly, and thereafter entered into an agreement with the defendants to sell them the timber. The action was brought by the mortgagees for an injunction and damages for the trespass of the defendants in entering upon the lands and cutting the timber. It appeared that after the mortgage was given the regulations mentioned were rescinded by an order in council providing that all grantees such as MacCrimmon should be entitled to the timber on their homesteads free of duties. Duff, J., held that the rule stated in *Robins on Mortgages*, p. 792, was not applicable in the circumstances to enable the mortgagee to get the benefit of the latter order in council as creating an accretion to the security; and dismissed the action.

**Discovery.]**—The decision of Perdue, J., in *Savage v. Canadian Pacific R. W. Co.* (Man.), 1 W. L. R. 441, noted 25 C. L. T. 462, was affirmed by the full Court, who held (3 W. L. R. 124) that the depositions of the defendants' officer who made the affidavits on production in question, on his cross-examination on the first affidavit, were admissible to contradict the statements in the second affidavit, for, while an affidavit on production cannot be contradicted by a controversial affidavit, an admission of its incorrectness from any source will sustain an attack upon it.

**Foreign Commission.]**—Although as a general rule it is extremely desirable that when fraud is charged the witnesses should attend at the trial and give their evidence in person, Craig, J., in *Carbonneau v. Letourneau* (Y. T.), 3 W. L. R.

219, in consideration of the facts to be proved by the evidence of the witnesses in question, the extraordinary expense of bringing the witnesses to the Yukon, greater in amount than the value of the main property in question, and the fact that the defendants were both worthless, decided that the circumstances of this case warranted an exception to the rule.

**Husband and Wife.]**—Unchastity of a wife before marriage was held by Perdue, J., in *A. v. B.* (Man.), 3 W. L. R. 113, not to amount to a matrimonial offence so as to be an answer to an action for restitution of conjugal rights, and, therefore, notwithstanding such unchastity and the fact, even, that the plaintiff was pregnant at the time of her marriage with a child not the defendant's, she was entitled to alimony; and his contention that the marriage was procured by fraud and was null and void, was, in view of the ruling in *Swift v. Kelly*, 3 Knapp 293, that there is no degree of deception which can avail to set aside a contract of marriage knowingly made unless the party imposed upon has been deceived to the extent that he has given no consent at all, and of the decision in *Moss v. Moss*, [1897] P. 263, not well founded. The wife was held entitled to an engagement ring given by the husband to her, but not to articles bought by him and sent by his friends in view of the marriage as wedding presents.

**Life Insurance.]**—In *Re Anderson* (Man.), 3 W. L. R. 127, an interpleader proceeding at the instance of a benevolent society incorporated under 40 V. c. 25, now R. S. M. 1902 c. 18, the subject matter was the proceeds of a certificate which the insured had made payable to his wife. By his will the insured made other provision for his wife, and directed that the moneys in question should fall into and form part of his general estate. It was held by the full Court that this will did not operate as a good appointment of the fund or declaration under the rules of the society so

as to make these moneys part of the insured's general estate; and that the appointment and direction of the will must be considered inoperative, and hence the widow was not bound to elect, and was entitled to her full right under the will, as if no reference to the fund in question had been made in it.

**Malicious Prosecution.]**—The cause of action of the plaintiff for false arrest and malicious prosecution in *Tanghe v. Morgan* (B. C.), 3 W. L. R. 146, arose out of his arrest and prosecution by the defendant for removing from a mineral claim (upon which the law required him to remain and work) certain loose fragments alleged to belong to the placer owner as "float" and not "rock in place," not clam et clandestino, but in the open light of day, in the ordinary way, and in view of the defendant, who had full knowledge of the matters in dispute. The full Court held that the question of the bona fides of the defendant's belief in the charge of theft was, in the circumstances, one peculiarly for the jury, and (Irving, J., dissenting) that the production by the proper officer of a certified copy of the bill of indictment returned "no bill" was, especially in view of the Evidence Act, sufficient proof of the favourable termination of the criminal proceedings.

**Mines and Minerals.]**—Aside from the questions of fact which are discussed at length in the judgment of Craig, J., in *McLaren v. Jansen* and *McLaren v. Elliott* (Y. T.), 3 W. L. R. 199, two important and, as concerning the Yukon, novel questions of law, arose for decision: first, the right of miners operating on a stream higher up to throw their débris on the claims below them, carrying it down by means of the water; to what extent the owner of a claim higher up the creek can foul or pollute the water to the injury of those operating below; second, what rights the owners of claims higher up the stream have to the free and uninterrupted flow of the water below them for the carrying off of their

débris deposited in the stream higher up. After a discussion of the modifications of the common law principle deducible from the cases decided in different English-speaking countries, and having regard to the peculiar conditions obtaining in the Yukon, the learned Judge arrived at the conclusions that those persons operating on the stream above lower owners should retain and provide for retaining all the débris except what may be called silt or impalpable or almost impalpable stuff, and that a lower owner seeking to recover from an owner above for damages done by deposit will not be able to recover if by his own acts he causes such obstructions in the stream below as create the injury for which he seeks redress.

**Mortgage.]**—In the beginning of the last century there existed a great prejudice against powers of sale in mortgages, but to-day the Courts take a more common sense view of the matter, deeming it in the interest of both borrower and lender that there should be every facility for realizing on mortgage securities, and hence in *Dominion Trust Co. v. Bower* (B. C.), 3 W. L. R. 157, Irving, J., was unable to deduce from the authorities any equity on which a sale under a power of sale in a mortgage, silent on the question of notice, when no notice had been given either to the mortgagor or a second mortgagee, could be held to be invalid.

**Partnership.]**—The effect of the decision of Wetmore, J., in *Howes v. Kinsey* (N. W. T.), 3 W. L. R. 183, is that where the conduct of the defendant Kinsey had been such as to hold out one Lindsay to the plaintiffs as his partner, and the plaintiffs settled a claim of the defendant against them with Lindsay by part payment in cash and the balance by setting off against the plaintiffs' claim an account of Lindsay against the plaintiffs, such settlement was a discharge as to the payment in cash, but not as the amount set off.

**Pleading.]**—The effect of the decision of Perdue, J., in *Martel v. Mitchell* (Man.), 3 W. L. R. 144, is that where there

are several defendants, against all of whom a certain cause of action is set up jointly with another cause of action against some only of such defendants, the Court will not interfere at the instance of a defendant against whom relief is asked in connection with both causes of action.

**Principal and Agent.]**—The point involved in *Richardson v. McCleary* (Man.), 3 W. L. R. 141, was whether the defendant had a right to revoke the plaintiffs' authority to sell a half section of land before the expiration of the time allowed for the sale thereof, under the circumstances that the defendant, having refused to carry out a sale made by the plaintiffs on the terms on which they were first authorized to sell, agreed with them that they were to have the sole right to sell the lands for a specified period, on new terms. The plaintiffs found a purchaser on these terms, but the defendant refused to sell, on becoming aware of which the plaintiffs did nothing more until the expiration of the period, and then claimed their commission. It was held that there was a distinct contract, that the authority was not revocable, being founded on valuable consideration, and that the plaintiffs were entitled to recover.

**Small Debt Procedure.]**—On motion by the defendant in *Cosgrave v. Duchek* (N. W. T.), 3 W. L. R. 194, for summary judgment on his counterclaim; the plaintiff having discontinued his action, Wetmore, J., held that it was unnecessary (in a case falling under the Territories small debt procedure) to plead in reply to a counterclaim, but that the latter is part of the dispute note, and all the facts alleged therein are in issue without anything further, and that therefore the defendant's motion could not succeed, and the case must be set down for trial.

**Vendor and Purchaser.]**—Exceptions to the rule that specific performance may be decreed in equity notwithstanding a failure to keep the dates provided for the carrying out of the contract or taking steps looking thereto, are, in the

judgment of Hunter, C.J., in *Morton v. Nichols* (B. C.), 3 W. L. R. 161, said to exist where there is something in the nature of the property, as that it is of fluctuating value, which indicates that it must have been the intention that time should be of the essence of the contract, and also in the case of options and unilateral contracts. In this particular case the subject matter of the contract sought to be enforced was a number of mining claims, and the contract was in the nature of an option, and it was held that the plaintiffs could not succeed on account of their failure to pay a sum of \$1,000 on account of their purchase money on the day provided therefor; the fact that they went to the defendant's hotel about a quarter to 12 p.m. to make a tender of the money, and were refused admittance by some one in authority there, in the absence of anything to shew that the defendant was evading performance, was not a sufficient seeking out of the defendant by the plaintiffs so as to dispense with an actual tender of the money.

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## EDITORIAL REVIEW.

### **Election of Benchers.**

It is difficult to forecast the result of the election of Benchers of the Law Society of Upper Canada. At the time of writing, the votes are all in and are being counted. The counting is a lengthy business, and the result will not be known for some days. Before the next election, in 1911, the statute should be amended so as to provide for nominations, if not for representation of districts. It seems inevitable that, owing partly to the present defective system of voting, some useful men will be defeated, while others, better known to the Bar, but almost useless as Benchers from the fact that they have not time to give to the duties, will be elected.

### **Judicial Appointments.**

Mr. Daniel D. McKenzie, barrister-at-law, of North Sydney, Nova Scotia, succeeds the late Judge Dodd as Judge of the County Court of District No. 7 in that province.

Mr. Henry F. McLatchy, barrister-at-law, of Campbellton, New Brunswick, becomes Judge of the County Court for the counties of Northumberland, Gloucester, and Restigouche, in place of Judge William Wilkinson, who has resigned.

Mr. Justice Aulay Morrison, of the Supreme Court of British Columbia, has been appointed Deputy Judge in Admiralty of the British Columbia Admiralty District.

### **Limiting Appeals in Respect of Venue.**

At a meeting of the Supreme Court of Judicature for Ontario held on the 24th March, 1906, the following Rule was adopted:

“1275. Notwithstanding the provisions of Rule 777, except in cases in which there is by statute or by Rule of Court



a local venue, an order of a Judge of the High Court determining the place of trial, whether made upon an original motion, or upon appeal from the Master in Chambers, or from a local Judge or local Master, and whether it change or confirm the venue as laid by the plaintiff, shall not be subject to appeal."

Several objections to the wording of this Rule might be made. Nevertheless, the intention to limit parties to an action to one appeal in settling the place of trial is pretty clearly indicated—and the idea is a sensible one.

#### **Interruptions from the Bench.**

In England the Court of Appeal and the Divisional Court have always had a certain notoriety for the amount of interruption that comes from the Bench in the course of the arguments of counsel, and this tradition is being well maintained. In the House of Lords, where, also, interruption has been frequent in the past, it would seem that under the new Lord Chancellor, who sometimes appears to be the very embodiment of taciturnity, counsel will have a better chance of presenting their arguments in a coherent and sustained form, free from the oftentimes irritating incursions of the noble Lords who dispense justice from the scarlet benches of that august tribunal. The late Lord Watson, it will be remembered, was a notorious offender in the frequency of his intervention during the argument of appeals; but it may also be remembered that when a member of the Bar once delicately hinted this to him, he replied: "Man, you needna' complain; I never interrupt a fool!" (The *London Law Times*.)

#### **Scarlett's Tact.**

It is not necessary that a lawyer should be eloquent to win verdicts, but he must have the tact which turns an apparent defeat to his own advantage. One of the most successful of verdict winners was Sir James Scarlett. His skill in turning a failure into success was wonderful. In a breach of

promise case the defendant, Scarlett's client, was alleged to have been cajoled into an engagement by the plaintiff's mother. She was a witness in behalf of her daughter, and completely baffled Scarlett, who cross-examined her. But in his argument he exhibited his tact by this happy stroke of advocacy: "You saw, gentlemen of the jury, that I was but a child in her hands. What must my client have been?"—*(Green Bag.)*

#### **A Solemn Declaration.**

The following declaration as to age was forwarded from California, to be filed as proof of the deponent's age, with a benefit society:—

#### **DECLARATION AS TO AGE.**

To be made before a Notary Public or Justice of the Peace.

RE

That N. F. T. is a member of Court Rose of Kent, No. 22, located at Ridgetown, Province of Ont.

I, Kent,  
of Canada            in the County of Kent, .  
I do solemnly declare that this is the best

1st. That I can Do.

2nd. That he was born on the 16 day of November A.D. one thousand eight hundred and 40.

3rd. My knowledge of this fact is based on that i leave it to my wife Elizabeth T. witch is still alive all right and Dont Look mutch Like Dieing yet So that i dont think that there will Be any trouble.

And I make this solemn declaration, etc.

(Sgd.) N. F. T.

#### **Recent American Decisions.**

*Bills and Notes.*—A notarial notice of protest of non-payment of a note, addressed to an indorser as if living when he is dead, is held, in *Bank of Ravenswood v. Wetzel* (W.

Va.), 70 L. R. A. 305, to be good to charge such indorser's estate if actually received by his administrator.

*Carriers.*—An undertaking by a ticket agent, upon receiving money to pay the passage of a third person from a point on another road to the point where the money is received, that he will instruct the initial carrier to deliver a ticket to the intending passenger, is held, in *Brezewitz v. St. Louis, I. M. & S. R. Co.* (Ark.), 70 L. R. A. 212, not to render his employer liable for delay of the initial carrier in complying with the instructions.

Failure to equip a train with tools usually carried by trains for emergency use in case of a wreck, for want of which a passenger is not rescued as promptly as would otherwise have been practicable from his position in the débris of a wreck, is held, in *Jackson v. Natchez & W. R. Co.* (La.), 70 L. R. A. 294, to render the carrier liable in damages for such additional suffering, regardless of whether the wreck itself was or was not caused by its negligence.

*Contract.*—One who has only partly performed his contract to install, for a gross sum, a heating plant in a building, to consist of boilers, radiators, and piping, at the time the building is destroyed by fire, without the fault of either party, is held, in *Dame v. Wood* (N. H.), 70 L. R. A. 133, to be obliged to bear the loss, unless he shews that the material already in place could not have been removed for a reasonable sum, so that the owner of the building must be regarded as having accepted it as the work progressed.

A delivery and acceptance sufficient to satisfy the Statute of Frauds is held, in *Richardson v. Smith* (Md.), 70 L. R. A. 321, not to be effected by a seller of tomatoes in cans giving the buyer two cans as samples, which the latter takes away with him, where they are not included in the bulk of the sale. Symbolic delivery by sample to satisfy the Statute of Frauds is the subject of a note to this case.

*Evidence.*—Testimony given before a coroner's jury, by one subsequently accused of the crime then under investigation, is held, in *Tuttle v. People* (Colo.), 70 L. R. A. 33, to be inadmissible at his trial, under a constitutional provision that no person shall be compelled to testify against himself in a criminal case. The other authorities on admissibility, on trial for murder, of testimony of accused at coroner's inquest, are collated in a note to this case.

*False Representation.*—A statement by one attempting to sell a cash register, that its use would save the expense of a bookkeeper and one half of the clerk's time, is held, in *National Cash Register Co. v. Townsend* (N. C.), 70 L. R. A. 349, to be merely dealer's talk, and, although false, not ground for rescission of the contract.

*Infant.*—A fence 4½ feet high around a water-supply reservoir in a public park, which is constructed so that children have to remove their shoes to climb it, is held, in *Carey v. Kansas City* (Mo.), 70 L. R. A. 65, to be sufficient to absolve the municipality from liability for the death, by drowning in the reservoir, of a child eleven years old, who has been warned by public watchmen not to go inside the inclosure, and driven out of it.

The fact that building materials lying in the street may be so arranged as to be attractive to children as a place for play, or as a resting place during or after play, is held, in *Friedman v. Snare & T. Co.* (N. J. L.), 70 L. R. A. 147, not to impose upon the landowner the duty so to arrange and maintain the materials as to render them safe for such use.

An agreement by an infant to submit his cause to arbitration is held, in *Millsaps v. Estes* (N. C.), 70 L. R. A. 170, to be voidable. The question of arbitration of infant's cause of action is considered in a note to this case.

*Insurance.*—An insured who accepts a policy incorporating the provisions of another policy as part of the contract

is held in *Conner v. Manchester Assurance Co.* (C. C. App. 9th C.), 70 L. R. A. 106, to be bound by such provisions, although the policy referred to is in possession of the insurer, and is never seen by the insured, who knows nothing of its terms. The other authorities on effect of party's ignorance of contents of extraneous paper, upon an attempt to incorporate it into contract by reference, are collated in a note to this case.

*Master and Servant.*—A mine owner is held, in *Beresford v. American Coal Co.* (Iowa), 70 L. R. A. 256, to be liable for the act of his superintendent, who has general command of the operation of the mine, in sending the engineer away from the engine operating the cage hoist, and attempting to operate it himself, knowing that he is incompetent to do so, by reason of which employees ascending the shaft are injured.

*Reward.*—To be entitled to a reward, it is held, in *Smith v. Vernon County* (Mo.), 70 L. R. A. 59, that one must act with a knowledge and in reliance on it.

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## BOOK REVIEWS.

**Smith's Mercantile Law:** A Compendium of Mercantile Law, by John William Smith, late of the Inner Temple, Barrister-at-Law. Eleventh Edition, by Edward Louis Hart, M.A., LL.B. (Cantab.), and Ralph Iliff Simey, B.A. (Oxon.), Joint Editors of "Arnould on Marine Insurance," both of the Inner Temple, Barristers-at-Law. London: Stevens and Sons, Limited; Sweet and Maxwell, Limited. Toronto: The Carswell Company, Limited. 1905.

This is a bulky work of over 1,500 pages, published 15 years later than the last edition. The first edition of the work was published in 1834, and ever since that time it has taken and preserved a firm hold upon the affections of the legal profession. It is not entirely easy to understand the almost universal approbation which it has received and retained for nearly three-quarters of a century, for it covers so many subjects that it is impossible that any one of them can be treated exhaustively; for example, to enumerate some only of the subjects covered, it treats of Partners; Joint Stock Companies; Principal and Agent; Shipping; Patents, Goodwill, and Trade Marks; Bills of Exchange and Promissory Notes; Contracts with Carriers; Contracts of Affreightment; Maritime Insurance; Insurance upon Lives; Insurance against Fire; Bottomry and Respondentia; Contracts of Hiring and Service; Contracts with Seamen; Contracts of Apprenticeship; Guaranties; Contracts of Sale; Contracts of Debt; Stoppage in Transitu; and Lien.

This is an attractive list of subjects, to treat which exhaustively would require a volume for every subject named. Within the bounds of what is possible (having limitations of space in view), the author and his subsequent editors have treated these numerous subjects in an admirable manner, and the fact remains that the profession have appreciated the

convenience of having all of these subjects, falling under the general heading of Mercantile Law, treated together in one work.

It will be noticed that since the first publication of the work in 1834, there has on an average been a new edition published in every 7 years. There are about 6,300 cases cited in this edition. The last edition, revised by Mr. Smith, the author of the work, was the third edition, which was published in 1843, and it contains 693 pages of text and 274 pages of statutes. The present edition contains 865 pages of text, 538 pages of statutes, and 75 pages of index, together with an introduction of 83 pages. This introduction was first published in the tenth edition, and was written by Mr. John Macdonell, one of the editors of that edition; it has been said that this introduction contains the best account given in English of the history of the law merchant.

In this connection we would refer to a breezy treatment of the question,—“What is the Law Merchant?” contributed by John S. Ewart, K.C., to the *Columbia Law Review*, and published in vol. 3, p. 135.

The Imperial Merchant Shipping Act, which, of course, is in force throughout Canada, is re-printed in the appendix to this work and covers 115 pages.

From a Canadian standpoint, one of the most important contents of the book is “An Act for Codifying the Law Relating to the Sale of Goods,” being Imperial statute (assented to on the 20th February, 1894) 56 & 57 V. c. 71, and known as the “Sale of Goods Act, 1893,” which is reprinted in the said appendix. The text contains 87 pages of comment upon this Act. It is doubtful if the profession generally are quite appreciative of the value of this statute.

Any person who has struggled with Benjamin on Sales and has endeavoured, through the medium of that struggle, to arrive at an opinion upon some question connected with the law on sales of goods, should fully appreciate the advantage of having the law upon the point codified and de-

clared by Act of Parliament. For example, let us suppose that he is endeavouring to determine when the property in goods passes to the purchaser under a contract of sale; he will find that Benjamin treats of the matter in several chapters, which in an American edition covers 124 pages. On the other hand, he will find the law upon the subject condensed into ss. 16 to 19 of the Sale of Goods Act.

Remarks of a similar character may be made about the Partnership Act, 1890 (53 & 54 V. c. 39), which is reprinted in the said appendix. The heading of this statute is "An Act to Declare and Amend the Law of Partnership." Notwithstanding that it does to a certain extent amend the law of partnership, yet, for the most part, it is a codifying and declaratory statute. The work under review contains 60 pages of text commenting upon the provisions of this Act. This Act is not so useful as the Sale of Goods Act, because it does not so nearly exhaust the subject as the latter Act does. To the extent, however, that it does deal with the subject, it is very useful, even in Canada, as containing an authoritative statement of the law.

A. H. M.

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**Denton's Law of Municipal Negligence respecting Highways.** (James Herbert Denton, LL.B., of Osgoode Hall, barrister-at-law.) Toronto: The Carswell Company, Limited: 1906.

This will prove a welcome and useful addition to the number of Canadian law books. With becoming humility, Mr. J. H. Denton calls his monograph a "somewhat modest volume." Its size is a recommendation; one wearies of the portentous dimensions to which modern text books on law are growing. It is a genuine pleasure to meet with a compact, handy, well printed volume such as the present, where all the law on one particular subject is to be found, accurately stated and in an accessible shape.



The branch of law discussed is one which is of constant and practical importance, and one which from the nature of the case cannot be adequately treated in a text book dealing with municipal law in general. The law in all the provinces of the Dominion, whether the common or statute law, is here summarized, and, as must necessarily be the case when dealing with municipal law, American authorities in point are freely referred to. The following brief survey of the scheme of treatment will shew that Mr. Denton has managed to cover the whole of this particular field of law, and at the same time has resisted the temptation to which writers on negligence seem peculiarly exposed, to be too discursive.

Chapter 1 deals with the nature and extent of the liability at common law, and discusses the conflicting views as to whether municipal bodies are under a civil liability for non-repair at common law. After a short review of the leading English and Canadian authorities, the conclusion is arrived at that under these cases it is clear that for nonfeasance simply a municipal corporation is not liable at common law, and that any such liability must be created by statute.

In chapter 2 the distinction between misfeasance and nonfeasance, as shewn by the authorities in England, Ontario, and the United States, is pointed out, and definite conclusions are formulated in regard thereto.

At p. 21 of this chapter the decision of the Master in Chambers in *Armour v. Town of Peterborough* (1905), 10 O. L. R. 306, is criticized. This decision was as to the meaning of the word "non-repair," which the learned Master seems to consider is used in a special or technical sense and not in the popular sense, for which Mr. Denton contends. But the decision of Mr. Justice Meredith in *Plant v. Township of Normanby* (1905), 6 O. W. R. 31, seems to support and justify the Master's reasoning. In this case the cause of the accident was the failure to place a guard rail on the side of the road. The learned Judge says that the phrase "kept in repair" does "not mean that they should restore some

existing thing to the state in which it was before putting into disrepair, but it does mean that they shall keep such highways in such a condition of reparation as the reasonable demands of the traffic over them shall from time to time require, having regard to the corporation's means of performing such duty—an efficient state of repair having regard to all the surrounding material circumstances.”

Chapter 3 takes up the statutory liability in the respective provinces in which there has been legislation on the subject, and chapter 4 the remedies by way of indictment and mandamus for failure to repair.

Chapter 5 deals with streets, the general liability for non-repair, obstructions or excavations, noises frightening horses, non-removal of snow and ice, etc.

Township roads and highways, being in their character different from those in cities, towns, and villages, are separately treated in chapter 6, while sidewalks and crossings take up chapter 7.

Chapter 8 is devoted to bridges in all their legal aspects.

The law applicable to new modes of locomotion, e.g., bicycles and automobiles, not yet much canvassed in Canada, but daily becoming more important, is briefly considered in chapter 9, and the numerous American authorities are digested and reviewed.

A useful chapter (10) on the doctrine “*Respondeat superior*” follows; the liability of a corporation for the tortious acts of its servants or officers is summarized. The case of *Consolidated Plate Glass Co. v. Caston*, 29 S. C. R. 625, might usefully have been referred to on p. 214, as a leading authority in our courts on the oft-debated and difficult question as to whether a person is or is not a servant of the corporation. Mr. Denton has made use, with advantage, of some unreported cases as illustrations; one of these “pocket pistols,” the case of *Grimes v. Miller*, is to be found on p. 219. In this chapter the interesting series of modern cases

on the liability of a corporation for the casual or collateral negligence of independent contractors is briefly but intelligently referred to.

In chapter 11 the somewhat difficult question as to notice of an accident is well covered; the cases under the Workmen's Compensation for Injuries Act in Ontario are digested, and compared with those coming under the Municipal Act, the provisions of which latter Act seem more rigid than those of the Workmen's Act.

The perplexing distinction between remote and proximate cause is carefully handled in chapter 13, and numerous cases are cited.

Chapter 14 deals with contributory negligence, including such phases as negligence of children, which might perhaps have been more fully treated, identification, and the special functions of Judge and jury where the defence of contributory negligence is set up. But why is the victim of the accident in what Lord Campbell calls "the oft-quoted Donkey case" referred to as an "animal" merely? (p. 319).

Chapter 15 discusses the various statutory provisions by which a remedy over against the real wrongdoer is given to municipal corporations who have been found liable for damages caused by non-repair of highways, and gives helpful suggestions as to procedure in such cases.

Chapter 16, relating to evidence and damages, will be found an extremely practical and helpful one; it very carefully deals with some phases of the law of evidence which are commonly met with in actions against municipalities to recover damages for non-repair. Solicitors preparing cases for trial will find much assistance on all points in this chapter.

The appendix calls for special mention, containing as it does the reports of the cases of *Bathurst v. Macpherson*, *Pictou v. Geldert*, and *Sydney v. Bourke*, decided by the Judicial Committee of the Privy Council; the convenience of having these very important cases so accessible will be appreciated by the profession.

The fact that much thought and care have been bestowed upon the preparation of this book is evidenced by the summary of the result of the authorities cited, with which Mr. Denton usually closes the chapters; he has not been content with merely stringing together, in a perfunctory manner, a list of cases often apparently inconsistent and irreconcilable, but has done his best to give light and guidance to readers, who so often look for them in text books, but fail to find them. This feature of the book is greatly to be commended.

Mr. Denton claims, and apparently with justice, that the Canadian cases are all brought down to the date of handing the manuscript to the publisher, and that if any are missing, it is because they do not elucidate any question not previously or otherwise covered by authority. It is, however, submitted with diffidence, that the following cases might well have been referred to. (1) On pages 292 and 254, *McArthur v. Dominion Cartridge Co.*, [1905] A. C. 72, by which the case of *Dominion Cartridge Co. v. McArthur*, 31 S. C. R. 392, was reversed, and new light given in regard to some recent cases in the Supreme Court, some of which are cited on those pages, in regard to proof of the cause of an accident. (2) On page 262, in dealing with damages under Lord Campbell's Act, *Rombaugh v. Balch*, 27 A. R. 32, will be found very instructive on the subject of actions by parents to recover damages for the death of children. On the same page, it would be helpful to refer to *Clark v. London, etc.*, 21 Times L. R. 505, where discredit was thrown upon *Dalton v. South Eastern R. W. Co.* (3) The case of *Grand Trunk R. W. Co. v. Jennings*, 13 App. Cas. 800, as to the effect upon damages of life insurance payable in respect of the deceased person, would seem a useful case for citation. But these suggestions are not made in any fault-finding spirit; Mr. Denton has shewn a very commendable desire not to "pad" the book unduly by citing cases, and it may well be that he has designedly left these suggested ones out, as not, in his opinion, adding any force to or elucidating what he had already laid down.

The book is printed in very clear type and is attractively got up. Some trifling inaccuracies may properly be noticed for correction in the next edition: Bevan on Negligence (e.g., pp. 295, 298) should be Beven; Coleman v. Town of Ferlin (p. 20), should be Clemens; Geldart (p. 126), should be Geldert. These, however, are mere slips and can mislead no one.

The book is one that should be on the shelves of every solicitor.

N. W. HOYLES.

Toronto.

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**Freeman and Abbott's A. B. C. of Parliamentary Procedure:**—A Handbook for Use in Public Debate. By Wm. Marshall Freeman, Barrister-at-law, and J. Carson Abbott, M.B., M.S. London: Butterworth & Co.: 1906.

This is a very useful book. The joint authors are presidents of important debating societies or "local parliaments," and keen about points of parliamentary procedure. The simplification of a complicated subject is the main object of the book, and it is fully attained by the authors.

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## PERIODICALS AND PAMPHLETS.

**Columbia Law Review** (March and April, 1906). In the March issue: "The Free Church of Scotland Case," by Francis C. Lowell; "The Original Package Ineptitude," by William Trickett; "Definite and Indefinite Failure of Issue," by George H. Yeaman. In the April No.: "Conspiracy to Commit Acts not Criminal per se," by Amasa M. Eaton; "Demand on Principal before Action against Guarantor," by William P. Rogers; "Alexander Porter," by William Wirt Howe; "Protection by Equity of Corporate Names against Unfair Competition," by H. C. McCollom.

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**Harvard Law Review** (April, 1906): "Presumption of the Foreign Law," by Albert Martin Kales; "Liability in the Admiralty for Injury to Seamen," by Fitz-Henry Smith jun.; "Respondeat Superior in Admiralty," by Frederic Cunningham.

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**American Law Review** (St. Louis, Mo., March-April, 1906): "The Consent of the Governed," by Wilbur Larrimore; "The Dartmouth College Paralogism," by William Trickett; "Development of International Law," by Edwin Maxey; "Injunctions against Boycotts and Similar Unlawful Acts," by James Wallace Bryan; "The Growing Complexities of Legislation," by Don E. Mowry; "The Jury System," by S. M. Bruce; "The Abolition of Capital Punishment in Italy and San Marino," by Maynard Shipley; "The Growing Conception of Neutrality," by Hannis Taylor.

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**Albany Law Journal** (February, 1906): "Need of an International Conference," by Edwin Maxey; "Can a Court of Equity Circumvent the Law?" by Joseph M. Sullivan; "Should the Grand Jury System be Abolished?" by George Lawyer.

**New York State Library Bulletin** (November, 1905, No. 359). Subject Index of Law Additions.

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**South African Law Journal** (15th February, 1906): "Sir John Lawson Walton, K.C., M.P.," with portrait; "Notes on the History and Development of the Roman-Dutch Law," by J. W. W.; "The Roman-Dutch Law in Relation to Gambling and Wagering," by P. C. Gane; "Residence as a Test of Jurisdiction," by C. J. Ingram.

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**Chicago Law Journal** (March, 1906, Nos. 10, 11, 12, 13).

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**Chicago Legal News** (March, 1906, Nos. 1955, 1956, 1957).

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**Central Law Journal** (St. Louis, 30th March, 1906).

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**Law Students' Journal** (London, Eng., March, 1906).

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**Legislative Schemes of the American Medical Association**—A Conspiracy to Establish a Physicians' Trust: Reprinted from "The National Druggist," St. Louis, Mo., 1906.

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**Madras Law Journal** (January, 1906): "Execution of Decrees against Holders of Impartible Estates;" "Notes of Indian Cases;" "Summary of Recent English Cases;" "Jottings and Cuttings;" "Reports."

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**Madras Law Times** (January and February, 1906). This is a new publication, ably edited, and containing original articles, English news, reports of cases, etc.

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**Criminal Law Journal of India** (Lahore, 31st January and 15th February, 1906).

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**Punjab Law Reporter** (Lahore, January, 1906).

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**Calcutta Weekly Notes** (February, 1906, Nos. 13, 14, 15).

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## Supreme Court of Canada.

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EXCHEQUER COURT.]

[5TH MARCH, 1906.]

### THE "ALBANO" v. THE "PARISIAN."

*Ship—Collision—Crossing ships—Admiralty Rules, 1897, Rule 19.*

The S. S. "Parisian," making for Halifax harbour, came along the western shore, sailing almost due north to a pilot station, on reaching which she slowed down, finally stopping her engines. The "Albano," a German steamship for the same port, approached some miles to the eastward, sailing first, by error, to the north-east, and then changing her course to the south-west, apparently making for the eastern passage to the harbour. She again altered her course, however, and came almost due west towards the pilot station. When about a quarter of a mile from the "Parisian" she slowed down, and on coming within 8 or 9 ship lengths gave 3 blasts of her whistle, indicating that she would go full speed astern. The "Parisian" then, seeing that a collision was inevitable, went ahead full speed for some 200 feet, when she was struck on the starboard quarter, and had to make for the dock to avoid sinking outside. The "Parisian's" engines were stopped about 6 minutes before the collision, and a boat from the pilot cutter was rowing up to her when she was struck. At the time of the collision, about 5 p.m., the wind was light, weather fine and clear, there was no sea running, and no perceptible tide.

*Held*, IDINGTON, J., dissenting, that the captain of the "Albano" had no right to regard the "Parisian" as a crossing ship, within the meaning of Rule 19 of the Admiralty



Rules, 1897; and that the "Parisian" having properly stopped to take a pilot on board, and being practically in the act of doing so at the time, the "Albano" was bound to avoid her, and was alone to blame for the collision.

Judgment of the Court below affirmed.

*E. L. Newcombe*, K.C., and *A. G. Morrison*, for the appellants.

*W. Nesbitt*, K.C., and *W. B. A. Ritchie*, K.C., for the respondents.

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BRITISH COLUMBIA.]

[18TH MARCH. 1906.

JACKSON v. DRAKE.

*Account stated—Admission of liability—Promise to pay—Evidence to vary—Admissibility.*

On the dissolution of a partnership the partners signed a statement shewing an amount as due to the plaintiff as his share, and containing a declaration that "for the sake of peace and quiet and to avoid friction and bother," the plaintiff was willing to waive investigation of the firm's books and to agree that the balance as stated should be deemed to be the amount payable by the defendants to the plaintiff.

*Held*, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability which the parties had so signed.

In an action on the account stated, the defendants alleged that the plaintiff had agreed not to sue upon it, and that the document was merely intended to shew the amount which would be payable to the plaintiff at such time as collections might be made of outstanding debts due to the firm.

*Held*, that these contentions tended to contradict, vary, and annul the terms of the written instrument, and, consequently, did not constitute collateral agreements in respect of which parol evidence would be admissible.

Judgment of the Court below, 2 W. L. R. 379, reversed.

*W. J. Taylor*, K.C., for the appellant.

*E. Peters*, K.C., for the respondents.

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## NEW BRUNSWICK.

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### IN EQUITY.

[BARKER, J., 16TH MAY, 1905.]

## CARLETON WOOLLEN CO. v. TOWN OF WOODSTOCK.

*Municipal Corporations—By-law—Exemption of company from taxation—Discrimination—Ultra vires—Pleading—Judicial notice of statute.*

By statute the council of the town of Woodstock are empowered from time to time, at their discretion, to give encouragement to manufacturing enterprises within the town, by exempting the property thereof from taxation for a period of not more than ten years.

*Held*, that a by-law of the council exempting any company establishing a woollen mill in the town from taxation for a period of ten years was ultra vires, being a discrimination in favour of a company as against private persons engaged in the same business.

A bill alleging that the plaintiffs were entitled to exemption from taxation under a by-law passed by the defendants:—

*Held*, sufficient, on demurrer, without alleging that the by-law was authorized by statute.

*T. B. Carrell*, for the plaintiffs.

*D. McL. Vince*, for the defendants.

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[15TH AUGUST, 1905.]

JOHNSTON v. HAZEN.

*Evidence—Marriage registry—Legitimacy—Pedigree—Declaration  
by deceased parent.*

A. was married at St. Paul's Church, Halifax, in 1809. In the entry of the marriage in the church's marriage registry his name appears with the addition "batr"—a contraction for bachelor. There was nothing to shew by whom the entry of the addition was made, or that it was made in pursuance of a duty prescribed by statute.

*Held*, that the registry, while admissible in proof of the marriage, could not be received as evidence that A. had previously not been married.

To prove that C. was the legitimate son of A. by an alleged previous marriage, it was shewn that he resided for two or three years at A.'s home, previous to departing to learn a trade, and at a subsequent time for a few months; that he addressed him as "father," was treated as a member of the family, was treated by A.'s wife as his son, and by children by her as their brother; that after his removal to the United States he wrote letters to A., in one of which he informed him of his (C.'s) marriage; that subsequently to his death D., a son of A., corresponded with a son of C., during which he referred to C. as a half-brother; and that in an

oral declaration by A. in the hearing of a witness, who was a neighbour of the family, he referred to the christian name of his former wife, and to her personal appearance.

*Held*, that C.'s legitimacy had been proved.

*A. O. Earle*, K.C., and *J. R. Campbell*, for the plaintiff.

*C. N. Skinner*, K.C., for D. H. Anderson.

*S. Alward*, K.C., for Mrs. Sarah Latta.

*L. A. Currey*, K.C., for George Anderson.

*J. R. Armstrong*, K.C., and *W. B. Naylor* (of the Wisconsin bar), for the next of kin of Charles Anderson.

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[17TH AUGUST, 1905.]

#### GAULT v. MORRELL.

*Parties—Striking out and adding names—Assignment for benefit of creditors.*

Where, after a suit was brought for a declaration that stock-in-trade in possession of the defendants belonged to the plaintiffs, the defendants made an assignment for the benefit of their creditors, and their assets were insufficient to pay their liabilities in full, the names of the defendants were ordered to be struck out and that of the assignee added.

*M. G. Teed*, K.C., for the plaintiffs.

*J. B. M. Baxter*, for the defendants.

# THE CANADIAN LAW TIMES.

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MAY, 1906. .

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## SOME CHANGES IN PROCEDURE.

**A**MONG the books which I treasured was a very early edition of Blackstone's Commentaries on the Laws of England, four fat little volumes, written in beautiful English and full of information. For the "amusement and instruction of the student," the writer shewed how by amendment the stately fabric of English law had risen from the days of our British and Saxon ancestors. Faults he admitted it had, and had not concealed them, lest we should be tempted to think the fabric of more than human structure—defects chiefly arising from the decay of time and the rage for unskilful improvements.

It would be a humiliating commentary on the perfection of human wisdom to take up the first edition of Blackstone and compare the contents with the laws of English-speaking countries of the present day. Conditions of life are so much changed that the laws have necessarily changed to suit them. Society has been so transformed that the principles of law applicable to it have been completely modified if not reversed.

When Blackstone wrote, the possession of land meant wealth, riches and honour, and the laws of real estate, of descent, of landlord and tenant, in fact the whole of society, was adapted to such ideas. Now land has shrunk and does

not pay a landlord, and the mercantile law has developed a thousand-fold and is supreme; there is no primogeniture, the science of real estate law is swept away, and that of landlord and tenant is based on the requirements of workmen in factories.

Each of us finds something to amend in the law and custom in existence when we reach manhood, and it seems to be impossible for one generation to appreciate more than one side of a question. To use a homely simile, the human intellect is like a small blanket trying to cover a very large subject. No sooner is one corner fairly tucked up than it is found that perhaps more harm than good has been done in other directions. Each reformer may say, in R. L. Stevenson's words, that he "meant well, tried a little, failed much." In the flux and reflux of progress, some of the evils of the olden time are washed from an exposed situation and re-deposited in another place, and in at first a quite unnoticed form.

These remarks are trite, but allow me to shew that in the practice of law the changes which have been made are accompanied by mixed results. The practice, according to Blackstone, had been consolidated in the time of Edward I., and had, when he wrote, become most elaborate systems of pleading. The object aimed at was the discovery and statement of the real fact in dispute, and the modes adopted were splendid results of intellectual acuteness. But they became too elaborate, and when used by unscrupulous and able men were expensive and dilatory. Gradual changes were made, but the tide was too strong to be met by amendments. A complete reform was decided on; the issue should be arrived at not so much by pleading, but by production of documents and the examination of the litigants. The result has been that instead of precise statements in unequivocal language, we have now a general allegation couched in unconventional, sometimes very homely, English, from which a grievance may be deduced, and it is only brought out with clearness by the

contents of the defence and the results of the inquisition into the papers and recollections of the parties to the action.

Under the system which was in vogue in Blackstone's time, there were various stages in the litigation at which it might be ended. Now-a-days there are no summary endings. An unsuspected or undwelt-on cause of action may be developed by the elaborate routine, and by a necessary amendment an issue can be framed and brought to trial. But bills of costs still exist, and are larger than ever, and an action drags along quite as slowly as it ever did. Defects develop as they did from Edward the First's time, and possibly the next generation may see that the old system was not so bad after all.

Perhaps the greatest change in the attitude of the public mind, and the professional mind, too, has taken place in treating of crimes. I can remember hearing the genuineness of an old deed discussed by an elderly gentleman who had known the attesting witness. "Yes," he said, "it was true he was a wild young fellow, but forgery—he would never have done that; forgery was a hanging matter in those days." What is forgery now? A mere irregularity to which little importance is attached. Of old the wrong done the injured or murdered, were serious matters. The punishment was serious, too, and though often cruelly severe, was not so savagely so as it became later. Concern for the criminal began with the close of civil wars and a settled dynasty. In George the Second's time, houses of detention and reformation were established, and were followed by transportation to Botany Bay.

Much hardship and much harm existed doubtless in those times, yet more good was attempted than is generally supposed. Indeed, I doubt if there was so much heartless abandonment of failures as takes place now in the case of remittance men, as where the trials for minor offences in Britain are adjourned in order that the delinquents may be shipped off to Canada by their relatives under a new and revised system

of transportation. What we need to guard against in the immediate future is the relaxation of the procedure after an arrest and up to the conviction of a criminal, and perhaps even beyond it. Our customs in such matters must, like our treatment of convicts, be largely influenced from the United States. Hitherto they have been just and certain.

I cannot think of anything better than a conversation I had some years ago with a very able man. Like so many of his countrymen, he had played more parts than Shakespeare enumerates. He had been in his day a leading lawyer in his State, and had filled ably the part of prosecuting attorney. At the time he held the stage as editor of "The Hot Blast." After getting a short account of our simple procedure, he sighed and said: "Yes, I understood that your system was effective, but in every stage we are hampered. First a homicide occurs. We don't call it murder. An inquest is held, and a citizen is arrested. He is brought before an examining magistrate and remanded—why?—because he is a citizen, and innocent till proved guilty, and his attorney wants a reasonable delay, which is meant to be most unreasonable. At last he is committed for trial. Then applications are made for discharge under habeas corpus, and by this means every witness is tested by affidavit, and the strong and weak points of the case for the State are fully known, and, as the applications are made to the Judge who will try the case, his views become known in advance. In this way the manufacture of evidence is facilitated and economized. If the Judge's views are very pronounced and his term is nearly over, it is not very difficult to have the case adjourned so as to come on before his successor. At any rate, everything is done to delay so as to have the outrage fade from the memories of the witnesses and the people. At last the prisoner is tried and convicted, and then begins the game of motions to quash, arrest judgment, new trials, and so on. Let us say there is a new trial, a not unusual occurrence. By this time there will be new State officers, and the new prosecuting attorney has



to go through the mass of papers. Let us suppose the conviction and sentence finally given. A new system of appeals begins, this time to the politicians and to the Governor. The sentence is in the end commuted to imprisonment, and soon a new Governor releases the prisoner. Can you wonder that in Chicago there are more murders than in all Canada, and practically no convictions carried out?"

This description shewed me a number of rocks ahead. We have fortunately so far steered clear of them on the whole, and if a uniform system could be adopted in the States, there would be a chance for better things for the victims of violence. There are three things in the criminal procedure of my native country which are generally pooh-poohed, but which I think far superior to the substitutes which we still use in common with most English-speaking communities. First, an accused has a right to run his hundred days. That grew up in the days of the old gaols and arbitrary detentions. By a notice, the Crown is obliged to bring an accused to trial within one hundred days of arrest or liberate him. Now when accused persons manage to have the final trial postponed in some States for years, the Crown should be able as well as the accused to give some similar notice. The second is a jury of fifteen, whose verdict shall be the agreement of a majority. And the third is the verdict of not proven. To compel twelve men to agree is a barbarous method, unjust to the injured as a rule, and unjust to those of the jury whose conscientious conviction may be that the accused is innocent or guilty, but that the evidence does not sufficiently prove the fact. Blackstone pointed out that the verdict may be either general, that is, guilty or not guilty, or special, in the latter case setting forth all the circumstances of the case and praying the judgment of the Court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at law. This is not the same as not proven, but shews the desire to avoid a general verdict to have been deeply rooted.

I said that the old evils may grow up in an unnoticed form. The change of society has arrayed nations, now great industrial communities, into two camps, the employers and the employed. In the latter has grown up a system of government which enforces the decrees of its Vehmgericht with a remorseless cruelty as bad and ruthless as the old tyranny of pit and gallows. The loose administration of the criminal law is doubtless responsible to a large extent for this state of affairs. Andrew D. White, the former president of Cornell, stated there recently that in the course of every year more murders were committed in the United States than in all other civilized countries. He attributed this state of things largely to the maudlin sentiment which possessed the people and cost annually 9,000 lives. More murderers were in each year punished by lynching than by the regular course of the law. Can it be a matter of wonder that the decrees of a union or the orders of a walking delegate are obeyed with slavish dread? Whatever an employer may wish, no union or non-union man has leave to toil. The ordinary working man is deprived of his right to his life, liberty, and the pursuit of happiness; if he dares disobey, it is with the knowledge that he will probably be maimed or killed, that his children dare not go to school, his wife will be denied food, and his house will be burnt down. The worst of it is that he also knows that the law is powerless as against the lives and fortunes of his judges, and that their executioners scoff at the idea of their being punished. The majesty of the law is a by-word. Blackstone argues if judgment were to be the private opinion of the Judge, men would be slaves to their magistrates, and would live in society without knowing exactly the conditions or obligations it lays them under. And, besides, that certainty prevents oppression on the one hand, as on the other it stifles all hopes of impunity. The protection of the liberty of Britain, he concludes, is a duty which we owe to ourselves who enjoy it, to ancestors who transmitted it down, and to posterity who will claim at our hands this the best birthright and noblest inheritance of mankind.

It is the old, old story. The blanket has been moved and laid bare a deposit of the old evils in a new form. I make no pretence in this short essay to do more than to suggest the subject.

Tennyson, in his well known poems, which are already going out of date, revelled in the era of settled government and its attendant blessings. It was one such halcyon time; it was the lull between the storms. Lately I was struck by an unexpected parallel. No one would think of the times of Charles II. as like our own, and still less that Rochester, the profligate Rochester, was in any sense a statesman. But this is what he wrote, and it sounds more modern than Tennyson's lines as a laureate:

All this with indignation I have hurled  
At the pretending part of this proud world,  
Who, swollen with selfish vanity, devise  
False freedoms, formal cheats, and holy lies,  
Over their fellow fools to tyrannise.

GEO. MARTIN RAE.

Toronto.

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## REMINISCENCES OF OSGOODE HALL, 1875-1900.

A great English writer has lived among us for the last forty years. It is not necessary to be in accord with all his opinions to acknowledge the high standard he has set up for all who are able to influence public opinion; and at the same time to admire his courageous and unflinching enunciation of what he deems wholesome truths, however unpalatable to his readers.

In one of his earlier writings, if we rightly remember, he spoke of this country of his adoption as "rough, raw, and democratic."

The two first of these epithets express an inevitable defect of a new country. Under such conditions it is a relief to turn here to two institutions from which time has removed most of the roughness and rawness of their youth. They are already enshrined in the grateful memories of many of our best known and most useful fellows. One of them is Upper Canada College—the other is Osgoode Hall.

It is of the latter that we propose to rescue from oblivion some of those memories which gave interest and colour to the lives of those who were eye witnesses of the actual facts, of which the brief narration may be of interest to their present and future successors.

It is not intended to go back to pre-historic times, before even the Common Law Procedure Act had been introduced: and when any such measure as the Judicature Act would have seemed the "sickly dream" of some dyspeptic practitioner. Even as to this, however, it may be worth while to make an exception in favour of the following story, because it illustrates the inexhaustible versatility, even in the first stages of his great career, of one whose name is imperishably linked with that of his country.

Forty years ago there was still a tradition lingering among the senior members of the Kingston Bar that in the days of special demurrers Sir John A. Macdonald once moved successfully against his opponent's pleading no less than fourteen times. It was thought by many well qualified to judge that "John A." was the only lawyer of his time whose off-hand opinion was of any value.

No doubt it is always easy (perhaps too easy) to praise those who have joined the great majority. The dead have no rivals. Yet at the risk of being set down as a "laudator temporis acti," we will speak of some of those, no longer amongst us, who during the last quarter of the 19th century administered law and justice (so far as they were compatible) in this province.

First in order of antiquity was the Court of Queen's Bench. Of this the massive R. A. Harrison was Chief Justice for the brief period of three years, 1875-1878. He had exalted and at the same time wide views of the scope of his jurisdiction; and on the first occasion of holding the assizes at Toronto he delivered a charge to the grand jury which could rightly be termed encyclopædic. This gave rise to many harmless pleasantries, of which the following is a fair specimen.

Then, as now, some newspapers answered questions addressed to them by their subscribers. Shortly after the above mentioned deliverance one of these papers was asked, "what was the best material for farm gate posts." The editor in reply regretted that he did not know; but comforted the inquirer with the assurance that he would soon know all about it, as Chief Justice Harrison was about to take the Toronto assizes, and no doubt in his charge would go fully into this among many other important matters.

In November, 1877, the death of Mr. Draper caused a vacancy in the Chief Justiceship of the Court of Appeal. This was at once filled by the appointment of one who is still affectionately remembered as "Tom Moss" by those who were

fortunate enough to know him. In some ways his career resembled that of Lord Bowen. Both were men of singularly winning manners; both had had a most distinguished university record; both were prematurely taken away just when they had attained a situation adequate to the full display of their great powers. The early death of Chief Justice Moss at the age of forty-four was the greatest loss the judiciary of this country has ever experienced. Even now he would not yet have completed the threescore years and ten which are the ordinary limit of our effective existence.

The vacancy in the Court of Appeal caused by the promotion of Mr. Moss was filled by Mr. Morrison from the Queen's Bench. His seat in that Court was amply filled by John Douglas Armour. A year later, on Mr. Harrison's death, Sir John Hagarty was transferred to the Queen's Bench, and Sir Adam Wilson took the Chief Justiceship of the Common Pleas. Sir Adam's place in the Queen's Bench was filled by Sir M. C. Cameron. In this way a Court was constituted, the memory of which will never fade from those who practised before that great tribunal. For six years (1878-1884) it was the constant scene of high judicial conflict and debate. The Judges were all men of great legal knowledge and of strong opinions. When the regular batch of thirty or forty judgments was delivered at the end of term, there was usually a dissenting judgment in at least half of the cases.

This result was easily forecasted by the almost ceaseless argument between the Chief Justice and his learned brothers, so keen and at the same time so enlivened and relieved by appropriate jest and repartee, that counsel not otherwise engaged came into the Court as spectators, to be at once amused and instructed and to enjoy the skirmishes derived from the contests of the judicial gladiators. One of these characteristic episodes took place on an argument to quash a conviction under the Lotteries Act or some similar statute. For legislation of this kind neither the Chief Justice nor the senior puisné had any sympathy; and the counsel who

was supporting the conviction had a hopeless task. The Chief Justice, with his incisive wit, poured gentle ridicule on all such paternal legislation. To all of this Mr. Armour cordially assented. "Such laws," he said, "are utterly useless. Measures of repression always produce a result contrary to what was intended." And then, as if to put the finishing stroke to his argument, he said, "Why I myself was brought up in a very strict home."

Quick as thought the Chief Justice threw himself back in his chair, raised both hands high over his head, and exclaimed in those well known tones, "I am sure I should never have thought it." Then came a hearty burst of laughter from the Bench, in which the others present took a more subdued share with all proper decorum.

In 1884 Sir John Hagarty succeeded Mr. Spragge as Chief Justice of the Court of Appeal, Sir Adam Wilson became Chief Justice of the Queen's Bench, and Sir M. C. Cameron went as Chief to the Common Pleas. His place on the Queen's Bench was taken by Mr. O'Connor, who died while taking the assizes at Cobourg in the autumn of 1887.

In this stage of its existence there was no longer the former brilliancy, though the work was not less solid. But all who had seen it under Sir John Hagarty's reign would agree that of the old Queen's Bench it might truly be said:

"It was a Court, take it for all in all,  
We shall ne'er look upon its like again."

One amusing incident of the later period still lingers in the memory. In those days Judges sat in appeals from their own judgments. And there came a summer's day when one of Mr. O'Connor's decisions was being attacked. The argument was lengthy, and in the afternoon the learned Judge, to whom it was, as the Scotch say, "cauld kail made het," sought refuge in sleep. The end came at last. The Chief leaned over to Mr. Armour and they concurred in dismissing the appeal. Sir Adam Wilson announced the result in due form, thinking it perhaps unkind or unnecessary to arouse

their slumbering colleague. Just as the Chief Justice finished Mr. O'Connor awoke. With the readiness of an old politician he grasped the situation, and gathering himself together said with great gravity: "All I think it necessary to say is that I have heard nothing this afternoon to lead me to change the opinion I expressed at the trial." The intense amusement of all present, and not least of his colleagues on the Bench, can be imagined. Even the unsuccessful counsel was mollified. The ready wit of the Judge as he shook off "dull sloth" and rose at once to the occasion, amply atoned for the momentary vexation of defeat.

In 1887 Sir Adam Wilson retired, and died four years later. This opened the way to Chief Justice Armour, who for thirteen years filled the place. He had now come to his own, to use a well known phrase, and all his powers were bent to carry out the principle of the Judicature Act as expressed in Rule 312, viz., to do everything "necessary for the advancement of justice, determining the real matter in dispute, and best calculated to secure the giving of judgment according to the very right and justice of the case."

The Chief Justice was not always satisfied to dispose of a case on the material submitted. Very frequently it was supplemented at his request. All who knew him would concur in the opinion of one who said: "If I was to be tried for an offence of which I was innocent I would sooner be tried before Chief Justice Armour than by any other Judge; but if I was guilty I would know my fate was sealed." He would control the proceedings in a criminal trial as was done by such Judges as Cockburn, C.J., and Hawkins, J. On one occasion the rightful acquittal of a prisoner charged with murder was due to his watchful care of the prisoner's rights and his determination to save him from an undeserved condemnation. A prominent illustration of the other side is to be found early in his judicial career. He presided at the first trial of those implicated in the celebrated Bid-dulph feud. His charge to the jury against the prisoners



was absolutely convincing to any competent judge of evidence. When in spite of that terrible marshalling and application of the evidence, the jury disagreed, it was plain that no conviction need be looked for on a second trial. When it took place the result was an acquittal.

In July, 1900, Mr. Armour became Chief Justice of the Court of Appeal. In November, 1902, he was transferred to the Supreme Court, after just a quarter of a century of judicial work.

The end of his career was almost tragic. He died in England in the summer of 1903, where he had gone to act as one of the arbitrators in the settlement of the question of the Alaska boundary.

We all felt that a better choice could not have been made; and that it was to us an irreparable loss that his voice could not have been heard before the final award. His opinion would have carried such weight that if he had acquiesced in the view of the majority it would have been acknowledged that this was the proper inference from the evidence. His portrait in the Hall will hand down to future generations the outward semblance of his commanding personality. The characteristic pose to the men who knew him not may suggest almost aggressive self-consciousness. But those who did know him were firmly persuaded that these were no part of the real man. Underneath these outward blemishes lay a profound sympathy with suffering, and a strong desire that as far as in him lay the right should prevail and justice be done to the desolate and oppressed. He was not at all times careful to repress or at least tone down his scorn of what he thought hypocrisy or the inconsistencies of loud profession. But those who came closest to him felt confident that he might have successfully claimed the oriental title of "Protector of the Poor," and that carefully concealed from the eyes of the unsympathetic or indifferent there was a real readiness to lighten the burdens of the careworn and unfortunate.

His ear was open equally to the juniors as to the senior members of the Bar. It was not altogether in jest that, on being asked to allow a case to stand because of the absence of the leading counsel, he said to the junior: "Oh, go on Mr. A. You will do very well, I am sure. I believe in some courts they wait for the arrival of the heavy ordnance. But for my part I prefer the lighter and more effective pieces." He frequently said that men ought to be encouraged to come from the country and argue their own cases, because they took more interest in them and got them up better.

Sometimes when a case comes up in which there is a marked difference of judicial opinion, as for instance in *McVity v. Trenouth*, 36 S. C. R. 455, the words of the poet are unconsciously repeated:

"Oh for the touch of a vanished hand  
And the sound of a voice that is still."

There can be nothing better wished for this and every other English-speaking country than that they may always have Judges such as those of whom we have now made mention. There were among them many distinguished men, and not the least distinguished of these was John Douglas Armour.

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## RECENT CASES FROM THE TIMES REPORTS.\*

**Adulteration.]**—It is held in *Suckling v. Parker*, 22 T. L. R. 357, that the fact that the part of a purchased sample retained by the purchaser pursuant to the provisions of the Sale of Food Act (see R. S. C. c. 109, s. 9) has from natural causes become bad and cannot be produced intact at the hearing, is not a bar to a conviction.

**Company.]**—Under the special articles of association in question in *Automatic Self-Cleansing Filter Syndicate Co. v. Cunningham*, 22 T. L. R. 378, the directors were not, it was held, bound to carry out a sale of the company's property although approved of by a majority of the shareholders.—In *Fuller v. White Feather Reward*, 22 T. L. R. 400, a mode of reconstruction was attacked but was upheld. A company had by its articles of association power to sell the undertaking for shares in other companies fully or partly paid up. A sale to a new company for partly paid shares to be taken up by the vendor company or its nominees and distributed among its shareholders or sold for those who did not wish to take them, was held to be valid.

**Contempt of Court.]**—The application in *In re Townshend*, 22 T. L. R. 341, to commit for contempt of court, failed because the newspaper editor proceeded against was able to shew that when he published the material complained of he had no knowledge that proceedings were pending, the existence of that knowledge being, the Court of Appeal holds, essential. In lunacy proceedings two doctors had examined and made reports as to the condition of a patient, and after

\* Including the cases in No. 20, volume 22, week ending April 3, 1906.

these proceedings had terminated the reports were published in the paper in question with comments upon them. Before publication, however, other proceedings had been instituted in which the reports were being used, and the publication and comments were unsuccessfully complained of.

**Copyright.]**—Exchange Telegraph Co. v. Howard, 22 T. L. R. 375, does not deal with copyright in the statutory sense, but with the right of property in information obtained with labour and expense for commercial distribution. The plaintiffs and defendants were rival news agencies, and the defendants were restrained from surreptitiously obtaining and copying cricket scores prepared by the plaintiffs, the fact of the copying having been proved by the appearance in the defendants' publications of errors intentionally made in the plaintiffs' scores.

**Deputy Judge.]**—It is held in *The King v. Lloyd*, 22 T. L. R. 390, that under the County Courts Act, 1888, s. 18, (see the similar section of the Division Courts Act, R. S. O. 1897 c. 60, s. 23), a Judge may in case of illness or absence appoint separate deputies to act for him concurrently in separate districts within his jurisdiction.

**Divorce.]**—The judgment in *Bater v. Bater*, 21 T. L. R. 517, noted 25 C. L. T. 381, has been affirmed by the Court of Appeal: 22 T. L. R. 408: the point decided being that an English Court will recognize the validity of a foreign divorce, binding in the country where the parties were domiciled, even though the grounds upon which the divorce was granted would not be sufficient to obtain a divorce in England, and even though a fact which would have led to the refusal of the divorce (a prior refusal on the ground of the applicant's adultery) was suppressed when the application was made.

**Guaranty.]**—A useful point is dealt with in *Hatch v. Weingott*, 22 T. L. R. 366. The defendant, upon his son being taken into the employment of the plaintiffs, wrote to

them holding himself "responsible for (the son's) fidelity whilst he remains in your employment up to the sum of £250." The son stole goods and was prosecuted and convicted, and pursuant to a restitution order a large portion of the goods was recovered. It was held that the plaintiffs were entitled to deduct from the proceeds of these goods the costs incurred by them in connection with the prosecution, and were not bound to give the defendant credit on his guaranty for the full amount of the proceeds.

**Husband and Wife.]**—It is unfortunate that the appeal to the House of Lords in the important case of *Paquin Limited v. Beauclerk*, 21 T. L. R. 361, noted 25 C. L. T. 271, sub nomine *Paquin Limited v. Holden*, has resulted in an equal division of opinion: 22 T. L. R. 395. The decision of the Court of Appeal that if a wife contracts in fact as agent for her husband she escapes personal liability even though the person contracting with her does not know that she is contracting as agent, or even that she is a married woman, has thus been affirmed.

**Implied Contract.]**—*Quis custodiet custodes?* is the question which the unfortunate squabble between Lord Justice Moulton and his step-children, ventilated in *In re Moulton*, 22 T. L. R. 380, suggests. The case is a good example of the principle that an obligation to pay for maintenance is not to be implied between child and parent or other near relations; in this case step-children living with their step-father, whose claim that he was entitled to charge as against moneys received by him as trustee on their behalf the cost of their maintenance, was disallowed. An incidental point in the case is also of some interest. The trial Judge expressed an adverse opinion as to the veracity of some of the disputants. The Court of Appeal thought that he was astray in his view as to the onus, and therefore that his strictures as to the witnesses could be disregarded, as he had looked at

their evidence from a wrong point of view. In other words, a witness is or is not telling the truth according as the tribunal passing upon his evidence decides upon which side the merits are.

**Landlord and Tenant.]**—Under a covenant by a lessee that she would not use, or permit the premises or any part thereof to be used, for any illegal or immoral purpose, it was held in *Prothero v. Bell*, 22 T. L. R. 370, that there was no “permission” by the lessee of an act of the kind complained of merely because she had in making a sub-lease not exacted a similar covenant from the sub-lessee. But a further covenant by the lessee that no act, matter, or thing should at any time be done on the premises which might or tend to the annoyance of the lessor, was held to have been broken because of acts of the sub-lessee in which the lessee had no personal concern.

**Payment into Court.]**—*Brown v. Feeney*, 22 T. L. R. 393, is useful as recognizing the principle that money paid into Court may be dealt with by the Court under its general inherent jurisdiction in such a way as is most consistent with the rights and interests of all parties concerned. The money in question had been paid into Court by the defendant in a libel action in satisfaction of the plaintiff’s claim. The plaintiff did not accept it in satisfaction, and while the action was proceeding the defendant died. The liability having thus come to an end his executors claimed the money, but the Court ordered it to be paid to the plaintiff, although the case did not come within the special rules.

**Power of Attorney.]**—A power of attorney given by tenants for life and tenants in remainder authorizing the attorney to manage the estate, collect rents, and pay certain debts, does not, it is held by the Judicial Committee in *Frith v. Frith*, 22 T. L. R. 388, confer such an interest upon the attorney as to make the power irrevocable.

**Prescription.]**—As an alternative to the claim set up in *Ramsgate Corporation v. Debling*, 22 T. L. R. 369, that by ancient custom the inhabitants of Ramsgate had the right to place chairs on a part of the sea-shore, the legal title to which was vested in the corporation, it was contended by those exercising it that at all events the right had been acquired by prescription. But as to the alleged custom the evidence was not sufficient, and as to the prescriptive claim the legal answer was that a right such as was claimed was a right in gross, and therefore not possible of prescriptive acquisition.

**Railway.]**—The short point as to corporate powers of a railway decided in *Attorney-General v. Mersey Railway Co.*, 22 T. L. R. 353, is that without express authority the running of omnibuses for the purpose of carrying passengers to and from their stations is not incidental to or consequential upon the company's business, and therefore is *ultra vires*.

**Trade Union.]**—To enable the summary jurisdiction of a magistrate, under the Trade Union Act, 1871, s. 12 (R. S. C. c. 131, s. 12), as to the withholding of books, etc., to be exercised, there must be something more than a mere civil dispute, something in the nature of misconduct. Therefore in *Madden v. Rhodes*, 22 T. L. R. 356, where there was a bona fide dispute between the central executive and branch officials, an application in respect of the withholding of books was dismissed, and the parties were relegated to the civil forum.

**Trespass.]**—*Fielden v. Cox*, 22 T. L. R. 411, shews the absurd length to which people will go in attempting to protect imaginary rights. The plaintiff, who was the owner of large preserves through which a highway ran, made an unsuccessful effort to obtain an injunction restraining some lads from using lamps on the highway for the purpose of catching moths, the result being, the plaintiff alleged, the disturbance of his pheasants in the adjoining coverts. He also failed in his attack based upon trespasses committed in

the pursuit of moths on his own lands, these trespasses having been very trivial and without any intention to infringe his rights.

**Will.]**—The scope and effect of a “name and arms” clause are considered in *In re Drax*, 22 T. L. R. 343.—The judgment in *Villar v. Gilbey*, 21 T. L. R. 561, noted 25 C. L. T. 441, as to the right of a child *en ventre sa mère* at a named period, has been reversed by the Court of Appeal: 22 T. L. R. 347. Unless there is something in the will to indicate a contrary intention, no distinction is to be drawn between a child born at a particular time and a child at that time *en ventre sa mère* and subsequently born alive. This principle was applied to a provision that a child born in the testator’s lifetime should not take a larger interest than a life estate, thus cutting down an interest instead of, as in most cases where the point has arisen, enlarging it.

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## THE LATEST ONTARIO DECISIONS.\*

**Account.]**—Under a judgment or order to account the Master may inquire into, adjudge, and report upon settled accounts—and this whether the judgment is by consent or otherwise, and whether the matter be referred to in the pleadings or not; and the audit of an executor's accounts by a Surrogate Judge under R. S. O. 1897 c. 59, s. 72, is to be regarded as a settlement of accounts: *Gibson v. Gardner*, 7 O. W. R. 474.

**Arbitration and Award.]**—An appeal in *Re Village of Beamsville and Field-Marshall* from the order of Teetzel, J., 7 O. W. R. 276, noted ante 213, was dismissed by a Divisional Court: 7 O. W. R. 545.

**Assessment and Taxes.]**—A large storage battery weighing several tons, resting by its own weight on the floor of a building of which the plaintiffs were lessees from the Crown, which building was specially put up for it, and in which the items for its construction were specially put together, and connected by two cables with the trolley wire and tracks of the plaintiffs' electric railway system, of which it formed an important part, was held by Teetzel, J., in *Ottawa Electric Co. v. City of Ottawa*, 7 O. W. R. 481, to be part of the real estate as between vendor and purchaser, mortgagor and mortgagee, and the owner and a rating municipality, so as to render the plaintiffs liable to assessment for and payment of taxes thereon, notwithstanding an agreement with the defendants by which the plaintiffs' franchises, tracks, rolling stock, and other personal property used in and about the

\* Short notes of the most important cases in Volume VII. of the *Ontario Weekly Reporter*, Nos. 11, 12, 13, 14, pp. 425 to 604, inclusive.

working of the railway should be exempt from taxation and all other municipal rates; and it made no difference that the fee of the land leased was in the Crown: R. S. O. 1897 c. 224, s. 7, s.-s. 2.—The decision of the Court of Appeal in *Re International Bridge Co. and Village of Bridgeburg*, 7 O. W. R. 497, on appeal by the company under s. 76 (6) of the Assessment Act, 4 Edw. VII. c. 23, from a decision of a board of County Court Judges upon an appeal by the company from the decision of the Court of Revision of the village in respect of the assessment of the International Bridge, is important as deciding that under s. 43 of the Assessment Act the conclusions to be drawn from the former decisions no longer apply, the proper rule being that the assessor should put himself in the place of an appraiser, and place “such actual cash value upon the designated portion of the structure as would be reasonable and proper in a dealing between two companies on equal terms with one another as regards all powers, privileges, and franchises, enabling them to make a beneficial use of the whole. Whether a purchasing company answering the description is or can be found is not material.” Having regard to *Toronto R. W. Co. v. City of Toronto*, [1905] A. C. 809, the Court refused to consider whether the bridge in question was properly assessable under s. 43, and whether it was subject to business assessment, and, if not, to be assessed for income.

**Bankruptcy and Insolvency.]**—The circumstances of *Craig v. McKay*, 7 O. W. R. 507, were such as to raise the one time much discussed question whether, before the insertion of the words “prima facie” after the word “presumed” in s.-ss. 3 and 4 of s. 2 of R. S. O. 1897 c. 147, the presumption thereby provided was an irrebuttable one, and an appeal by the plaintiff from the judgment of Falconbridge, C.J. (6 O. W. R. 160) was dismissed by the Court of Appeal, who held that the presumption was rebuttable, and that on the evidence the defendants, when they took the mortgage in question, had no reason to suppose their grantor was insolvent.

**Bill of Exchange.]**—The question involved in *Canada Permanent Mortgage Corporation v. Briggs*, 7 O. W. R. 443, arose out of the deposit to the credit of a savings account of the defendant with the plaintiffs of a sight draft on England. No charge was made by the plaintiffs for exchange or discount. The defendant's contention was that the plaintiffs were not entitled to recover because the transaction was a loan on the security of a bill of exchange, which the plaintiffs by their Act of incorporation were not at liberty to make, and was therefore illegal and void; but a Divisional Court held that if the defendant's contention as to the nature of the transaction were correct, they were parties to what amounted to a breach of trust, and must return the trust property which they had no right to retain.

**Club.]**—An appeal in *Rowe v. Hewitt*, 7 O. W. R. 543, from a judgment restraining the defendants from taking any action depriving the plaintiff of his rights as a member of the Ontario Hockey Association, was allowed by a Divisional Court for reasons stated in the judgment of Boyd, C.: "It must appear, to give jurisdiction to interfere by way of injunction to restrain the expulsion of a member of a society or club, that the plaintiff, as member, has some right of property for the protection of which the Court will interfere by this method of relief. If it be no more than this, that paying a subscription entitles one to the use and enjoyment of the rooms and property and effects of the society, without any right to participation in its assets if distribution ensued, then the right is only a personal one, and, if the expulsion is wrongful or injurious, the person injured has his remedy in seeking damages; this is the highest measure of relief which the Court will give in the absence of a right of property: *Baird v. Wells*, 44 Ch. D. 661."

**Contract.]**—*Northern Elevator Co. v. Lake Huron and Manitoba Milling Co.*, 7 O. W. R. 484, in form an action for conversion, involved the question of the price to be paid by

the defendants for certain wheat. The plaintiffs' offer was 3 over New York July, which they contended, by a clearly defined and well understood usage in the trade, fixed the cash price of the wheat bought by the delivery of the New York wheat to the vendor or of an order to purchase the same on the purchaser's account. The defendants' acceptance was qualified by the statement "Price fixed date of shipment or sooner." Falconbridge, C.J., held that evidence shewing a custom as alleged to exist at New York, Winnipeg, Chicago, and Minneapolis, was not proof of universal custom, and more especially as the defendants appeared in the transaction as millers and not as warehousemen or speculators. Furthermore, that the reply of the defendants annexed a new term, and the plaintiffs had not the right to disregard it, and should have inquired what was meant by it, as the words must have been intended to have some meaning.—The facts disclosed by the evidence in *McLeod v. Lawson and McLeod v. Crawford*, 7 O. W. R. 519, may be shortly said to be as found by Mabee, J., as follows:—Thomas Crawford, Donald Crawford, Murdoch McLeod, and John McLeod were co-owners (not co-partners) in a mining claim, the lease of which was taken in the name of Thomas Crawford as trustee for the other three, of a quarter interest each. The defendant Lawson, having knowledge of the value of the claim which he did not disclose, entered into an agreement with Thomas Crawford for the working of the claim to the 31st August, 1905, when at his option Lawson was to have the privilege of entering into a "new agreement." At this time Lawson had no notice or constructive notice of the claims of the other three. Donald Crawford and Murdoch McLeod became aware of this arrangement, and were disposed to ratify it, but, learning of the value of the discovery before Lawson was made aware of this position or changed his position in consequence thereof, repudiated it, and brought these actions to establish their rights. It was held that this agreement gave Lawson no title to the property, but only a license to take out ore, and, even if it did

amount to a sub-lease, it expired on the 31st August, and Thomas Crawford's agreement to renew could not be specifically enforced against the other three co-owners, nor was the Statute of Frauds an answer to this claim, the statute not applying to the case of the creation of a trust. There was no fraud on the part of Lawson in not disclosing what he had learned of the value of the claim.

**Criminal Law.]**—On a case stated in *Rex v. Brooks*, 7 O. W. R. 533, the Court of Appeal quashed the conviction of the defendant on the ground of the reception of improper evidence (the evidence of certain witnesses at a previous trial of another accused), the only justification for which was a letter written by counsel employed by the defendant offering to admit the evidence of certain witnesses, as it appeared to the Court, as a concession to obtain a postponement of the trial. Although the prisoner was represented by counsel who did not object to this method of proof, the Court held that it was the duty of the County Court Judge before whom the case was tried to see that proper evidence only is adduced.

**Crown Patent.]**—In *Drulard v. Welsh*, 7 O. W. R. 575, an appeal from the judgment of Britton, J., 7 O. W. R. 87, was dismissed by a Divisional Court. The action was for trespass and declaration of boundaries of land, now a part of the city of Windsor, Ontario, which was originally settled by a colony of habitants under the French régime. The Chancellor gives an elaborate and interesting historical review of the land tenure, with special reference to the effect of a Crown patent upon rights previously acquired.

**Damages.]**—In *Wood v. London Street R. W. Co.*, 7 O. W. R. 601, an appeal from the judgment of Meredith, C.J., at the trial dismissing an action under the Fatal Accidents Act, where the only question was whether the plaintiff had any reasonable expectation of pecuniary benefit from the continuance of the life of the deceased, a Divisional Court

refused to disturb the finding of the trial Judge, since it could not be said that the Judge (as a jury) might not reasonably find that, in the circumstances of the case, there was no sufficient evidence upon which to find more than nominal damages, and a verdict for nominal damages is not to be given in such a case.

**Discovery.]**—In an action for libel—*McKergow v. Comstock*, 7 O. W. R. 449—the defence consisted of general denials and pleas of qualified privilege, put in issue by the reply, but justification was not pleaded. The question how far the defendants could go, on this record, when examining the plaintiff for discovery, in questioning him about the facts relating to the charge made against him in the alleged libel, was one of a good deal of nicety. A Divisional Court (affirming with a variation previous decisions in 7 O. W. R. 197, 273), laid it down that the defendants had a right to such discovery as might prove serviceable should the ruling upon the issue of privilege be favourable to them. “They are not bound to rely upon the presumption of malice which arises from privilege; they may anticipate an effort on the part of the plaintiff to rebut that presumption by any means open to him; and, to aid them in combatting whatever case the plaintiff might, not probably but possibly, endeavour to make in order to establish express malice, they are entitled presently to all relevant discovery.” This was approved by Osler, J.A., in refusing leave to appeal to the Court of Appeal: 7 O. W. R. 558.

**Distribution of Estate.]**—On an application in *Re McNeill*, 7 O. W. R. 563, for payment out of moneys in Court to the credit of the estate of Finlay McNeill, deceased, who by his will gave his real and personal estate (subject to his wife’s life interest) to his brothers and sisters, share and share alike, the question was whether the administrator of the estate of Alexander McNeill, a brother, could claim a share, he having been absent and unheard of more than seven

years, so as to raise a presumption of his death. Teetzel, J., held that the onus was upon the administrator of Alexander McNeill to prove that the latter survived the testator, and, in the absence of substantial evidence on this point, that the administrator was not entitled to share.

**Ditches and Watercourses Act.**]—The word “owner” in R. S. O. 1897 c. 285, it was decided by a Divisional Court in *Wicke v. Township of Ellice*, 7 O. W. R. 425, means the owner for the time being, and the words “his lands” the lands of the person in default, which are included in the drainage scheme, and, as a consequence, the defendants were entitled to charge against the property of the plaintiff, purchased by him after the resolution of council which purported to so charge it, the cost of certain works ordered by an arbitrator under the Act, which the plaintiff’s predecessor in title had neglected to perform.

**Division Courts.**]—A Division Court Judge allowed a case to go to the jury, reserving a motion for nonsuit to be heard in Chambers. The jury found in favour of the plaintiff, when the Judge indorsed upon the summons, “Verdict for plaintiff for \$60, certificate for costs to plaintiff.” It appeared that the Judge had never adjudicated upon the motion for nonsuit, and expected to have it argued in Chambers, and the question on the plaintiff’s application for prohibition was whether the indorsement upon the summons certifying costs to the plaintiff disposed of the motion and deprived the trial Judge of jurisdiction over it. Mabee, J., was of opinion that there was nothing to prevent the Judge from yet disposing of this motion, no judgment having been directed to be entered for the plaintiff except by implication: *Re McDermott v. Grand Trunk R. W. Co.*, 7 O. W. R. 602.

**Evidence.**]—The plaintiffs’ appeal in *Bank of Montreal v. Scott*, from the judgment of Britton, J., 6 O. W. R. 411, noted 25 C. L. T. 625, was allowed by the Court of Appeal, 7 O. W. R. 496, on the grounds that the depositions of one

Glass taken upon his examination for discovery under Con. Rule 439, should not have been admitted in evidence either by production of the depositions certified by the examiner, or by the proof by the examiner or reporter of what was said by Glass, because Glass, not being an officer of the bank at the time of the examination, was not examinable for discovery under the Rule mentioned, and his statements were not admissible as admissions for two reasons: they were not statements made at the time of the transaction, and he was no longer agent of the plaintiffs when he made them. A new trial was directed.

**Extradition.**]—An appeal by the prisoner in *Re Harsha*, from the order of Boyd, C., 7 O. W. R. 398, noted ante 381, was dismissed by a Divisional Court: 7 O. W. R. 471.

**Highway.**]—A Divisional Court in *Armstrong v. Township of Euphemia*, 7 O. W. R. 552, refused to interfere with the findings of fact arrived at by the learned Judge of the County Court of Lambton, after the full and careful consideration given by him to the case. The questions involved were the necessity for a rail or other barrier where there is an embankment at the edge of a graded roadway, and the effect of the horse of a person injured being at the time of the accident beyond control or vicious to the knowledge of the driver thereof. Many cases were cited and considered by the trial Judge.

**Illegal Distress.**]—It was decided by Boyd, C., in *Stone v. Brooks*, 7 O. W. R. 463, an action for wrongfully distraining and selling where no rent was due (see 3 O. W. R. 527), that the goodwill of the business carried on by the plaintiff on the premises demised could not form an element in the calculation of the damages to be awarded him, on the grounds that plaintiff might if he wished, have continued his business, and that the damages on this head were too remote to be charged against the defendant.



**Judgment.]**—The proper practice where an action is referred to a Master for trial with power to dispose of the costs, is to move for judgment upon the Master's report, the order of reference not being an order for judgment, but an order simply to try the issues. Ruling of Clute, J., on motion for judgment in *Murphy v. Corry*, 7 O. W. R. 574.

**Landlord and Tenant.]**—The point involved in the judgment of the local Master at Ottawa, affirmed on appeal by Clute, J., in *Wilson v. McLean*, 7 O. W. R. 540, was that the acceptance of rent due from a tenant by a landlord on the expiration of the term, is not a waiver by the landlord of his right to claim damages for breach of covenants to be performed at the expiration of the term.

**Life Insurance.]**—The defendants in *Hamilton v. Mutual Reserve Life Ins. Co.*, 7 O. W. R. 430, having treated the annuity or endowment provision of the certificate in question as severable from the general mortuary provision, as appeared by their letters and circulars to the assured, and from the fact that they undertook to levy special and separate assessments to provide a separate fund to satisfy that provision, and from the fact that he was informed by them that his mortuary benefits might be continued independently of the annuity benefits which they were the first to suggest his abandoning, were held by Teetzel, J., to be estopped from exacting a forfeiture of the assured's mortuary rights for non-payment of an annuity call (if indeed such call was authorized, of which there was no evidence), in the absence of any intimation by the defendants that, notwithstanding the pendency of negotiations opened by them, for a surrender of his annuity rights, a forfeiture of all his rights would ensue in case of non-payment of such call.

**Limitation of Actions.]**—An appeal from the judgment of Falconbridge, C.J., in *Cobean v. Elliott*, 7 O. W. R. 13,

noted ante 117, was dismissed by a Divisional Court: 7 O. W. R. 495.

**Lunatic.]**—Since the passing of 3 Edw. VII. c. 8, s. 13, by which power is given to permit service out of Ontario of any document by which any matter or proceeding is commenced, whatever the law may have previously been, service of a petition for declaration of lunacy and appointment of a committee may be allowed out of Ontario, and personal service upon the supposed lunatic, upon evidence that such service may prove dangerous or useless, may be dispensed with: Mabee, J., in *Re Webb*, 7 O. W. R. 565.

**Master and Servant.]**—In *Robertson v. Northern Navigation Co.*, 7 O. W. R. 476, the plaintiff entered into a contract with the defendants in January, 1905, to act as chief engineer of the steamer "Collingwood" for the ensuing season on the same terms as the "last season" (1904), for which a contract in writing had been entered into, a term of which was that the plaintiff, besides a second engineer, should have a staff of 4 firemen, and, in consideration of an increase of salary over what was at first agreed upon, should do without an oiler. In March the defendants advised the plaintiff that they only intended "to carry 3 firemen." The plaintiff insisted on his contractual rights, and was then informed that the "contract was cancelled." It was held by Anglin, J., that the plaintiff was entitled to recover for wrongful dismissal, and, in all the circumstances, could probably recover aside from the express contract. The destruction of the steamer by fire after breach by the defendants, and especially in the absence of evidence to shew that the burning was not due to the negligence of the defendants, was held not to relieve the defendants from liability on the ground of impossibility of performance.

**Municipal Elections.]**—An appeal by the relator in *Rex ex rel. Cavers v. Kelly*, from the order of the Master in Chambers, 7 O. W. R. 280, noted ante 220, was dismissed by Meredith, C.J.: 7 O. W. R. 600.

**Negligence.]**—The effect of the judgment of Mabee, J., in *Heath v. Hamilton Street R. W. Co.*, 7 O. W. R. 459, is that the deceased had a right to expect that the defendants were operating their cars as they had for years been accustomed to do, and that in turning over to the south track he was relying upon the established custom of the defendants in running their west bound cars on the northerly track, and that in doing so he supposed he was avoiding instead of encountering danger, so that the defendants were not entitled to a nonsuit in an action for damages for the death of deceased by being overtaken and run over by the defendants' car while proceeding in the same direction on a bicycle, on the ground that it was plain and indisputable that the accident would not have occurred but for the want of care of the deceased; and, in view of the facts that the defendants had given no notice or warning of the change in running the cars, and had omitted to put in "turn overs" (temporary switches), which would have obviated the necessity of changing the running of the cars over the portion of the street at which the accident took place, and the plaintiff's evidence as to the working of the fender and the speed of the car, it could not be said that upon no reasonable view of the evidence could negligence have been inferred, and hence the question of negligence was for the jury.

**Notice of Accident.]**—There was evidence in *Morrison v. City of Toronto*, 7 O. W. R. 547, which a Divisional Court considered sufficient to support the finding of the trial Judge, that it would have been unreasonable to expect plaintiff to have given the notice of accident required by s.-s. 3 of s. 606 of the Municipal Act, as amended by 3 Edw. VII. c. 18, s. 130, within 7 days; and, applying the rule laid down by Sedgewick, J., in *City of Kingston v. Drennan*, 27 S. C. R. 61, they refused to interfere with the exercise by the trial Judge of the discretion given him by the section referred to. Dealing with the contention of the defendants' counsel that the plaintiff's cross-examination shewed that if

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**Municipal Elections.]**—An appeal by the relator in *Rex ex rel. Cavers v. Kelly*, from the order of the Master in Chambers, 7 O. W. R. 280, noted ante 220, was dismissed by Meredith, C.J.: 7 O. W. R. 600.

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his attention had been called to the statutory requirements he could have given the required notice, the Court distinguished between mere knowledge and will power, Anglin, J., in this connection saying: "Read in the light of the rest of the evidence, I think the last statement should be taken to mean that, if his attention had been aroused and the necessity for giving such notice sufficiently impressed upon him, he would have assented to its being given, not that he was, during at least the first week following the accident, himself capable of the effort of mind and will requisite to have enabled him, had he been cognizant of the statutory requirement, to give, of his own initiative, spontaneously and unaided, any direction or instruction as to notice."

**Parties.]**—An appeal from the order of the Master in *Imperial Paper Mills of Canada v. McDonald*, 7 O. W. R. 412, noted ante 283, refusing to add one Gray as a party defendant, was dismissed by Boyd, C.: 7 O. W. R. 472. "There must be a very clear and a very strong case made to induce the Court to introduce a new defendant against whom the plaintiff does not wish to proceed, and whose presence is not necessary to determine the matters involved in the action as constituted between the original parties."

**Penalty.]**—The defendant's appeal in *Lancaster v. Shaw* from the judgment of Meredith, J., 6 O. W. R. 316, 10 O. L. R. 604, noted 25 C. L. T. 448, was allowed by the Court of Appeal (7 O. W. R. 502), because the Ontario Election Act, R. S. O. 1897 c. 9, s. 4, does not take away the right to vote of a sub-postmaster by official name, and penal offences cannot be established by construction, and, looking beyond the language for the intention of the legislature, it appears that when it is intended to include subordinate officers they are specifically named, as in the case of deputy sheriffs, who are named, while deputy registrars are not.

**Pleading.]**—An appeal by the defendants in *Attorney-General v. Hargrave* from the order of the Master in Cham-

bers, 7 O. W. R. 368, noted ante 283, was dismissed by Boyd, C.: 7 O. W. R. 455.—Black v. Ellis, 7 O. W. R. 490, was an action on behalf of the plaintiff and all other ratepayers of the city of Ottawa, to have a certain contract which the mayor of that city, authorized by a by-law of the city council, entered into with the Consumers' Electric Co. of Ottawa, declared not to be the agreement which such by-law authorized, and for the cancellation thereof, and to prevent the payment of certain sums to the company which were provided for in the contract executed, but which the plaintiff contended were in excess of the sums to be paid under the agreement contemplated by the by-law. Anglin, J., although the plaintiff did not allege fraud or that the mayor had executed the agreement in question for his own personal profit, on motion to strike out the statement of claim as frivolous and disclosing no cause of action, held that, assuming the plaintiff's allegations to be true, the action was maintainable, and, in view of the facts that the city corporation had knowledge of the alleged illegalities for 6 months, that the city council had by by-law attempted to ratify the agreement attacked, and were defending the action, allowed the plaintiff to supply a defect in his pleading by an amendment alleging the unwillingness and refusal of the council to sue. It was held further that the attempted ratification of the transaction, in the circumstances alleged, was a distinct breach of trust and illegal as involving a payment of an additional sum to that originally agreed upon, without consideration.

**Preferential Transfer of Cheque.]**—In Robinson v. McGillivray, 7 O. W. R. 438, where the transaction attacked as preferential was the deposit by the debtor with his banker of a cheque, the proceeds of the sale of his stock in trade, against which the banker charged up a promissory note held by him for advances made to the debtor, but without the knowledge or connivance of the latter, the majority of a

Divisional Court held that the transaction was equivalent to a payment of money to a creditor, which is excepted from the Act; that it was one in the ordinary course of business, also excepted; that there must have been a concurrence of intention to prefer on the part of both payer and receiver, which was not supported by the evidence; and that the preference arose by operation of law, and not by the act of the debtor, the banker having a right to retain moneys in his hands to satisfy any balance due to him.

**Railway.]**—On appeal by the plaintiffs in *London and Western Trusts Co. v. Lake Erie and Detroit River R. W. Co.* from the judgment of Meredith, J., 6 O. W. R. 321, noted 25 C. L. T. 449, dismissing the action, the Court of Appeal (7 O. W. R. 511) considered that the plaintiffs' evidence that the deceased did not look up the defendants' track to ascertain whether any cars were coming before attempting to cross immediately behind 4 cars standing thereon, did not necessarily establish contributory negligence on the part of the deceased, because, in the circumstances, there was no reason to expect that other cars would be backed down against the standing cars, at least in such a way as to give no warning, and that therefore the question was for the jury, and their findings entitled the plaintiffs to judgment. The Court cited with approval the rule laid down by Lord Fitzgerald in *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. 52: "The propositions of negligence and contributory negligence are so interwoven as that contributory negligence is generally brought out and established by plaintiff's witnesses. In such a case, if there be no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a verdict for the defendant, or, if there is a conflict or doubt as to the proper inference to be deduced from the proof, then it is for the jury to decide."—In *Arthur v. Central Ontario R. W. Co.*, 7 O. W. R. 527, a Divisional Court affirmed the judgment of Morrison, Co.C.J., the effect of which was that s.-s. 4 of s.



237 of the Railway Act, 1903, changed the pre-existing law as to the liability of railway companies for animals wrongfully at large upon a highway within half a mile of a railway crossing, which are killed or injured, not at the railway crossing, in which case there would admittedly be no liability, but elsewhere on the property of the company, and such companies are now liable for damages in such cases when there are not cattle guards at the crossing "suitable and sufficient to prevent animals from getting on the railway."—The curious situation developed in connection with the lands in question in *Re Ruttan and Dreifus and Canadian Northern R. W. Co.*, 7 O. W. R. 568, raised the question whether the common law rule that a trespasser who builds upon the lands of another dedicates his structures to the owner, has any application to a railway company entering upon land without the formalities provided by the Act for the expropriation thereof, and with a view to the acquisition thereof, where the ownership is claimed by different parties, the consent of some of whom was obtained, but not that of the party eventually appearing to be the real owner, who however was aware from the first that the entry of the company on the lands, and the construction of their works, all had reference to acquiring the title either by agreement or proceedings under the Act. This question was decided by Mabee, J., in the negative, and he reduced the award of the arbitrators under the Act by the amounts allowed for the structures and works of the company.—On appeal by the plaintiff in *Booth v. Canadian Pacific R. W. Co.*, 7 O. W. R. 593, from the judgment of the Judge of the County Court of Carleton, in term, setting aside the judgment at the trial on the findings of the jury, a Divisional Court held that the Judge erred in holding that the company were exempt from liability by reason of the terms of the special contract under which the horses in respect to which damages were claimed were shipped, the jury having found negligence on the part of the company and their servants which was not covered by such contract. The Court refused to interfere

with the finding of the jury on the question of negligence by the defendants, which question could only come up in consequence of the appeal on the point first mentioned, but, with respect to the question of contributory negligence on the part of the plaintiffs and their servants, it appearing that had they, during a stay of the car for over 8 hours at North Bay, taken a little trouble to remove a manger so as to unload the horses (which would have taken about half an hour), the rest which the horses would thus have obtained would largely, if not wholly, have counteracted any ill-effects suffered by the horses attributable to the delay owing to the negligence of defendants, held that the finding of the jury was wholly unwarranted by the evidence, and ordered a new trial.

**Search Warrant.]**—It was decided by a Divisional Court in *Rex v. Kehr*, 7 O. W. R. 446, that, since the magistrate to whom an application for a search warrant is made must exercise a judicial discretion upon the facts brought before him, such a proceeding is of a judicial character, and therefore the Court has jurisdiction to quash a search warrant where a sufficient case is made out, and, without passing upon other objections to the search warrant in question, the Court, following *Regina v. Walker*, 13 O. R. 83, 95, held it to be bad because the information on which it was issued did not disclose the facts and circumstances which went to shew that there was reasonable ground for believing that the documentary evidence sought for was at the place designated. “Belief at two removes is not sufficient ground . . . upon which to base proceedings of so serious a character as that of searching a man’s office and carrying away the documents and papers relating to his business.”

**Trading Company.]**—Falconbridge, C.J., in *National Malleable Castings Co. v. Smith’s Falls Malleable Castings Co.*, 7 O. W. R. 436, overruled all the defendants’ technical objections to the plaintiffs’ right to recover damages for breach of a contract, viz.: that, if the alleged contract was

entered into, such contract was not made by the defendants, but by one Frost, the president of the company, who was not authorized either by resolution or by-law to bind the defendants by any such contract; that the plaintiffs never accepted the alleged offer of the defendants in such manner as to make the same a binding contract upon the plaintiffs; that there was no consideration for the alleged contract; and that the alleged contract, if otherwise valid, was void for want of mutuality of obligation. It was also held that an objection that the plaintiffs, an extra-provincial corporation, were carrying on business without a license, contrary to 63 V. c. 24 (O.), should have been pleaded; and it was suggested that if an amendment were made, it would be proper to give the plaintiffs an opportunity to apply for a license.

**Wharf.]**—The defendants had sold to the plaintiffs the easterly wharf at the James street slip, Hamilton, defined by metes and bounds, and without any reservations or any grant of the land underneath the waters of the slip. The plaintiffs had, before the purchase, used this wharf under agreement with the defendants, and thereafter and at the time of the matters complained of, had continued to use it *identically* as before, but the defendants had commenced to bring to the wharf on the westerly side of the slip large freighters of such great beam as to interfere with the plaintiffs' vessels, which were the ones which had always used the easterly wharf, getting in or out. The question "whether any user of the slip by the defendants in a way that interfered with the use and enjoyment of it as an approach to the plaintiffs' wharf as it existed at the time of the deed, and as the defendants knew the plaintiffs expected to continue, was a derogation from the defendants' grant," was answered by *Mabee, J.*, in the affirmative: *Hamilton Steamboat Co. v. Mackay*, 7 O. W. R. 465.

**Will.]**—The phrase "what money remains to be equally divided amongst my family" was held by *Boyd, C.*, in *Re*

Wilkie, 7 O. W. R. 473, in the absence of any context, to effect a gift to a class, "family" meaning children, so as to exclude the children of children dying in the lifetime of the testator.—Smith v. Smith, 7 O. W. R. 586, was an action by relatives of the late John B. Smith, beneficiaries under his will, against the executors and others, to have the interest of the estate in the business, which was to be carried on by directions contained in the will, ascertained, and a transfer of such interest to the other partners for \$40,000 set aside, and for a declaration that the plaintiffs were entitled to follow the assets of the business into the hands of the company into which the business was changed after the transfer. The main question in dispute was the payment of salaries to the sons, who had the active conduct and management of the business, in excess of small salaries received by them during the life of their father; and Boyd, C., in view of the facts that the business, which was practically bankrupt on the death of the father, had become very prosperous under the management of these sons, and that clause 12 of the will empowered Robert Jaffray, one of the executors, to decide any question that might arise as to the intention or construction of the will, or under the carrying out of the trust created thereby, and the latter in the exercise of the power so conferred on him, had agreed upon the sum of \$40,000 as the value of the share of the estate in the business, and there being no allegation or evidence of mala fides, held that the plaintiffs could not succeed.

## CASES FROM WESTERN CANADA.\*

**Agent's Commission on Sale of Land.]**—The full Court in dismissing an appeal from the judgment of Perdue, J., in *Hunter, Cooper, & Co. v. Bunnell* (Man.), 3 W. L. R. 229, held that the plaintiffs had not earned their commission by finding a purchaser for the defendant's hotel, ready, willing, and able to make the purchase, G., a person with whom the plaintiffs were negotiating, not being able to raise the money necessary. It did not appear from the evidence that the withdrawal by the defendant of the property from the hands of the plaintiffs was done with the intention of depriving the plaintiffs of their commission, and it was therefore within the right of the defendant; and, although afterwards G. purchased from the defendant, through another agent, it was because a friend of his had come to his assistance and provided the money, and at the time of the sale the defendant did not know G. in the matter at all.

**Arbitration and Award.]**—The plaintiff's appeal in *Johannesson v. Galbraith* from the judgment of Perdue, J. (Man.), 1 W. L. R. 445, noted 25 C. L. T. 460, was allowed by the full Court (3 W. L. R. 275), on the grounds that the "former practice" referred to in Rule 774 is the former practice relating to the enforcement of awards, and therefore the practice as to setting aside and otherwise dealing with awards formerly belonging to the Court of Chancery, and now exercised by the Court, remains untouched; and determination of the appeal hinged upon the question whether the statement of claim, as amended, was sufficient to enable the Court to pronounce a judgment setting aside the award in question. The allegations in the body of the claim

\* Short notes of the most important cases in Volume III. of the *Western Law Reporter*, No. 2, 225 to 280, inclusive.

were sufficient, but there was no specific prayer that the award be set aside. There was, however, a prayer for general relief. What the plaintiff asked for was payment, and under the prayer for general relief the Court may remove any obstacle there may be to his obtaining that relief. If the award were one to which the provision of the statute 9 & 10 Wm. III. c. 15 applies, the jurisdiction of the Court of Chancery to set aside awards that existed prior to the passing of that Act still exists, and may be exercised unhampered by any limitations imposed by it.

**Chose in Action.]**—A defence raised in *Miller v. Williams* (Y.T.), 3 W. L. R. 264, was that the plaintiff, who sued as the assignee of a chose in action, was not the owner of the entire beneficial interest in the claim sued on, as required by s. 2 of the Ordinance, but Craig, J., it appearing that this objection was based on the fact that the plaintiff, to whom the entire beneficial interest was transferred by the assignor, had some oral arrangement with one Park by which the latter was to share in the proceeds, held that the section in question only affected such assignments as reserved in the assignor some interest, and where the assignment does not pass all the interest of the assignor in the property affected. An inference being attempted to be drawn from the accounts that some of the charges were excessive, without the evidence being adduced, as it might have been, to support such defence, the Court considered it a case for the application of the dictum of Mr. Justice Strong in the *Richelieu Election Case*, at p. 177 of 21 S. C. R.: “In dealing with questions of evidence Courts do not permit facts in themselves susceptible of easy proof to be established by mere inference from other facts from which they are not necessary consequences.”

**Contract.]**—The plaintiffs in *London Guarantee and Accident Co. v. George and Lenton* (Man.), 3 W. L. R. 236, having given guaranties for the conduct of the defendants in their business, entered into an agreement with them by which

the plaintiffs were authorized "to take possession of any money or other property which the company may find belonging to the undersigned, whatever the same may be or thought to be," and these agreements contained powers to sell such "goods or property" to realize any payment made by the plaintiffs, and also the clause following: "The undersigned agrees to do and execute any deed or writing that the company may deem to be necessary in order to give the company the rights and powers herein expressed (or intended) to be given." In the absence of any expressions consistent only with dealings in real estate, and having regard to the facts that the agreements were on printed forms prepared by the plaintiffs, and that the word "property" is a general term coupled first to the word "money" and then to the word "goods," Richards, J., held that the plaintiffs were not entitled to a declaration of a ~~men~~ on the defendants' lands.

**Costs.]**—The effect of the ruling of Wetmore, J., in *Massey-Harris Co. v. Hutchings* (N.W.T.), 3 W. L. R. 252, is that the costs of an affidavit of non-delivery of a statement of defence cannot be allowed on a taxation of the plaintiffs' costs under a judgment in default of pleading, except when a defence has been filed and not served. Delivery including filing and service, there is default if no pleading is filed, which does not require proof.—Where an action is brought by the Attorney-General, on the relation of a private individual, the latter may be ordered to pay the costs, and this indeed appears to be the real reason for inserting the relator's name in the proceedings: Decision of Irving, J., in *Attorney-General v. Ruffner* (B.C.), 3 W. L. R. 272.

**Criminal Law.]**—An indictment charging the defendant "with having, at the city of Calgary, on 14th November, 1905, unlawfully attempted to dissuade a witness, . . . by a bribe, from giving evidence in a certain matter, namely, in a court of revision held in connection with a contested provincial election," was in *Rex v. Lake* (N. W. T.), 3 W. L. R. 244, held by Harvey, J., to be good as charging an offence

under s.-s. (a) of s. 154 of the Criminal Code, notwithstanding that the defendant might be regarded as really a party to the proceedings mentioned, and was not obliged to attend, since he was described as a witness, and it is only witnesses who "give evidence." A second count charging the defendant with "having unlawfully and wilfully attempted to obstruct, prevent, and defeat the course of justice by giving to (witness) the sum of \$10 to induce him to abstain from attending a court of revision in connection with a contested provincial election, contrary to the provisions of s. 154 of the Criminal Code," was held defective as a charge of an offence under s.-s. (d), because there was nothing to shew that the attendance of the witness was in any way essential to the due administration of justice.

**Default Judgment.]**—Where the defendant had all day of the 2nd January to enter his appearance, and judgment was on that day irregularly signed in default of appearance, and it was not until the 10th February following that he caused a search to be made to find whether judgment had been signed, and moved against it, and his affidavit failed to shew any defence on the merits or to disclose when he first became aware of the irregularity, and failed to explain the delay, the Court refused to interfere: per Wetmore, J., in *Scott v. Hoffner* (N.W.T.), 3 W. L. R. 247.

**Discovery.]**—The plaintiff and defendant in *Vanderlip v. McKay* (Man.), 3 W. L. R. 232, being partners, entered into an agreement whereby the defendant took over the business and the assets thereof and assumed the liabilities. The defendant was sued by the plaintiff for an account of the profits of the business during the partnership. The defendant, on his examination for discovery, refused to answer any question relating to the partnership or the profits thereof, whereupon the plaintiff moved for an order to strike out his defence, and the defendant moved for a stay, on the ground that the partnership agreement provided for arbitration. *Cumberland, Loc.J.*, held that the questions involved were



not covered by the arbitration clause, and that the Court had a discretion to compel the defendant to answer questions such as those indicated, even though the answers could not be made use of at the trial, but in this case the amount of profits in question and the knowledge or belief of the parties respecting the amount at the time they made their bargain formed part of the collateral facts and surrounding circumstances in the case.

**Mandamus.]**—The Courts have no jurisdiction to interfere by mandamus with the conduct of the election of members to the provincial legislatures, except as by statute otherwise provided, as in the case of the trial of election petitions, the legislature having retained all the powers it has not expressly given up; and Scott, J., in *Re Dubuc* (N.W.T.), 3 W. L. R. 248, refused an application for a mandamus to the clerk of the executive council for the province of Alberta, commanding him to give notice in the Official Gazette of the province of the name of the applicant as the candidate elected as member of the first Legislative Assembly of the province for the electoral district of Peace River therein, and to give notice thereof to the clerk of the Legislative Assembly.

**Parliamentary Elections.]**—The effect of the decision of Richards, J., in *Re Lisgar Dominion Election* (Man.), 3 W. L. R. 268, is that misconduct of a returning officer in changing the polling subdivisions and lists, etc., may be a corrupt act under the common law of Parliament, though not so declared by any Act of the Parliament of Canada; and that, under s. 7 of the Dominion Controverted Elections Act, a returning officer may be deemed to be a respondent where his conduct is complained of in cases other than where an undue return, no return, or a double return is alleged.

**Promissory Notes.]**—An appeal by the defendants in *First National Bank of Minneapolis v. McLean* from the judgment of Dubuc, C.J. (Man.), 1 W. L. R. 538, noted 25 C. L. T. 506, was dismissed by the full Court: 3 W. L. R. 227.

**Surrogate Court.]**—The effect of the decision of the full Court in *Re B. Estate* (Man.), 3 W. L. R. 225, is that an application under s. 63 of the Surrogate Courts Act (Man.), to have proceedings removed into the Court of King's Bench, can only be made on notice to all parties concerned. Where an order for removal is made by a Judge of the Court of King's Bench, an appeal lies to the Court in banc.

**Vendor and Purchaser.]**—In *Taylor v. Grant* (N.W.T.), 3 W. L. R. 254, the plaintiff had effected a re-sale, and a transfer from the defendant to his purchaser and a mortgage back were executed by the respective parties, but, upon the terms of a certain lease becoming known to his purchaser, he declined to go on with his purchase, and the plaintiff thereupon offered to carry out the purchase himself as originally agreed. The Statute of Frauds was set up, but it was held by Harvey, J., that the transfer, though the purchaser was not named, was sufficient to take the case out of the statute, because of the reference therein to the consideration of \$6,000, it being clear that the person to whom the sale was made was the person paying the consideration: *Carr v. Lynch*, [1900] 2 Ch. 613; and it did not matter that the terms of payment of the purchase money were not set out in detail. —*Stevenson v. McRae* (N.W.T.), 3 W. L. R. 259, an action for specific performance, involved the question of fact whether an agreement had been arrived at between the parties by which the defendant was to settle a claim of R., or whether the sale was dependent upon R. being settled with for \$37.50, or by the plaintiff, who in that event was to pay \$10 an acre for the quarter section. The finding of Harvey, J., on the evidence, the agent agreeing with the plaintiff's statement of the facts, was in favour of the plaintiff, and specific performance of the agreement set up was decreed. A certificate or receipt for a deposit of \$150 signed by the agent, who was authorized to close the deal and enter into an agreement on behalf of the defendant, though not mentioning the defendant, was held to be a sufficient memorandum to

satisfy the Statute of Frauds, since it referred to a cheque given for the deposit, which was made payable to the defendant, this cheque being thereby made part of the memorandum.

**Water and Watercourses.]**—An appeal by the defendants in *West Kootenay Power and Light Co. v. City of Nelson* (B.C.), 3 W. L. R. 739, from the judgment of Irving, J. (2 W. L. R. 66), was allowed by the full Court, Martin, J., dissenting, evidence having been admitted, on the application of the defendants, of the depth of the river bottom at different points, which could not be given at the trial owing to the river being so high that it was impossible to take soundings. From this evidence, Hunter, C.J., makes the deduction that the works of the defendants had not caused damage to the plaintiffs, or a reasonable possibility of damage, and it was held that any sensible interference with the bed of a stream did not per se give a right of action by a riparian proprietor against the party causing it, but that there must be damage caused, or the reasonable possibility of it.

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## EDITORIAL REVIEW.

**Election of Benchers.**

The quinquennial election of Benchers of the Law Society of Upper Canada, held last month, resulted in the return of the following gentlemen with the following number of votes:—

1. Strathy, H. H. (Barrie), 822; 2. Shepley, G. F. (Toronto), 793; 3. Wilson, M. (Chatham), 768; 4. Aylesworth, A. B. (Toronto), 747; 5. Lynch-Staunton, G. (Hamilton), 715; 6. Clarke, A. H. (Windsor), 714; 7. Ritchie, C. H. (Toronto), 708; 8. Maclellan, D. B. (Cornwall), 701; 9. Glenn, J. M. (St. Thomas), 699; 10. Guthrie, D. (Guelph), 689; 11. Gibbons, G. C. (London), 688; 12. Chrysler, F. H. (Ottawa), 685; 13. McKay, S. G. (Woodstock), 674; 14. Bruce, A. (Toronto), 635; 15. Hoskin, J. (Toronto), 634; 16. Kerr, W. (Cobourg), 624; 17. White, W. R. (Pembroke), 603; 18. Barwick, W. (Toronto), 602; 19. Smith, E. Sydney (Stratford), 600; 20. Hogg, W. D. (Ottawa), 599; 21. Riddell, W. R. (Toronto), 586; 22. McPherson, W. D. (Toronto), 578; 23. Bicknell, J. (Toronto), 575; 24. Watson, G. H. (Toronto), 571; 25. Northrup, W. B. (Belleville), 568; 26. Denistoun, R. M. (Peterborough), 556; 27. Lash, Z. A. (Toronto), 533; 28. McMaster, A. C. (Toronto), 533; 29. Nesbitt, J. W. (Hamilton), 517; 30. Farewell, J. E. (Whitby), 510.

The following who were not elected received large votes:—  
31. Nesbitt, W. (Toronto), 489; 32. Cowan, J. (Sarnia), 476; 33. Harcourt, F. W. (Toronto), 472; 34. McIntyre, J. (Kingston), 472; 35. Masten, C. A. (Toronto), 456; 36. Douglas, W. M. (Toronto), 441; 37. Wilkes, A. J. (Brantford), 441; 38. Bayly, R. (London), 433; 39. Hodgins, F. E. (Toronto), 357; 40. MacKay, A. G. (Owen Sound), 357; 41. Thomson, D. E. (Toronto), 342; 42. Johnston, E. F. B.

(Toronto), 340; 43. DuVernet, E. E. A. (Toronto), 328; 44. Ryckman, E. B. (Toronto), 328; 45. Kehoe, J. J. (Sault Ste. Marie), 320; 46. Lazier, S. F. (Hamilton), 259; 47. Hellmuth, I. F. (Toronto), 251.

Of the 30 elected 25 had, in effect, the privilege of being nominated by virtue of their having been in office as Benchers just previous to the holding of the election. There were 28 gentlemen in that position, not 30, because Mr. Walkem died just before the election, and Mr. Foy, as Attorney-General for Ontario, became an ex officio Benchers; so only 3 of those who had the benefit of a nomination were beaten, viz., Mr. Wallace Nesbitt, Mr. R. Bayly, and Mr. D. E. Thomson. Their places and the places of Mr. Walkem and Mr. Foy are taken by 5 new Benchers; Mr. James Bicknell, Mr. W. B. Northrup, Mr. R. M. Dennistoun, Mr. A. C. McMaster, and Mr. J. E. Farewell. It will be noticed that Toronto loses one Benchers; of the 5 displaced 3 were Toronto men, and of the 5 newly elected only 2 are Toronto men. Taking Mr. Farewell (Whitby) as displacing one Toronto man, Mr. Northrup (Belleville) and Mr. Dennistoun (Peterborough) have replaced Mr. Walkem (Kingston) and Mr. Bayly (London), and in that way the east gains one seat from the west. Practically there are only these two changes in what may be roughly termed the representation of districts. Mr. McMaster, one of the new Benchers, was in some sense the candidate of the junior Bar, and it was noticeable that he polled a large country vote, while most of the Toronto men were not favourites outside. The personnel of Convocation can hardly be said to be changed at all. The slight infusion of new blood may be beneficial and certainly can do no harm. An analysis of the Benchers elect shews that 26 of the 30 are King's counsel; that the Senate has one representative and the House of Commons two, but the Ontario Legislature none; and that 16 are Liberals and 14 Conservatives, from which it may be argued that politics play no part in the election. The total vote cast was in the neighbourhood of 1,000.

**Judges and "Side-Lines."**

The Minister of Justice spoke very plainly in the House of Commons about the apparent reluctance of some of the Judges to give up their positions as directors, arbitrators, etc., as required by the statute which increased their official emoluments. There seem to be two defences put forward on behalf of Judges: one, that the statute is ultra vires; the other, that its operation should be restricted to the acceptance of future extra-judicial positions of emolument. The latter hardly seems tenable unless in mitigation, and the former will probably not be brought to a test. It is probable that the example of one Judge who recently resigned a lucrative (if rumour is to be believed) directorship, in compliance with the statute, will be followed by others, and that there will be a gradual relinquishment of "side-lines." It is not unfair, perhaps, that a little time should be allowed in that behalf. But it should be, and no doubt is, quite clear to the occupants of the Bench that public sentiment is strongly in favour of the statute. It is a trite saying, but it seems to need repetition, that respect for and obedience to the law depend largely upon the independence of the Bench, and that that independence must not only exist but be apparent and notorious.

**Lord Somers.**

The London *Law Times*, in its series of "Striking Figures in the Legal History of England," gives an admirable sketch of the great Whig lawyer and Lord Chancellor of the Revolution—the junior counsel for the Seven Bishops at their famous trial, the draftsman of the Bill of Rights and the Act of Settlement, and the patron of learning and literature—Lord Somers. "The cause of constitutional government in England," it concludes, "owes an immense debt to Lord Somers. At a critical epoch in the development of our constitution he formulated those political principles which have ever since been the basis of popular government in England

and in all those parts of the British Empire which have inherited the spirit of our constitution. Through evil report and good report, he never wavered in his allegiance to those principles. He vindicated them on all occasions ably and strenuously; and if to-day we find firmly established the doctrine of the omnipotence of Parliament, the doctrine that all government, authority, and magistracy proceeds from the people, we are indebted for it, and the excellent fruit of beneficial legislation which it has borne, to Lord Somers—*clarum et venerabile nomen.*”

#### **The English Criminal Appeal Bill.**

A meeting of the Judges of the King's Bench Division is to be held for the purpose of considering the Criminal Appeal Bill brought in by the Lord Chancellor. The *Law Times* thinks it a great misfortune that the Bill of the late government to compel a Judge to state a case on a point of law did not pass—the present measure goes a great deal too far. Our Canadian system of limited appeal, very similar to that proposed by Lord Halsbury's Bill, has worked very well for fourteen years, and contains every reasonable safeguard against miscarriages of justice such as the famous Adolf Beck case in England, which brought about the present agitation for the establishment of a Court of Criminal Appeal. Nevertheless some of the features of Lord Loreburn's Bill might well be introduced, such, for example, as the revision of sentences. The inequality of sentences is a standing reproach to our law.

Briefly, as regards the present Lord Chancellor's Bill, its effect is to give to a person convicted on indictment of a criminal offence an unrestricted right of appeal to a Court of Criminal Appeal, which Court is to consist of at least three Judges of the High Court. The measure contemplates all convictions in ordinary criminal cases tried at assizes or

quarter sessions. At present a prisoner convicted in the cases mentioned has no ground whatever of appeal save only on a point of law; and it is, of course, within the Judge's discretion to reserve a point or not. The Bill before the Lords abolishes this discretionary power; it makes absolute, in the cases set forth, the right of the prisoner to appeal. Further, the prisoner who, intending to appeal, gives notice of his intention within ten days of conviction, will have the privilege of appeal on questions not only of law, but of fact also—a weighty matter at times. One exception is, that when a prisoner has received sentence of death, no appeal may be made on the ground of "undue severity." But it is in no way proposed to interfere with that prerogative of mercy which the Crown has often wisely and nobly used; and provision is also made that the Secretary of State may, in response to a petition for clemency directed to the King's Majesty (save where sentence of death has been given), refer the case at any time to the Court of Criminal Appeal.

The new Court, when established, will possess certain powers peculiar to itself. It will be entitled, for example, to give ear to the testimony of witnesses who were not called at the original trial—testimony whether to uphold, to quash, or to amend the conviction. Suppose the Court of Appeal decides that, although the point raised ought to be given in the appellant's favour, there has been in fact no substantial miscarriage of justice; it may then dismiss the appeal. Again, if the Court comes to the conclusion that the appellant, improperly convicted of one offence, has been properly convicted on some other count, it may either affirm the judgment passed or proceed to such other judgment as it deems proper.

The effect of the Bill when it becomes law is thus humourously anticipated by the English *Law Times*:—



## SCENE IN COUNSEL'S CHAMBERS, APRIL 1ST, 1908.

Litigant—When will my case be reached?

K.C.—In about four years' time.

Litigant—How is that?

K.C.—There are 4,000 criminal appeals.

Litigant—How many of them will be successful?

K.C.—Perhaps fifteen.

Litigant—Why do they then appeal?

K.C.—They have nothing to lose, and no costs to pay. If they have funds, they are urged to appeal; if not, their counsel may attain fame and distinction.

Litigant—Then it really prolongs the agony unnecessarily?

K.C.—Quite so.

Litigant—Do juries now try the cases as earnestly and carefully as they used to do?

K.C.—Oh, dear no! Why should they? Their real responsibility is gone.

Litigant—Are Judges as good a tribunal as a jury on these cases?

K.C.—No. Nor have they the facilities for inquiry of the Home Office.

Litigant—Why was the Bill introduced?

K.C.—The Lord knows. (It is presumed he means the Lord Chancellor.)

**Mural Decorations in Legal Habitations.**

We referred some time ago to the need for mural decorations at Osgoode Hall. Perhaps the following paragraphs taken from an English journal may be of interest in this connection:—

Professor Gerald Moira has now completed two of his mural paintings for the lunettes over the entrances to the courts, in the central hall of the new Sessions-house, Old Bailey. The finished lunettes, which are of great size, represent "Justice receiving the Homage of the Empire" and

"Mosaic Law" respectively, the latter forming one of a series which will include English, Greek, and Roman Law also. In the first a statuesque figure of Justice with sword and scales stands upon the topmost of a flight of steps, on either side being typical groups headed respectively by the late Archbishop of Canterbury and the late Cardinal Manning, and including also representations of the Chief Rabbi, a Prime Minister, the Chancellor of the Exchequer, the Lord Chief Justice, the Commander-in-Chief, an Indian prince, labourers, and on one side a finely-designed group of a mother and children. The whole background is filled with a view of St. Paul's Cathedral. The "Mosaic Law" is less comprehensive in its allegory, and exhibits Moses and Aaron with the Tables of the Law and the Elders of Israel, seated at the foot of Mount Sinai. Professor Moira is also to execute the painting of "English Law," and the cartoons and decorations over the grand staircase and those of the dome, as well as the armorial stained glass for the windows near by, so that the important quality of unity is in this case well assured.

The fresco by G. F. Watts in the hall of Lincoln's-inn is little known to the general public, but is one of the artist's greatest works. Mr. Warwick Draper, who writes about it in the *Burlington Magazine*, says that many of the heads were portraits "more or less;" and from what a famous circle of Victorian personages Watts drew! Tennyson became Minos, and Holman Hunt the Saxon King Ina; Solon and Servius are represented by Spencer Stanhope and Valentine Prinsep; Sir Charles Newton and James Spedding, the interpreter of Bacon, appear as Edward I. and the standing monk; Edward Armitage, the painter, and Lord Laurence posed for the two barons with Magna Charta; in the centre, where the fresco is sadly decayed, the features of Sir William Vernon Harcourt are still discernible as Justinian, while at his side Theodora once had the likeness of Sophia Lady Dalrymple. Emma Lady Lilford, frequently the subject of Watts's art, here became a youthful King Alfred.

**English Court Incidents.**

They seem to have livelier times in English Courts than we do here, if these occurrences, reported by the London *Law Times*, are fair samples:—

During the hearing of an application made by Mr. Rufus Isaacs, K.C., Lord Justice Vaughan Williams was addressing an explanatory dissertation to the learned counsel, in the middle of which he paused to evolve the next word. Lord Justice Moulton, believing he had finished, cut in with a question. “Really, I protest,” said the learned president. “I cannot correct you as I can Mr. Isaacs.” It was humorously rumoured among the counsel present in Court that possibly the incident may lead to a crier being appointed, whose duty it would be to crave silence from his brethren for the learned president.—In the course of the hearing of a case before Mr. Justice Lawrence in the King’s Bench Division, objection was taken to the intervention of a member of the Bar who said he held a “watching brief.” His Lordship said that this reminded him of an incident when he was at the Bar and held a watching brief in a case. When he wished to address the Court, which was presided over by the late Master of the Rolls (Sir A. L. Smith), he was asked who he was. He replied he had got a watching brief, and his Lordship said, “All right, watch away.” That was all that his Lordship would allow him to do. Mr. Neilson: I think it is what is called a “thinking part.”

**Recent American Decisions.**

**Bank.]**—The right of the drawer to claim the proceeds of a bank draft sent in payment of goods sold, deposited in bank, collected, and placed to the credit of the payee, because, to get possession of the property which he bought, he was compelled to pay a draft on himself which the seller of the goods had drawn, attached to the bill of lading, and had discounted, is denied in *T. S. Reed Grocery Co. v. Canton Nat. Bank (Md.)*, 70 L. R. A. 959, although the seller fraudulently appropriated his draft while leaving the one against

him outstanding in the hands of the concern which discounted it with lien on the property as security. The right to follow proceeds of draft into payee's bank account because of fraud or failure of consideration is the subject of a note to this case.

**Carriers.]**—The refusal of the agent at the intermediate terminal to indorse a return-trip ticket, which indorsement, according to the terms of the ticket, is necessary to validate it, is held, in *Texas & P. R. Co. v. Payne* (Tex.), 70 L. R. A. 946, not to be a final breach of its contract, by the carrier, so as to preclude recovery by the passenger of any damages that may subsequently accrue; and, where the passenger is ejected from the train when attempting to use the ticket, under circumstances of humiliation, it is held that he may recover damages therefor.

In case of the burning of cotton on a railroad platform, in the course of delivery, it is held, in *Lehman, S. & Co. v. Morgan's Louisiana & T. R. & S. S. Co.* (Mich.), 70 L. R. A. 562, that the carrier is bound to prove the origin of the fire, and that it was purely accidental and impossible to prevent.

That it is not negligence, as matter of law, for a passenger who is upon a train so crowded that he cannot find a seat, and becomes sick because of lack of proper ventilation, and tobacco smoke, to seek relief upon the platform when unable to reach a window, is declared in *Morgan v. Lake Shore & M. S. R. Co.* (Mich.), 70 L. R. A. 609.

The right of a blind person to transportation upon a railway upon tender of fare, without an attendant, is upheld in *Illinois C. R. Co. v. Smith* (Miss.), 70 L. R. A. 642, if, as matter of fact, he is competent to travel alone without requiring other care than that which the law requires the carrier to bestow upon all its passengers alike.

**Contract.]**—An agreement by an applicant for admission to an old folks' home to deliver to it all property which he may subsequently become the owner of, in consideration of

maintenance during life, is held, in *Baltimore Humane Soc. v. Pierce* (Md.), 70 L. R. A. 485, to be void as against public policy. The question of validity of agreement to transfer future-acquired property in consideration of maintenance is treated in a note to this case.

**Covenant.]**—A modern apartment house is held, in *Kitching v. Brown* (N.Y.), 70 L. R. A. 742, not to be within a covenant against the erection upon certain premises of a tenement house, which was made at a time when that term referred to the habitations of the very poor, and was associated in the contract with other things that were obviously noxious, noisome, or deleterious.

**Master and Servant.]**—An employee of a railway company whose duty it is to operate a steam pump, and who is furnished with a railway tricycle to procure the necessary fuel along the road, who has departed from his employment by going beyond the point where he expected to secure fuel on an errand of his own, is held, in *Barmore v. Vicksburg S. & P. R. Co.* (Miss.), 70 L. R. A. 627, to resume the employment when he begins to return to that point, so as to render the master liable for his negligent act in running down a pedestrian between the point where he turned about and the point where the fuel was to be obtained.

A mason contractor is held, in *Mooney v. Beattie* (Mass.), 70 L. R. A. 831, to owe no duty to his employees to inspect stone received from the quarry to ascertain if it is free from explosives used to blast it from the quarry bed. The duty of a master to inspect materials upon which a servant is to work is the subject of a note to this case.

The act of a railway employee, under direction of his foreman, who has been sent by the general superintendent to erect a snow fence upon private property of an abutting owner, in assaulting an employee of the latter who has been sent by the owner of the property to remonstrate against the erection of the fence, is held, in *Waler v. Great Northern*

R. Co. (S.D.), 70 L. R. A. 731, not to be within the scope of his employment. The liability of an employer for acts of a servant sent to commit a trespass, which the employer claims were in excess of his authority, is the subject of a note to this case.

That a railway company sending employees out in severely cold weather to clean the track in open country, remote from habitations, is under no duty to provide them with food and shelter, or carry to his home an employee whose feet have been frozen, is declared in *King v. Interstate Consolidated Street R. Co. (R.I.)*, 70 L. R. A. 924. A note to this case collates the other authorities on duty of master to furnish protection to servant whose work requires exposure to cold.

**Trust.]**—An irrevocable trust is held, in *Re Totten (N. Y.)*, 70 L. R. A. 711, not to be established by the deposit of one's own funds in his own name in a savings bank in trust for another, where the depositor retains possession of the deposit book and control of the deposit, does not notify the beneficiary of the act, and deals with the account as his own, withdrawing it entirely in his lifetime.

## BOOK NOTICES.

**Goodeve's Modern Law of Real Property**, with an Appendix containing the Vendor and Purchaser Act, 1874; the Conveyancing Acts, 1881 to 1892; the Settled Land Acts, 1882 to 1890; the Married Women's Property Acts, 1882 and 1893; the Trustee Act, 1893, ss. 10-12; and the Land Transfer Act, 1897 (Part I.) By the late L. A. Goodeve, of the Middle Temple. Fifth Edition, by Sir Howard Warburton Elphinstone, Bart., M.A., and Frederick Trentham Maw, B.A., LL.B., both of Lincoln's Inn, Barristers-at-law. London: Sweet and Maxwell: 1906. (Cloth 21s.)

This book is often cited in the Courts in Canada, and a new edition, with many additions and alterations bringing it up to date, will be welcomed here. Goodeve has a reputation for accuracy and thoroughness which the present edition will not impair. The arrangement of the book, the typography, and the indexing, are excellent.

**Demarest's Hints for Forensic Practice:** A Monograph on Certain Rules Appertaining to the Subject of Judicial Proof. By Theodore F. C. Demarest, A.M., LL.B. New York: The Banks Law Publishing Co.: 1906 (Cloth \$1.50.)

A little volume recommended to the ambitious youngster desirous of conducting his own case. His terror usually is the springing of objections to evidence which he proposes to adduce. It will not take him long to master the contents of Mr. Demarest's work, and, making due allowance for differences in procedure, the hints given will be useful to the Canadian barrister as well as to the American "counsellor."

**Heaton's Commercial Handbook of Canada** (Second Year). Toronto: Heaton's Agency. (Cloth \$1.00, Paper 60c.) With immense labour and considerable skill Mr.

Ernest Heaton (of Toronto, Barrister-at-law) has compiled a useful handbook, containing a trade register and index of industrial opportunities. The special article this year is on "The American Invasion." Other divisions of the book are: "Commercial Information," "General Information," "Legal Information," "Postal Information," "Customs Information," "Tables—Exchange, Measures, Miscellaneous." There is a good index. Altogether a thoroughly practical, concise, and business-like annual. Many lawyers will be interested in it.

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## PERIODICALS AND PAMPHLETS.

**Report of the Inspector of Legal Offices for Ontario, 1905.** The 23rd annual report contains a good deal of interesting information, and is worthy of study by members of the legal profession. We are glad to notice that for some of his information the learned Inspector is indebted to that useful publication *The Ontario Weekly Reporter*. Appendix H. shews 866 actions tried and disposed of by Judges of the High Court, 1,191 motions disposed of by Judges in Chambers, 623 in Weekly Courts, 837 by the Master in Chambers (excluding ex parte motions), 463 by Divisional Courts, and 120 appeals and stated cases by the Court of Appeal.

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**Law Students' Journal** (April, 1906—London, Eng.)

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**Federal Reporter** (National Reporter System). Vol. 140, Nos. 16, 17; vol. 141, No. 1 (April, 1906.)

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**General Digest American and English** (Bi-monthly advance sheets—No. 50, December, 1905.) The Lawyers' Co-operative Publishing Co., Rochester, N.Y.

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**Green Bag** (Boston). The April issue has the following leading articles: "Employers' Liability as an Industrial Problem," by Roger S. Warner; "The Abuse of Personal Injury Litigation," short opinions by many lawyers; "Personal Injury Actions and Workmen's Compensation in England," by R. Newton Crane; "The Belgian Law of 1903," by G. de Leval; "Workmen's Compensation in Italy," by Henry Burnham Boone; "Employers' Liability in France," by B. H. Conner.

**Michigan Law Review** (Ann Arbor):—Chief articles in April issue are: "The Compensation of Medical Witnesses," by H. B. Hutchins; "The Nature and Extent of an Agent's Authority," by Floyd R. Mechem.

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**Chicago Legal News** (Nos. 1958, 1959, 1960, April, 1906.)

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**Chicago Law Journal** (Vol. 23, Nos. 14, 15, April, 1906.)

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**Central Law Journal** (St. Louis, Mo.—Vol. 62, Nos. 12, 14, 16, March and April, 1906.)

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**Law Student's Helper** (Detroit, Mich.—Vol. 14, Nos. 3, 4, March and April, 1906.)

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**Law Notes** (Northport, N.Y.—Vol. X., No. 1, April, 1906.)

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**Criminal Law Journal of India** (Lahore—Vol. 3, Nos. 5, 6, March, 1906.)

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**Calcutta Weekly Notes** (Vol. 10, Nos. 17, 18, March, 1906.)

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**Madras Law Times** (Vol. 1, No. 3.)

**Supreme Court of Canada.**

EXCHEQUER COURT.]

[1ST MARCH, 1906.]

RUTLAND R.R. CO. v. BEIQUE.

WHITE v. BEIQUE.

MORGAN v. BEIQUE.

*Railway—Judicial sale — Purchase by solicitor of party — Capacity to purchase—Special statute—Discretionary order—Appeal.*

Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by Art. 1484, C. C.

The Act 4 & 5 Edw. VII. c. 158 directed the sale of certain railways separately or together, as, in the opinion of the Exchequer Court, might be for the best interests of creditors, in such mode as that Court might provide, and that such sale should have the same effect as a sheriff's sale of immovables under the laws of the province of Quebec. The Judge of the Exchequer Court directed the sale to be by tender for the railways *en bloc*, or for the purchase of each or any two of the lines of which they were constituted.

*Held*, that the Judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system, in preference to two separate tenders for the several lines, at a slightly larger amount, and that his decision should not be disturbed on appeal.

*F. H. Chrysler*, K.C., and *J. E. Martin*, K.C., for the appellants the Rutland Railroad Company.

*Beulac*, for the appellant White.

*Morgan*, appellant in person.

*W. Nesbitt*, K.C., and *Lafleur*, K.C., for the respondent Beique.

*Aimé Geoffrion*, K.C., for the respondent the Minister of Railways.

EXCHEQUER COURT IN ADMIRALTY.]

[6TH APRIL, 1906.]

## THE "NORTH" v. THE KING.

*Constitutional law—Illegal fishing—Three-mile limit—Legislative jurisdiction—Continuous chase—Capture on high seas.*

The Dominion cruiser "Kestrel" sighted the American schooner "North" on the fishing grounds in Quatsino Sound, within the three-mile limit off the coast of British Columbia, having four dories out and evidently engaged in fishing for halibut, contrary to the provisions of R. S. C. c. 94. On being chased by the cruiser, the schooner picked up two of her dories, and stood out to sea. The cruiser kept up a continuous chase (picking up one of the dories on the way), overhauled and seized the schooner on the high seas, some distance outside the three-mile limit, and towed her into port at Winter Harbour, B.C., where she was properly attached and libelled in the Exchequer Court of Canada. At the time of seizure, freshly caught halibut were lying upon the deck of the schooner, and there were other evidences that she had been recently engaged in fishing.

*Held*, affirming the judgment of MARTIN, Loc. J., Rex v. The "North," 11 B. C. R. 473, 2 W. L. R. 74, GIROUARD, J., dissenting, that the Parliament of Canada, under the provisions of the British North America Act, 1867, has exclusive jurisdiction to legislate with respect to fisheries within the three-mile limit off the coasts of Canada; that the cruiser had the right to immediately pursue the schooner sighted within the three-mile limit beyond that limit on to the high seas for the infraction of a municipal regulation of Canada; and that the seizure there made was justified by the rules of international law.

*Charles Wilson*, K.C., for the appellant.

*E. L. Newcombe*, K.C., for the respondent.

BOARD OF RAILWAY COMMISSIONERS.]

[30TH MARCH, 1906.]

## OTTAWA ELECTRIC R. W. CO. v. CITY OF OTTAWA.

*Board of Railway Commissioners—Jurisdiction—Construction of subway—Apportionment of cost—Company interested or affected—Street railway—Agreement with municipality.*

The power of the Board of Railway Commissioners, under s. 186 of the Railway Act, 1903, to order a highway to be carried over or under a railway, is not restricted to the case of opening up a new highway, but may be exercised in respect of one already in existence.

The application for such order may be made by the municipality as well as by the railway company.

The Board, on application by the corporation of the city of Ottawa, ordered a subway to be made under the tracks of the Canada Atlantic Railway Company where they cross Bank street, the cost to be apportioned among the city corporation, the Canada Atlantic Railway Company, and the Ottawa Electric Railway Company. By an agreement between the electric company and the city corporation the company were given the right to run their cars along Bank street and over the railway crossing, paying therefor a specified sum per mile. The company appealed from that portion of the order making them contribute to the cost of the subway, contending that the city corporation were obliged to furnish them with a street over which to run their cars, and they could not be subjected to greater burdens than those imposed by the agreement.

*Held*, that the electric company were a company "interested or affected" in or by the said work, within the meaning of s. 47 of the Railway Act, and could properly be ordered to contribute to the cost thereof.

*Held*, further, that there was nothing in the agreement between the company and the city to prevent the Board mak-

ing the order, or to alter the liability of the company so to contribute.

Decision of the Board affirmed.

*G. F. Henderson*, for the appellants.

*Taylor McVeity*, for the city corporation.

*F. H. Chrysler*, K.C., for the Canada Atlantic Railway Company.

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BOARD OF RAILWAY COMMISSIONERS.]

[6TH APRIL, 1906.]

**JAMES BAY R. W. CO. v. GRAND TRUNK R. W. CO.**

*Board of Railway Commissioners—Jurisdiction—Appeal to Supreme Court.*

The Board of Railway Commissioners granted an application of the James Bay Railway Company for leave to carry their line under the track of the Grand Trunk Railway Company, but, at the request of the latter, imposed the condition that the masonry work of such under-crossing should be sufficient to allow of the construction of an additional track on the line of the Grand Trunk. No evidence was given that the latter company intended to lay an additional track in the near future, or at any time. The James Bay Company, by leave of a Judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms, contending that the same was beyond the jurisdiction of the Board.

*Held*, that the Board had jurisdiction to impose said terms.

*Held*, per SEDGEWICK, DAVIES, and MACLENNAN. JJ., that the question before the Court was rather one of law than of jurisdiction, and should have come up on appeal by leave of the Board or been carried before the Governor-General in council.

Appeal dismissed with costs.

*W. Barwick*, K.C., and *G. F. Macdonnell*, for the appellants.

*F. H. Chrysler*, K.C., for the respondents.

*A. G. Blair*, for the Board.

ONTARIO.]

[6TH APRIL, 1906.]

## GIBB v. McMAHON.

*Specific performance—Contract for sale of land by trustees—Evidence of concurrence by all—Statute of Frauds—Correspondence—Authority of trustees to bind co-trustee.*

A trustee in Toronto wrote to a co-trustee in St. Mary's stating that an offer had been made to purchase a portion of the trust estate for \$12,000, and giving reasons why it should be accepted. The co-trustee replied concurring in those reasons and consenting to the proposed sale. The Toronto trustee afterwards had negotiations with the solicitors of G., and at their suggestion offered to sell the same property to G. for \$13,000, but without further notice to his co-trustee. The offer was accepted by the solicitors, whereupon the person who had offered \$12,000 raised his offer to \$14,000, and the trustee notified the solicitors of G. that the sale to him was cancelled. In a suit by G. for specific performance:—

*Held*, affirming the judgment of the Court of Appeal, 9 O. L. R. 522, 5 O. W. R. 554, that the letter written by the co-trustee in St. Mary's contained a consent to the particular sale mentioned therein only, and could not be construed as a general consent to a sale to any person even for a higher price. Even if it could, there were circumstances which occurred between the time it was written and the signing of the contract with G. which should have been communicated to the co-trustee before he could be bound by the contract.

*C. H. Ritchie*, K.C., for the appellant.

*T. D. Delamere*, K.C., and *A. B. Aylesworth*, K.C., for the respondents.

ONTARIO.]

[14TH APRIL, 1906.]

## CONNELL v. CONNELL.

*Will—Execution—Evidence—Onus—Beneficiary—Subsequent conduct of testator.*

In proceedings for probate by the executors of a will, opposed on the ground that it was prepared by one of the exe-

cutors, who was also a beneficiary, there was evidence, though contradicted, that before the will was executed it was read over to the testator, who seemed to understand its provisions.

*Held*, IDINGTON, J., dissenting, that such evidence and the fact that the testator lived for several years after it was executed, and on several occasions during that time spoke of having made his will, and never revoked nor altered it, satisfied the onus, if it existed, on the executor to satisfy the Court that the testator knew and approved of its provisions.

*Held*, also, that where the testator's estate was worth some \$50,000, and he had no children, it was doubtful if a bequest to the propounder, his brother, of \$1,000 was such a substantial benefit that it would give rise to the onus contended for by those opposing the will.

Judgment of the Court of Appeal, 4 O. W. R. 360, affirmed.

*G. H. Watson*, K.C., for the appellants.

*J. L. Whiting*, K.C., *F. J. French*, K.C., and *W. E. Middleton*, for the respondents.

*A. A. Fisher*, for the widow.

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BRITISH COLUMBIA.]

[6TH APRIL, 1906.]

### LASELL v. HANNAH.

*Company—Transfer of shares—Illegal consideration—Fraud—Officers of company—Breach of trust.*

With a view to overcoming the financial difficulties of a mining company and securing control of its property, the manager entered into a secret arrangement with the respondent, whereby the latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution, and purchase it for a new company to be organized, in which the respondent was to have a large interest. The manager, who was a creditor of the company, was to have his debt secured and to receive an allotment of shares in the new company proportionate to those held by him in the insolvent



company, and he agreed that he would not reveal this understanding to the other shareholders.

*Held*, affirming the judgment appealed from, *Lasell v. Thistle Gold Co. and Hannah*, 11 B. C. R. 406, 3 W. L. R. 149, *SEDGEWICK, J.*, dissenting, that the agreement could not be enforced, as the consideration was illegal and a breach of trust by which the other shareholders were defrauded.

*Charles Wilson, K.C.*, for the appellant.

*J. S. Ewart, K.C.*, and *G. A. Morphy*, for the respondent.

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## NEW BRUNSWICK.

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**In the Supreme Court.**

**IN EQUITY.**

[BARKER, J., 14TH JULY, 1905.]

**IN RE FREEZE.**

*Infant—Guardian—Married woman.*

A married woman will not be appointed sole guardian of the person and estate of an infant.

*W. B. Jonah*, for the applicant.

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[19TH SEPTEMBER, 1905.]

**ST. JOHN PORTWARDENS v. McLAUGHLAN,**

*Portwardens—Fees of office—Competition.*

Portwardens appointed by the city of St. John have no exclusive right to examine hatches of vessels arriving at the port so as to entitle them to fees for the services paid to an outside person.

*C. H. Skinner, K.C.*, for the plaintiffs.

*A. O. Earle, K.C.*, and *J. R. Armstrong, K.C.*, for the defendant.

[20TH OCTOBER, 1905.]

## EASTERN TRUST CO. v. JACKSON.

*Donatio mortis causa—Evidence—Delivery for safe-keeping.*

A person on his death-bed handed to his wife, out of a satchel which he kept in a closet of his bedroom, \$2,000 in bonds and \$1,550 in cash, telling her to "take them and put them away; wrap them up and lock them up in your trunk." At the same time he handed to her a pocket book containing \$150, saying that it was for present expenses. A few minutes later he handed to his business partner remaining contents of satchel, consisting of \$1,000 belonging to the firm. Subsequently he made a will bequeathing to his wife \$3,000, a horse, two carriages, and all his household effects; to his partner his interest in partnership property; to two grand-nephews \$500 each; and to nieces and nephews the residue of his estate. His private estate was worth about \$8,000. When giving directions for the drafting of his will, on the amount of the legacies to his wife and grand-nephews being counted up, he said, "There is more than that."

*Held*, that there was not a *donatio mortis causa* to the wife, the deceased intending no more than a delivery for safe-keeping.

*J. A. Belyea*, K.C., for the plaintiffs.

*A. O. Earle*, K.C., for legatees.

*A. J. Gregory*, K.C., for the widow.

[19TH DECEMBER, 1905.]

## EVANS v. EVANS.

*Husband and wife—Purchase in wife's name—Gift.*

Where property purchased by a husband as a home for himself and wife was, by his direction, conveyed to her, so that the title might be in her in case of his death, it was held that a gift was intended, to take effect upon his death if she should survive him.

*A. I. Trueman*, K.C., and *W. H. Trueman*, for the plaintiff.

*W. B. Wallace*, K.C., and *E. S. Ritchie*, for the defendant.

# THE CANADIAN LAW TIMES.

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JUNE, 1906.

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## POST LETTERS.

THE Postmaster-General, with his messengers and agents, has become an indispensable public servant. Public convenience and modern business requirements have demanded the best energies and ingenuity of successive chief postmen, until a system of despatch and reception has been constructed which readily adapts itself to improvement, and satisfies business and social demands by its accuracy, safety, and rapidity. With the winning of public confidence and increased user, it was natural that the law, ever ready to make definite the functions of agencies serving the public, should early find it necessary to declare itself regarding the rights and duties of him who carried, and him who used, the mails.

Long ago it was that an attempt was made to invest the post office with the liability of common carrier. But this effort received a check by the declaration of Lord Mansfield that there was no analogy between the Postmaster-General and a common carrier or master of a ship, for the reason that he did not carry for hire nor was he a contractor. True, he said, there were great receipts from postal revenue, but there was a surplus of benefit to the public: *Whitfield v. Lord Le Despencer* (1778), Cowp. 754. In other words, the payment of postage is imputed to defray the cost of carriage and protection in general, but is not to be taken as payment on the individual letter or package, in consideration of which the common law liability of carrier would attach.

The attempt to make the Postmaster-General personally liable for loss in the mails was also combatted and declared against, on the ground that he contracted as agent for the

Crown. "Where a man acts as agent for the public and treats in that capacity, there is no pretence to say that he is personally liable:" *Gidley v. Lord Palmerston* (1822), 3 Brod. & B. 275. "No man would accept of any office of trust under the Government upon such conditions:" *Macbeath v. Haldimand* (1786, Lord Mansfield sedente), 1 T. R. 172. The postal official is also protected from the tortious acts of those under him when appointed by Government, though he may be liable for the acts of those appointed by himself under *respondeat superior*: *Raisler v. Oliver* (1893), 12 So. Rep. 238; and is entitled to the statutory protection afforded to public officers; though not for defamation: *Hanes v. Burnham* (1896), 23 A. R. 90.

There has thus been created the judicial anomaly that the post office is the agent of a sender or receiver of a letter intrusted to it only so long as it has physical possession of it, yet not an agent subject to the legal penalties for its loss through negligence or other preventable cause. The public, by Parliament, has accepted this theory, and its acquiescence has been set in Postal Acts of like tenor.

The day of private messenger and runner had few questions difficult of solution, as the time when communications were made and answered depended upon the individual in the transaction, and evidence could be exact as to when minds met and contracts became complete. But with the use of the impersonal post complexity ensued. What rights of property existed in a letter? Whose agent was the post office,—that of the offerer, or the offeree, or of both? When was the offer made, when posted, or when received? Could the offeree repent after posting, and by sending a quicker messenger effectually withdraw? Was the post office, intrusted with an offer, the agent for an indefinite time, or did the agency cease immediately upon delivery? Was the post office the offerer's agent to "bring" the acceptance or to "receive" it? Lucid discussions of such points have taken place. Some observations regarding the question, even if not a novel or unfamiliar one, may be of interest.

Who owns a letter? The control of the sender ceases immediately it is posted, and he has no further rights of property in it. A letter is posted when deposited in any post office or authorized letter box. It is a post letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post office or letter box, or is being carried through the post: 1 Edw. VII. c. 19, s. 1 (D.) It need not be actually deposited in the mail chute: *Rex v. Ryan* (1905), 9 O. L. R. 137: but may be delivered to any person authorized to receive letters for the post. When posted, a letter "shall cease to be the property of the sender, and shall be the property of the person to whom it is addressed:" The Post Office Act, s. 43 (D.) Should a lady decline an offer of marriage by post, the fatal moment is that when the missive is dropped in the post box. After that, remorse or wringing of hands will be unavailing. In this our law differs from that of France, where there is a *locus poenitentiae* until the letter is put upon the mail train: *Ex p. Cote* (1873), L. R. 9 Ch. 27, 32. The statement that the sendee is the owner of a post letter must, however, be qualified in two particulars. In an indictment for its theft the property may be laid in the Postmaster-General: The Post Office Act, s. 111: and the sender has yet a quasi right of property in it, in that he can control its publication. The property of the sendee in the paper on which it is written is absolute, but, as the lawful secrets of business and friendship are inviolable (Edmund Burke), he must not publish its contents against the will of the sender, and may be restrained from doing so: *Oliver v. Oliver* (1861), 31 L. J. C. P. 4; *Earl of Lytton v. Devey* (1885), 1 Times L. R. 41: unless it contains materials which make it necessary for the sendee to use them for his own justification, or the vindication of his character. Nor must a stenographer or typewriter divulge the contents of a letter after it ceases to be the property of the writer, and can be enjoined from so doing. "Every clerk employed in a merchant's counting-house is under an implied contract that he will not

make public that which he learns in the execution of his duty as clerk:" *Tipping v. Clarke* (1843), 2 Hare 393.

But to perform its true function, the post office must not only be cheap and rapid; it must be secure and inviolable. With this end in view, the Post Office Act (s. 89) makes it a misdemeanour to open, secrete, delay, or detain a post letter. From this penalty no one is exempt in Canada; but in Great Britain the supposed necessity for affording means for detecting treason or sedition, allows the Principal Secretaries of State, by express warrant, to direct the opening of post letters. This right has scarcely ever been exercised, but so late as 1881 Sir W. Vernon Harcourt explained and defended it in Parliament, and such champions of the people's rights as Charles James Fox and Lord John Russell have availed themselves of its power.

So much as to the ownership and character of a letter. Then as to the part it plays in the law of contract. The efficacy of the post office to bind people who are in the ordinary walks and conditions of life is now as great where nothing is expressly said about the use of the post, as it is where there is an agreement that it shall be the agency of communication. In other words, it is the ordinary method of communication between those living at a distance. When the telegraph office is adopted by the parties as the channel of communication, the same rules will apply. But the post office is recognized by law as the common agency, because "it is a public agency charged with the duty of transmitting letters, and the presumption is that what ordinarily results, probably resulted in the given case, and therefore the mailing of a letter is proof of its reception: *Henderson v. Carbondale* (1891), 140 U. S. R. 25, per Brewer, J. The rule is well settled that "parties are presumed to contemplate acceptance by post whenever the circumstances are such as to make such acceptance reasonable in the usual course of business:" *Henthorn v. Fraser*, [1892] 2 Ch. 27. If a person posts a letter containing an offer, he, as some one has said, "extends his personality" to the post office. He makes it part

of himself, and therefore an acceptance of an offer, when posted in return, instantly becomes communicated to the offerer, and a contract is made. This state of the law, however, has not been arrived at without some jangling. It was a wrench to the habits of mind of several Judges. Bramwell, L.J., gave utterance to some of his virile dissents from the doctrine that a person could be bound by an acceptance which he did not or might not personally receive: *Household Fire Ins. Co. v. Grant* (1879), 4 Ex. D. 216. Lord Romilly had previously held that if the letter of acceptance was not received there was no contract: *Reidpath's Case* (1876), L. R. 11 Eq. 86. And in *British and American Telegraph Co. v. Colson* (1871), L. R. 6 Ex. 108, the opinion was that there was no contract until the time when the acceptance had come to the knowledge of the offerer. These last two cases must now stand overruled as heresies, and the doctrine of the earlier cases of *Adams v. Lindsell* (1818), 1 B. & Ald. 681, and *Dunlop v. Higgins* (1848), 1 H. L. C. 381, re-established with undoubted clearness.

In the first named, the defendants posted an offer to sell a quantity of wool. The letter was wrongly addressed to a town not that of the plaintiffs' business, but being a well-known firm it was forwarded to them, and having received it the next day following, they posted a letter accepting the offer. The defendants, not having had an acceptance by return post, had sold the wool to another firm and declined to admit themselves bound. It was held that the contract was complete with the posting of the acceptance in due course of mail after actual receipt of the offer, and the mistake in address being that of the defendants, they could not take advantage of it to relieve themselves. Lord Ellenborough said: "The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs."

This was approved in *Dunlop v. Higgins*, where the defenders in Liverpool offered 2,000 tons of iron in a letter

addressed to the pursuers in Glasgow. Owing to bad roads the letter was delayed in transmission, and the Liverpool firm, having no immediate answer, sold the iron elsewhere. Upon the argument that there was no binding contract until the plaintiff's answer was actually received, Lord Cottenham, L.C., said: "If that was so, no contract could ever be completed by post, for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it, and so on ad infinitum." Lord Blackburn said that the acceptor in posting the letter has put it out of his control and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound: *Brogden v. Metropolitan R. W. Co.* (1877), 2 App. Cas. 666.

*Household Fire Ins. Co. v. Grant* (1879), 4 Ex. D. 216, involved a test of the binding character of correspondence regarding the acceptance of shares. The defendant had applied, but the answering letter of allotment went to a person of the same name in the street, and the defendant, thus not having any notification, repudiated liability. The Lord Justice Thesiger said: "As soon as the letter of acceptance is delivered to the post office, the contract is as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself. How can a casualty in the post unbind the parties or unmake the contract?"

Suppose there are two communications, an acceptance and one of a different character, in the letter, what happens when it is lost in the post? My tenant in Ottawa offers to sell me some lumber. I post an acceptance and enclose also a notice to quit. The mail car is burnt, the letter destroyed, and never reaches the addressee. Is the posted letter valid as a notice to quit? Obviously not. Then why should it be binding as an acceptance? Because no principle is in-



volved. It is a legal rule of convenience: vide *Household Fire Ins. Co. v. Grant*, supra.

This statement of the law leads to the observation that the post office is the agent of the offerer to receive the acceptance for him and not to bring it to him. If the latter was the case, the acceptor would be always in doubt as to whether the acceptance had arrived, and as to the time from which he may consider himself an owner. The law has declared the balance of business convenience to be in favour of the first named proposition, and if the offerer receives no answer owing to mistake or casualty of post, he must satisfy himself regarding his letter by further letter or a telegram of inquiry.

This is illustrated yet further by the last important case of *Henthorn v. Fraser*, [1892] 2 Ch. 27. The offeree, in business in Birkenhead, had an option to buy land. The offerer, in Liverpool, posted a letter withdrawing the option at 1.30 o'clock. This was received by the offeree at 5 o'clock, and after he had posted a letter exercising his right at 3.50 o'clock. It was held that a withdrawal by post does not bind until actually received, and that the contract had been made. Lord Herschell, L.C.: "When the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted." This rule has been approved in Canada in *Magann v. Auger* (1901), 31 S. C. R. 186.

Then to sum up:—

- (1) In places with postal facilities, the post office is the means of communicating an offer and acceptance, if no other way is chosen.
- (2) The offerer makes the post office his agent to receive the acceptance.
- (3) If the acceptance is received (that is, posted), the contract is complete, and it matters not if it does not reach the offerer through casualty of post.

**"THE GREATER THE TRUTH, THE GREATER THE  
LIBEL."**

(From the London *Law Times*.)

The authorship of this maxim is usually attributed to Lord Mansfield. Burns wrote in "The Reproof:"—

Dost not know that old Mansfield,  
Who writes like the Bible,  
Says the more 'tis a truth, sir,  
The more 'tis a libel?

Again, we meet the phrase in the poems of Moore, "A Case of Libel":—

It was nuts for the Father of Lies,  
As that wily fiend is named in the Bible,  
To find it settled by laws so wise,  
The greater the truth, the greater the libel.

At the present day the maxim applies only to criminal proceedings, and it is stated in modern text-books that it was never at any time applicable to a civil action. Mr. Blake Odgers, in his *Outlines of the Law of Libel*, humorously remarks that the phrase has become a sort of catchword with the man in the street, who is rather prone to air it in order to shew how wicked and absurd the law of England is. Yet there is something to be said on behalf of the much-maligned "man in the street," for his misconception may perhaps be due in some measure to the confusion which apparently prevailed in the eighteenth century. In the library of the Inner Temple there is a quaint old text-book on the law of libel, published in 1765 (probably the oldest work dealing with civil proceedings for defamation), and written by "A Gentleman of the Inner Temple," in which the following passage occurs: "It seems now settled that no scandal in writing is any more justifiable in a civil action than in an indictment or information at the suit of the Crown; for though in actions for words the law through compassion admits the truth of the charge to be pleaded as a justification, yet this tenderness of the law is not to be extended to written

scandal, in which the author acts with more coolness, whereas in words men often, in a heat and passion say things which they are afterwards ashamed of, yet the scandal sooner dies away and is forgotten; and therefore, from the greater degree of mischief and malice attending the one than the other, the law allows the party to justify in an action for words, though not for written scandal."

In support of his view the "Gentleman of the Inner Temple" cites *Rex v. Roberts* (B. R. M. T. 8 Geo. II.) This case does not appear in the published reports, but it is referred to by Holt in his *Law of Libel* (1812), as being considered at one time as an authority. Holt cites a dictum of Lord Hardwicke in this case: "It is said that if an action were brought, the fact, if true, might be justified; but I think this is a mistake. I never heard of such a justification in an action for libel even hinted at. The law is too careful in discountenancing such practices." Holt, however, adds that in 1812 *Rex v. Roberts* was no longer considered good law, and refers to two unreported cases—*King v. Parsons* (1799) and *Plunkett v. Cobbett* (1804)—as authorities for the admission of the truth of the charge as a complete defence.

The non-admission of the truth seems to have been a legacy from the Star Chamber jurisdiction, which in turn adopted the severe Roman law, *De Libellis Famosis*. Hudson, in his treatise on the Star Chamber, points out that this court has swept away "a gross error from the law of England—" i.e., that it is not a libel if the words be true. Hudson further stated that while spoken words may be justified, if the scandal be put in writing it is then "past any justification, for it is not the matter but the manner which is punishable; for, as the woman said, she would never grieve to have been told of her red nose, if she had not one indeed."

As late as 1843 Lord Brougham, when giving evidence before the committee of the House of Lords appointed to inquire into the law of defamation, said: "I am quite clear that the truth ought not to be made decisive either in civil or criminal proceedings, for cases may be found where the truth,

instead of being a justification, would be an aggravation." This seems to have been the general view of those who were called before this commission, among whom were judges, magistrates, and newspaper editors. Their evidence throws a valuable sidelight on the subject of defamation.

One of the dangers involved in the admission of the truth as a defence is clearly shewn by a witness named John Black, who was editor of the Morning Chronicle. When asked whether he had considered the law of libel, he naively replied, "More often than I could wish for." He then referred to a newspaper established for the express purpose of disseminating scandalous libels. This paper, the Argus, employed a professional pugilist on its staff, who received 3½ guineas a week as nominal editor. He was a powerful man, about 7 ft. high, known in the neighbourhood as the Duke of St. Giles, and head of the clan M'Carthy, and was able to muster a thousand hooligans from the locality at a moment's notice. When anybody called with a horsewhip and asked for the editor, in the words of the report, "He rose up, and said, 'I am,' and the party bolted with all possible speed." This "Duke of St. Giles" seems to have his counterpart at the present day in Germany, where the Sitzredacteur is employed to go to prison when the real editor transgresses the Press laws.

Another witness, the editor of the Examiner, did not seem to have quite made up his mind on this point. He was then pressed. "Do you not consider," he was asked, "that the admission of evidence of the truth would greatly aggravate the pain and mischief caused by the publication of the libel?" "Yes," he replied, "but that is the case in any proceeding. Being dragged from private life into court is a great pain. There is a great pain, it seems to me, in the whole operation of seeking justice." A further question was then put to him: "If a lady should be held up to the public as having false hair, false teeth, and false eyebrows, which is utterly unknown to anybody but her waiting-maid, that, if proved, is an absolute defence. Do you approve of that?" This hypothetical

case seems to have clinched the question with him, for he replied, "No; I certainly do not." Although his reply does not carry us much further, it is at least an interesting example of early Victorian ethics.

In Lord Denman's view, the admission of the truth as a defence tended to enable the wrongdoer to take advantage of his own wrong, by challenging the character of the person injured. The upshot of this commission was a recommendation that the truth should not be a sufficient defence in an action for libel or slander, unless the publication was also for the benefit of the community. One of the principles on which this recommendation was based seems to have been the hardship caused by raking up some forgotten peccadillo of the past, at a time when a man has turned over a new leaf, and is leading a respectable life. This is, no doubt, a serious defect in the present state of the law; but hard cases never made good law, and the safeguard of the plaintiff is that the justification must be as broad as the charge (*Weaver v. Lloyd*, 2 B. & C. 678); in other words, it must be true in substance and in fact. As a rule, a really malicious defendant, unless he has an intimate acquaintance with the law of libel, will overstep the mark, and be unable to prove the complete truth of his allegations. Another reason for the admission of the truth as a defence is that given by Mr. Justice Littledale in *McPherson v. Daniels* (1829, 10 B. & C. 272): "The plaintiff is not entitled to recover damages in respect of an injury to a character which he does not possess." England and America seem to stand alone in adopting this principle, while colonial and foreign legislatures require, in addition, that the publication should be for the public benefit.

## RECENT CASES FROM THE TIMES REPORTS.\*

**Attachment.]**—It is decided in *In re Tuck*, 22 T. L. R. 425, that a writ of attachment for disobedience to an order cannot issue unless the order has been personally served, or evasion of service is made out. Mere knowledge of the making of the order is not enough. This applies to mandatory orders however, not to restrictive orders requiring a person not to do a certain act.

**Cruelty to Animals.]**—In *Bowyer v. Morgan*, 22 T. L. R. 426, it was held that there was evidence to justify the presiding justices in coming to the conclusion that branding on the nose sheep, which grazed in unenclosed mountain lands in parts of Wales, was reasonably necessary for the purpose of identification, and was not an offence under the Act. —*Rex v. Cable*, 22 T. L. R. 438, decides that there may be a conviction for cruelty to a number of animals upon one occasion; a separate conviction in respect of each animal not being necessary.

**Factory Acts.]**—A room in which a fishing boat owner employs persons to mend the nets he uses in his calling as a fisherman is not, it is decided in *Curtis v. Skinner*, 22 T. L. R. 448, a “workshop” within the meaning of s. 149, s.-s. 1 (b), of the Factory Act, 1901, the words “in which any manual labour is exercised for purposes of gain” meaning for purposes of direct gain to the employer by the sale at a profit of the article upon which the manual labour is bestowed. The corresponding section of the Ontario Factories Act, R. S. O. 1897 c. 256, s. 2, s.-s. 1 (c), is much wider in its terms, and an establishment of the kind in question would as far as this point is concerned probably come within it.

\* Including the cases in Vol. 22, No. 22, week ending May 1, 1906.

**Land Titles Act.]**—The judgment in *Attorney-General v. Odell*, 21 T. L. R. 458, noted 25 C. L. T. 383, has been reversed by the Court of Appeal: 22 T. L. R. 466. The solicitor of the registered owner forged his signature to a transfer and obtained money from a purchaser in good faith. The register was rectified on the application of the owner. It was held that the transferee was not entitled to indemnity out of the insurance fund.

**License to Sell Intoxicating Liquors.]**—The lease of a public house in question in *Williams v. Lassell and Sherman*, 22 T. L. R. 443, contained a provision for termination if the licensing authority should for any cause whatsoever refuse to renew the license, and a covenant by the lessee to insure license against loss or forfeiture in the sum of £400. A renewal of the license was refused on the ground that it was not required by the necessities of the neighbourhood. It was held that this was a possibility which should have been insured against, and that the lessee was answerable in damages for having failed to do so.

**Motor Car.]**—*Plancy v. Marks*, 22 T. L. R. 432, may perhaps be of interest under the recent Ontario motor car legislation. It is there decided that evidence of a constable as to speed, based on the time, ascertained by a stop-watch, taken by the motor car to travel a certain distance, was sufficient to justify a conviction.

**Municipal Corporations.]**—While a number of the points in question in *Attorney-General v. De Winton*, 22 T. L. R. 446, depend upon special statutory provisions, there are several of general interest. The defendant was treasurer of a borough and manager of a bank where the borough account was kept. The account was overdrawn, and each quarter the defendant debited the borough account with interest and credited the amount to the bank. It was held that the overdrafts were unlawful; that an action lay by the Attorney-General, it being in effect one to prevent the misapplication

of public funds; that the municipal authorities were not necessary parties; and that their direction to the defendant was no protection to him in committing a breach of trust.—By the Act in question in *Norton v. Taylor*, 22 T. L. R. 450, any person who, while holding a civic office, was directly or indirectly interested in any contract with the municipality, except as shareholder in a company, was made subject to a penalty. It was held by the Judicial Committee that a member of a firm who supplied materials to a municipal contractor in the carrying out by him of a contract previously entered into was not within the prohibition of the Act. Compare the language of the Ontario Municipal Act, 3 Edw. VII. c. 19, s. 80.

**Patent.]**—A combination of old machines was held in *Northern Press Co. v. Hoe and Co.*, 22 T. L. R. 453, not to be the subject of a patent, no substantial exercise of invention being required.

**Restraint of Trade.]**—The judgment in *Hooper v. Willis*, 21 T. L. R. 691, noted 25 C. L. T. 538, holding that a thirty miles' radius and a fourteen years' term were unreasonably restrictive in the case of a dealer in builders' supplies, has been affirmed by the Court of Appeal: 22 T. L. R. 451.

**Will.]**—A gift of pictures to a named person, with the added provision that they are "to go to him when he is married and has a house of his own," is not, it is held in *In re Panter*, 22 T. L. R. 431, a gift conditional upon marriage, but is an absolute gift with a direction as to the time for handing over the pictures.—It was held in *In re Pardoe*, 22 T. L. R. 452, that gifts of certain funds in trust to apply the income, (a) in paying bell-ringers for ringing the church bells on the 29th May in commemoration of the restoration of the monarchy, (b) in erecting head-stones at the graves of certain pensioners, and (c) for such public charities as the trustees should in their absolute discretion think fit, were good as charitable gifts.



## THE LATEST ONTARIO DECISIONS.\*

**Appeal to Court of Appeal.]**—Since the judgment at the trial in *Playfair v. Turner*, 7 O. W. R. 744, gave the defendants the election to have a reference, though the trial Judge held that the plaintiffs were entitled to recover damages to upwards of \$4,000, it was contended by the defendants that this judgment was not a final judgment, and that no appeal could lie to the Supreme Court of Canada, and therefore that leave to appeal could not be granted under s. 76 of the Judicature Act. Osler, J.A., however, on the authority of *Frankel v. Grand Trunk R. W. Co.*, 1 O. W. R. 254, 339, 396, 3 O. L. R. 703, 33 S. C. R. 115, granted leave to appeal.

**Appeal to Divisional Court.]**—The case of *Diamond Harrow Co. v. Stone*, 7 O. W. R. 685, decided in 1901, is authority not only for the practice point noted under “Dismissal of Action for Non-prosecution,” post, but for the proposition that an order of a County Court Judge in a County Court action requiring the plaintiffs to set the action down for trial for a particular sitting, and directing that in default the action be dismissed, is an order in its nature final, and therefore one from which an appeal lies. The other cases on this subject are collected in an article in 25 C. L. T. 674.

**Company.]**—A person who has been a holder of shares ostensibly paid up, but upon which, to his knowledge, nothing has been paid, they having been issued as “bonus shares,” and who has transferred them, is not liable, in a winding-up, in respect of such shares or to be put upon the list of contributories qua shareholder, there being nothing in the Ontario Companies Act to provide that calls may be made upon any but shareholders (which means shareholders at the time

\* Short notes of the most important cases in Volume VII. of the Ontario Weekly Reporter, Nos. 15, 16, 17, 18, pp. 605 to 776, inclusive.

the call is made), and nothing in the Winding-up Act which creates any liability on the part of a past member of a company; but where such a person was a director of the company when the transaction took place which resulted in the allotment of such "bonus shares" he would doubtless be liable for a breach of trust in the issue thereof and in putting them off on his transferees to the prejudice of the company: *Re Wiarton Beet Sugar Co., Freeman's Case*, 7 O. W. R. 613. —An appeal by the liquidator from the order of Anglin, J., in *Re Pakenham Pork Packing Co., Galloway's Case*, 4 O. W. R. 22, was dismissed by the Court of Appeal (7 O. W. R. 658), chiefly on the grounds that there had been no acceptance by the company of Galloway's offer to purchase shares and allotment thereof to him, that the authority said to have been given by the directors to the secretary to accept such offers and allot such shares was unlawful, and that the company, by reason of having failed to pass a by-law creating preference and common stock, were not in a position to give to Galloway what he had applied for.

**Contract.]**—The contract in *Wallace v. Teniskaming and Northern Ontario R. W. Commission*, 7 O. W. R. 665, provided that, as a condition precedent to an action by the plaintiff for the price of ties delivered by him under such contract, he should obtain the certificate of the chief engineer of the defendants. The evidence disclosed that the chief engineer upon his inspection was satisfied with the ties delivered, but refrained from giving the certificate in question on account of the views of the members of the commission, and shortly thereafter resigned. The judgment of the Court of Appeal ordering a new trial was delivered by Garrow, J.A., who made the following statement as to the rights of a contractor under a contract containing such a provision: "He is entitled to have, at the hands of the official, good faith, and the expression of his own honest opinion, and not merely that of his employers. The employer has, of course, the right to direct the attention of the certifying official—before he certifies—to alleged defects of performance, and

to ask for care and diligence in the discharge of his duty, but he has no right to dictate or to in any way impose his own opinion, or to prevent or attempt to prevent the certifying official from expressing his own conscientious conclusions."

**Costs.]**—The defendant in *Ludlow v. Irwin*, 7 O. W. R. 720, an action for libel, had not justified, but had served notice, under Rule 488, of his intention to adduce, in mitigation of damages, evidence of the circumstances under which the libel was published, and pursuant thereto sought to adduce evidence which the trial Judge held inadmissible except in support of a plea of justification. The plaintiff had prepared for the contingency of such evidence being admitted by bringing a number of witnesses whom he had intended to call in reply, and on the taxation sought to have the costs appertaining to such witnesses allowed him, which was refused by a local taxing officer. On appeal Anglin, J., held the plaintiff entitled to a reasonable sum for the costs in dispute, having regard to the implication arising out of Rule 1176 (3) and to Rule 1175.

**Damages.]**—In *Renwick v. Galt, Preston, and Hespeler Street R.W.Co.*, 7 O.W.R. 673, on appeal from the order of a Divisional Court (6 O. W. R. 413, 11 O. L. R. 158, noted 25 C. L. T. 614), the Court of Appeal was of opinion that the verdict of \$3,000, as estimated by Osler, J.A., at \$210 per annum for the rest of the joint lives of the mother and daughter, was excessive, as being beyond any amount that a jury could reasonably find would, considering their station in life, be the pecuniary loss occasioned to the mother by the daughter's death, and unless the parties could agree upon the suggested sum of \$1,500, directed that there should be a new trial.

**Discovery.]**—An appeal by the defendants from the order of Mabee, J., in *Massey-Harris Co. v. DeLaval Separator Co.*, 7 O. W. R. 59, noted ante 111, was dismissed by a Divisional Court: 7 O. W. R. 682. It was held that the plaintiff in an

action of libel, where the defence of qualified privilege is set up, has the right to discovery of the source of the information on which the defendant alleged that he relied in making the statement for which he is sought to be made liable; and that *prima facie*, at least, the plaintiff is entitled to discovery of the names and addresses of the persons to whom the alleged libel was published.—The ruling of the Master in Chambers in *Lefurgey v. Great West Land Co.*, 7 O. W. R. 738, affirmed by Meredith, C.J., was that a defendant resident out of the province stands in a different position from a plaintiff so resident, and will not be compelled to attend for examination for discovery within the province.

**Dismissal of Action for Non-prosecution.]**—A belated report is that of the decision of a Divisional Court (Meredith, C.J., MacMahon and Lount, JJ.), in *Diamond Harrow Co. v. Stone*, 7 O. W. R. 685. The important practice point decided is that when once the plaintiff has complied with Rule 433 by giving notice of trial and proceeding to trial, as therein provided, the Rule has no further application; and that therefore, when a new trial has been ordered, a motion to dismiss will not lie at the instance of the defendant for the plaintiffs' failure to give notice of trial and proceeding to trial, the defendant's remedy being to give notice of trial himself. This was followed by the Master in Chambers in *Sorenson v. Smith*, 7 O. W. R. 725.

**Division Courts.]**—An appeal by the plaintiff from the order of Mabee, J., in *Re McDermott v. Grand Trunk R. W. Co.*, 7 O. W. R. 602, noted ante 345, was dismissed by a Divisional Court: 7 O. W. R. 678.

**Fatal Accidents Act.]**—In *Mulvaney v. Toronto R. W. Co.*, 7 O. W. R. 644 (noted post under the heading "Street Railways"), an interesting question arose upon the defendants' contention that the action, which was brought under R. S. O. 1897 c. 166, could only be maintained by the father of the young woman whose death occasioned the accident,

where he as well as the mother was alive, or, in other words, that the mother was not entitled to share in the apportionment of the damages, the father being alive. The action was brought in the name of both parents, and the jury, assessing the damages at \$2,000, gave \$1,500 to the mother and \$500 to the father. Mr. Justice Garrow, delivering the judgment of the Court of Appeal, remarked that the objection had no merit but that of novelty. "The only construction which would exclude the mother would be one holding that she should be included only if the father is dead, but not otherwise. This result could be reached only by implying some very important words not to be found in the statute, nor involved in its true meaning, or intention."—In the very similar case of *Renwick v. Galt, Preston, and Hespeler Street R. W. Co.*, 7 O. W. R. 673 (noted ante under the heading "Damages"), the Court of Appeal expressly decided that the mother of the deceased could bring an action under the same statute, notwithstanding that the father was living.

**Forged Cheques.]**—The judgment of the Court of Appeal in the important case of *Rex v. Bank of Montreal*, 7 O. W. R. 638, affirms the elaborate judgment of Anglin, J., 5 O. W. R. 185, 10 O. L. R. 117, in favour of the Dominion Government against the defendants, and dismissing the claim of the defendants for indemnity or relief over against other banks. The case arose, as will be remembered, out of the sensational forgeries of Abondeus Martineau, a clerk in the Department of Militia and Defence at Ottawa. The judgment of the Court of Appeal, so far as published, does not call for any special comment.

**Illegal Distress.]**—Upon an appeal by the defendant and cross-appeal by the plaintiff in *Stone v. Brooks* from the judgment of Boyd, C., 7 O. W. R. 463, noted ante 346, a Divisional Court (on the facts disclosed in 3 O. W. R. 527), decided (7 O. W. R. 732) that the damages to the plaintiff's business was due to the defendant having made the distress under his chattel mortgage, and "that the proper amount to

be allowed would be reached if there were deducted from the damages awarded by the referee what has been allowed for the goods that were distrained for the rent, and there were added to the balance remaining the damages for the interference for the days on which plaintiff was wrongfully interfered with." A clause accelerating payment of a chattel mortgage in case of a distress for rent refers to a distress by one other than the mortgagee.

**Infant.]**—Upon the evidence in *Re Faulds*, 7 O. W. R. 759, Anglin, J., finding the father's paternal rights to the custody of his daughter, a child of 10 years, undiminished, and that letters written by the respondent, maternal grandmother of the child, shewed that her claim that an agreement existed whereby the child should remain with her was not supportable, held, applying the principle of *In re McGrath*, [1893] 1 Ch. 143, that regard for the real welfare of the child required the making of an order which would give effect to the natural rights of the father. Considerations moving to this conclusion were: the better situation of the child if brought up at London as regards surroundings and education: the improvement in her prospects owing to the probability of greater generosity on the part of the father; the desirability of keeping a family together, the father having with him a son 2 or 3 years younger than the daughter; and the right of the father, in the absence of deep religious convictions on the part of the child, to have regard shewn to his wishes as to the religious education of his children.

**Land Titles Act.]**—Points decided by Britton, J., in *Yemen v. Mackenzie*, 7 O. W. R. 701, on appeal from the order of a local Master of Titles, were (doubtfully) that a Judge of the High Court has power to extend the time for giving notice of appeal under Rule 78 (2) of the Land Titles Act, even if no application has been made for such extension within the 7 days mentioned in that Rule; and that a local Master of Titles has jurisdiction in proceedings under s. 76 to determine the validity of a mortgage or other document against which a caution has been filed.

**Life Insurance.]**—In *Re Philips and Canadian Order of Chosen Friends*, 7 O.W.R. 765, an application was made by the National Trust Co., administrators of the estate of Catherine Philips, deceased, wife of John S. Philips, deceased, for payment out of Court of one-third of the moneys paid in by the Order in respect of an insurance upon the life of John S. Philips, who along with his wife was lost with the steamer “*Minnedosa*.” Anglin, J., held that, there being no presumption of survivorship, the onus was upon the respondents, children of John S. Philips by a former wife, to prove that the wife died before the husband, to entitle them to claim by survivorship, which onus they could not discharge: R.S.O. 1897 c. 203; 4 Edw. VII. c. 15, s. 7. Unless the other provisions of the Ontario Act suffice to exclude the implication under s. 159 of a joint tenancy of the fund with the accompanying right of survivorship, the English cases would govern and decide the matter in favour of such right. Apart therefrom, a preferred beneficiary under a policy within s.-s. 1 of s. 159 only acquires a contingent interest upon his being alive when the assured dies. Therefore neither party can prove the survivorship of either the husband or wife, and in whatever form the question might arise the party having the affirmative would fail. Independently of s.-s. 8 of s. 159, the proviso in s.-s. 1 precludes any resulting trust arising in favour of the insured's estate and imports that a lapsed share would enure to the benefit of the surviving beneficiaries; wherefore the entire fund in Court was held to belong to the two infant children in equal shares.

**Lost Indictment.]**—The question raised on the motion of the prisoner for a reserved case in *Rex v. McAuliffe*, 7 O. W. R. 704, was whether, where a true bill has been found, and the case has been traversed to a later sittings, and before the case comes on for trial the indictment has been lost or stolen, it is proper to prefer a new indictment before the grand jury at such later sittings. Anglin, J., refused the motion, stating that he had no doubt either as to the regularity or the sufficiency of the proceedings.

**Mortgage.]**—In *Rogers v. Brann* the judgment of Mabee, J., 6 O. W. R. 993, noted ante 122, was affirmed by a Divisional Court: 7 O. W. R. 617.

**Municipal Corporations.]**—Sub-section 9 of s. 580 of the Municipal Act is restricted, in its application at least, to cases in which the transaction takes place within the municipality, and does not extend to cases where the only act done within it is the delivery of the goods in question: *Rex v. Woollatt*, 7 O. W. R. 727.—Teetzel, J., dismissed a motion in *Re Vandyke and Village of Grimsby*, 7 O. W. R. 739, to quash a local option by-law, holding that an unintentional mistake in first publishing the by-law more than 5 weeks before voting day, where the mistake was noticed immediately and the advertisement treated as a nullity and a proper publication made as required by the Act, should not thwart the will of the electors; that the question whether the councillors who passed the by-law were legally elected or not was not one that need be considered, they having been in fact returned as duly elected by the clerk, who acted as returning officer under s.-s. 4 of s. 129, and having taken the oath of office; and that the signature of the de facto reeve to the by-law was sufficient though he had resigned the day before, because his resignation was not then effective, inasmuch as there was not a compliance with s. 210 of the Municipal Act, which requires the consent of the majority of the members of council present to such resignation to be entered upon the minutes of council.

**Notice of Accident.]**—Leave to appeal from the order of a Divisional Court (7 O. W. R. 547, noted ante 349), was refused by Osler, J.A., in *Morrison v. City of Toronto*, 7 O. W. R. 607, in a judgment which was practically an affirmance of the decision of the Divisional Court. He was of opinion that the case was distinguishable from *O'Connor v. City of Hamilton*, 10 O. L. R. 536, 6 O. W. R. 227, the evidence disclosing facts on which it was open to the trial Judge to hold that the plaintiff's injuries had made him incapable, for *the*



time, of considering his situation, except as a sufferer, or of taking or suggesting the initiative of any course to be pursued on his recovery.

**Pleading.]**—In view of the present state of the law that “if animals at large get upon the property of a railway company, and are killed or injured by a train (unless where the highway crosses the track), the railway company are liable *prima facie* :” Dominion Railway Act, 3 Edw. VII. c. 58, s. 237 (cl. 4) ; *Arthur v. Central Ontario R. W. Co.*, 7 O. W. R. 527 ; the Master in Chambers held that a statement of claim setting out (apart from the description of the parties and the prayer for relief) that, on or about the 15th October, 1905, a horse, the property of the plaintiff, got upon the property of the defendant company in the township of Stamford, in the county of Welland, and was killed by one of the defendants’ trains, was sufficient to entitle the plaintiff to recover unless displaced by the defence at the trial.

**Railway.]**—An appeal by the plaintiff in *Wright v. Grand Trunk R. W. Co.*, from the order of a Divisional Court, 5 O. W. R. 802, noted 25 C. L. T. 351, setting aside a judgment for the plaintiff and dismissing the action, was allowed by the Court of Appeal (7 O. W. R. 636), and the judgment at the trial restored, on the ground that it was for the jury to say whether there was want of care on the part of the plaintiff, in the circumstances disclosed, of a train having just gone east and one coming in from the west and stopping just before the plaintiff proceeded to cross the tracks without again looking to the east, his attention having been directed to the west where the danger appeared.—A new trial was ordered by the Court of Appeal in *Sims v. Grand Trunk R. W. Co.*, 7 O. W. R. 648, on appeal by the defendants from the judgment of Street, J. (5 O. W. R. 664, 10 O. L. R. 330. noted 25 C. L. T. 351), on the ground that the verdict of the jury was “opposed to the great weight of evidence on the main points of the case.” The opinion of Street, J., that there was evidence of negligence on the part of the defen-

dants to go to the jury was affirmed.—In *Misener v. Wabash R. R. Co.*, 7 O. W. R. 651, it appeared that the accident in respect of which the action was brought, was occasioned by an engine of the defendants, running light, striking the deceased while driving across the intersection of a highway and the defendants' tracks. The defendants' servants did not blow the whistle or ring the bell. The view down the track in the direction from which the engine came was obstructed until a person coming along the highway reached the fence along the defendants' right of way. The deceased looked down the track and then up, and evidently did not see the engine and did not look again, though he was going slowly and had time to have seen the engine and stopped after he had an unobstructed view down the track. In dismissing an appeal from the judgment at the trial in favour of the plaintiff, the Court of Appeal held that while there was some evidence of contributory negligence, it would not have justified the withdrawal of the case from the jury, since after "hearing nothing and seeing nothing the deceased might not unreasonably have assumed that he could safely traverse the short intervening space between where he then was and the other side of the track without again looking."—While of opinion that, where there is a statutory right to a farm crossing, it is the duty of arbitrators under the Dominion Railway Act, to take that fact into consideration, Meredith, C.J., on appeal by the landowner in *Re Armstrong and James Bay R. W. Co.*, 7 O. W. R. 713, held that the crossing to which the appellant was entitled was not such a one as would prevent the impairment of the value of the appellants' farm, used largely as a dairy farm, by preventing the convenient use of springs in the field which the railway separated from the remainder of the farm, so as to bring the case within *Vezina v. The Queen*, 17 S. C. R. 1, and that, apart from the fact that he deemed the opinions of the witnesses for the appellant (practical dairy farmers) to be preferred to those of the witnesses for the respondents, the arbitrators were not justified in wholly disregarding the evidence of the former.

since it is the opinions of such practical and experienced men that in the main regulate values.—A railway company is responsible for the loss occasioned by animals being killed or injured on the railway track, irrespective of whether they have been at large within half a mile of a railway crossing without some competent person or persons in charge, unless the company establish that there was negligence on the part of the owner by which such animals got at large or that they got at large by the wilful act of the owner: *Bacon v. Grand Trunk R. W. Co.*, 7 O. W. R. 753. Compare *Arthur v. Central Ontario R. W. Co.*, 7 O. W. R. 527, noted ante 352, and *Rysdale v. Wabash R. W. Co.*, 7 O. W. R. 677, noted ante "Pleading."—A motion by plaintiffs to set aside a nonsuit in *Newell v. Canadian Pacific R. W. Co.*, 7 O. W. R. 771, was refused by a divisional Court, distinguishing this from what, in the language of Boyd, C., "is, perhaps, an extreme case" (*Williams v. Great Western R. W. Co.*, L. R. 9 Ex. 158), where the child injured was lawfully on a level railway crossing which should have been protected by a gate or stile, and was only 4 years old whereas here the child injured was 8 years old, was a trespasser on the defendants' property, was injured about 400 feet from the place where he entered, he was old enough to know and understand that he was in a place where he ought not to be, and where his parents had admonished him not to go. Furthermore, if there was any obligation on the part of defendants to fence against trespassers (very much doubted), it must have been shewn that the failure to fence was the effective cause of the accident.

**Seduction.**]—An appeal by the defendant in *Gambell v. Heggie* from the judgment of a Divisional Court, 6 O. W. R. 184, 10 O. L. R. 489, noted 25 C. L. T. 451, was dismissed by the Court of Appeal: 7 O. W. R. 633.

**Statutes.**]—The judgment of Teetzel, J., in *Way v. City of St. Thomas*, 7 O. W. R. 194, noted ante 223, was affirmed by a Divisional Court: 7 O. W. R. 731.

**Street Railways.]**—The accident in respect of which the action of *Mulvaney v. Toronto R. W. Co.*, 7 O. W. R. 644, was brought, and which resulted in the death of the plaintiffs' daughter, happened as the latter, after alighting from a west-bound Queen street car, proceeded to cross the tracks in front thereof, when she was struck by a car proceeding easterly at a speed much in excess of that at which the defendants' rules allow a car to pass another standing still, and without ringing the gong, as the rules required. The judgment of the Court of Appeal was delivered by Garrow, J.A., who said, in part: "The failure to sound the gong is, perhaps, under the circumstances, the least important of these circumstances found by the jury as acts of negligence. Those really important are the other two, namely, the high rate of speed of the east-bound car and the movement forward of the west-bound car. Some difficulty is no doubt created by the finding that the deceased was guilty of contributory negligence. But taking the findings as a whole, and having regard to the evidence and the charge, it is clear that the jury were of the opinion that he deceased saw the east-bound car in time to have retreated to a place of safety if the west-bound car had not moved forward, and therefore that that circumstance, the latest in point of time, was the real or efficient cause of the injury—a conclusion well warranted by the evidence."

**Third Party Procedure.]**—The defendants were held by Anglin, J., in *Montgomery v. Saginaw Lumber Co.*, 7 O. W. R. 619, to be entitled to bring in as third parties, in an action by an employee for personal injury, a company which had entered into a contract to guarantee the defendants against such liability, although such company was a foreign company not licensed to do business in Ontario and having no place of business or agent in this province, and although, by a special provision of the policy, the company was not to be liable to the defendants until the latter had paid the amount of any judgment recovered against them. An appeal by the third parties from the decision of Anglin, J., was

allowed by a Divisional Court (7 O. W. R. 729), on the ground that there had been no *breach* of the contract sued on *within Ontario*. The judgment of the Divisional Court left the determination of the above points by Anglin, J., unreversed, he having proceeded on the assumption that it was conceded that there had been a breach within Ontario. The Divisional Court's opinion is an interesting one. By 3 Edw. VII. c. 8, s. 13, the word "writ" in Rule 162 is to be deemed to include any document by which a matter or proceeding is commenced. It was held that the third party notice was a "proceeding" within the meaning of that statute, but that there was no jurisdiction to permit service upon a third party unless the third party proceeding was in respect of a breach within Ontario of a contract, whether made in Ontario or elsewhere; the word "action" in Rule 162 (1) (e) must be read (since the statute) as if it were "third party proceeding." It followed, therefore, in the circumstances of this case, that there was no breach within Ontario, the time when a breach of the third parties' contract could take place not having arrived.

**Timber.]**—An appeal by plaintiff from the judgment of Street, J. (6 O. W. R. 702, noted 25 C. L. T. 706), was dismissed by a Divisional Court in *McWilliams v. Dickson Co.*, 7 O. W. R. 747.

**Trade Union.]**—"The workmen of plaintiff were passive until set in motion by the active procurement of the union and defendants, its officers." "The union men in the employ of the plaintiffs were . . . called out in the middle of the day. Whether the employment was terminable at will or for a defined period is not a material element in considering whether the relation of employer and workmen was arbitrarily disturbed, and goes at most to the quantum of damages." "This withdrawal of the men in the midst of their work by the combined action of the defendants was oppressive and unfair to the plaintiffs, not justifiable by any countervailing prospect of pecuniary advantage. . . . Communications are sent broadcast over the country informing the

customers of the plaintiffs and others that the plaintiffs deal in 'unfair goods,' and that these goods will not be handled by 'organized labour,' the meaning of this being that any one who attempts to use the goods manufactured by plaintiffs shall have his union workmen called out on strike." "The law which allows workmen to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another." "Intentional infliction of damage upon a man's trade by combined action is wrongful unless just cause or excuse can be found for it:" Chalmers-Hunt on Trade Unions, p. 82 (1902)." Observations of Boyd, C., in delivering the judgment of a Divisional Court dismissing the defendants' appeal from the judgment of MacMahon, J., in *Metallic Roofing Co. of Canada v. Jose*, 7 O. W. R. 709.

**Trial.]**—An application by the defendants in *Pinkerton v. Township of Greenock*, 7 O. W. R. 737, to postpone the trial of the action, which was for damages for the wrongful construction of a bridge whereby the plaintiffs' land was flooded, until the autumn sittings, on the ground that a necessary and material witness, the engineer on whose plans and under whose directions the bridge in question was built, who had been appointed by the Dominion Government to do surveying in the province of Saskatchewan, expected to leave at once and to be absent until the autumn, was refused by the Master in Chambers.

**Water Rates.]**—The defendants' appeals from the judgment of Street, J., in *Hamilton Distillery Co. v. City of Hamilton* and *Hamilton Brewing Association v. City of Hamilton*, 6 O. W. R. 143, 10 O. L. R. 280, noted 25 C. L. T. 397, were dismissed by the Court of Appeal: 7 O. W. R. 655.

## DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.\*

**Arbitration and Award.]**—In *Smith v. Zwicker*, 1 E. L. R. 70, Meagher, J. (Nova Scotia), enlarged the time for making an award upon a voluntary submission, after the time fixed by the submission had expired, deciding upon a review of the authorities that he had power to do so, and that the circumstances warranted the extension.

**Assessment and Taxes.]**—An interesting question as to responsibility for taxes under the provisions of the Halifax city charter was decided by the Nova Scotia Supreme Court en banc in *City of Halifax v. Wallace*, 1 E. L. R. 18. The defendant was the owner of a lot of land in Halifax, which was assessed for the purpose of rates and taxes for 1903-4 at \$118.20. On the 15th March, 1903, the book of general assessment was delivered to the collector of rates for the city, and on the 25th of the following month the defendant conveyed the lot to a religious teaching society, who went into possession at the time. The question for the Court was whether or not the defendant was liable to the plaintiff for the rates and taxes, and it was held that he was, various provisions of the statute making it clear that, in addition to a lien on the property for all taxes and rates, there was also a personal responsibility, and the mere fact of parting with the land, after it had been duly assessed, not affecting the liability imposed on the owner by law when the property had been properly assessed in his name.

**Bankruptcy and Insolvency.]**—*Comeau v. White*, 1 E. L. R. 98, was an action to set aside a judgment obtained, on confession, by a son against his father, upon the ground that it was a preference under the Nova Scotia Assignments Act,

\* Short notes of the most important cases in Volume I. of the *Eastern Law Reporter*, Nos. 1 and 2, pp. 1 to 116 inclusive.

R. S. N. S. 1900 c. 145, and also that it was devised to defeat and delay creditors. The Supreme Court of Nova Scotia en banc held that the judgment could not be declared a preference because insolvency was not shewn, nor, if it were, that the son had notice of it. Upon the charge of intention to defeat or delay creditors, the plaintiff contended that the presumption from a judgment by confession was that there was no consideration. The judgment was registered against the lands of the father. The Court was of opinion that no distinction could be made between a judgment by confession to be registered against land and a mortgage given upon that land—in either case the burden would be upon the plaintiff to shew that there was no debt due. But if the judgment by confession must be presumed to be without consideration, the plaintiff must still shew that by the confession the debtor was abstracting so much from his assets that there was not enough left to pay the claims of creditors.

**Bill of Exchange.]**—Where a bill of exchange drawn by the plaintiff upon the defendant was accepted by the defendant, it was held by Longley, J. (Nova Scotia), upon a motion for summary judgment, that the plaintiff was the holder in due course and entitled to recover upon it, notwithstanding that he had drawn it in favour of a bank (for collection) and that it had not been indorsed by the bank but returned to the plaintiff unpaid without indorsement: *Nova Scotia Carriage Co. v. Lockhart*, 1 E. L. R. 76.

**Canada Temperance Act.]**—In *Rex v. Johnson*, 1 E. L. R. 95, the defendant, imprisoned under a warrant of commitment, on a condition for an offence against the Canada Temperance Act, complained that he had not been permitted to make a full defence, because the magistrate refused to be sworn as a witness to prove that he was biassed. Russell, J. (Nova Scotia), was of opinion that the precedent in *Re Sproule*, 14 O. R. 375, should not be extended, and refused to establish the principle that in every case the defendant has the right to examine the magistrate who is trying his



case. The commitment of the prisoner was invalid, there being two warrants reciting the same conviction, but Russell, J., thought that he was prohibited by ss. 117 and 118 of the Canada Temperance Act from regarding the invalidity. The application to discharge the defendant was renewed before Graham, E.J., on the ground that there was no authority to award imprisonment in default of payment of costs where imprisonment without the option of a fine was imposed as a penalty for the offence; but this objection also was overruled: ss. 867, 869, and 870 of the Criminal Code.

**Collection Act, Nova Scotia.]**—By a provision (s. 28) of the Nova Scotia Collection Act, R. S. c. 182, a judgment creditor who has been unable to obtain satisfaction of his judgment by execution may have the judgment debtor brought before an examiner and compelled to answer all questions respecting his property, and the examiner is empowered to require the debtor to execute an assignment of all his real and personal property to the creditor “in trust for the payment due on the judgment,” etc. In *Farlinger v. Ingraham*, 1 E. L. R. 1, the question arose, for the first time in Nova Scotia, whether a compulsory assignment under that enactment conferred upon the judgment creditor rights which he would not have under a voluntary assignment; and it was held by the Supreme Court en banc that such an assignment was part of the legal process provided by statute to enable the creditor to enforce payment of his debt, and was not subject to the Bills of Sale Act.

**Conditional Sale.]**—*Lapierre v. McDonald*, 1 E. L. R. 41, was an action to recover possession of a piano which W. & Co. agreed to sell to D. under the terms of a memorandum of the 8th May, 1903, embodying a promise to pay \$260 with interest 12 months after date, D. agreeing that the property in the piano should remain in W. & Co. until payment. On the 13th January, 1904, D. transferred the piano by way of chattel mortgage to the plaintiff. The conditional sale agreement was never filed under the Bills of Sale Act, and the

mortgage was not filed until the 13th May, 1904, before which date W. & Co. got possession of the piano by paying off a landlord's claim for rent, taking an assignment of that claim to themselves. The defendant held the piano for the benefit of W. & Co., and resisted the plaintiff's claim, first, on the ground that the chattel mortgage had no priority over W. & Co.'s claim, for want of filing, and, second, under the assignment from the landlord. "As between D. and the plaintiff," said Russell, J., delivering the judgment of the Supreme Court of Nova Scotia, "the mortgage was from the first perfectly valid without any filing. As between the plaintiff and W. & Co., the agreement that the property in the piano should remain in the latter until payment of the note for the price was null and void under s. 8 (4) of the Bills of Sale Act. The plaintiff, therefore, upon the execution of the mortgage from D., had the legal title to the piano, subject only to the danger that his title under his mortgage should, under s. 5 (3), as against purchasers and creditors, only take effect and have priority from the time of filing such bill of sale. . . . The definition of the term 'creditor' in the Bills of Sale Act of this province means . . . that simple contract creditors are not included within the term, nor creditors without process of law, and W. & Co. were not creditors within the meaning of the Act. Neither are they purchasers unless they can be considered as having purchased from the landlord. . . . Whatever rights W. & Co. can claim by virtue of the assignment from the landlord must come by way of subrogation to the lien of the landlord under his distress for rent. . . . The plaintiff has the legal title, with equities equal to those of W. & Co., and this combination prevails over the merely equitable claim of the latter to subrogation, even if that could be asserted against the property."

**Criminal Law.]**—A stipendiary magistrate by whom a man was convicted of theft was about to release the prisoner on his own recognizance, suspending sentence on probation of good conduct, when he (the magistrate) recollected that

the prisoner had been previously convicted before him. The previous conviction had not been proved. The magistrate stated a case as to the power to take the previous conviction into consideration, and the Supreme Court of Nova Scotia en banc—doubting whether a case could properly be reserved about such a matter—nevertheless intimated the opinion that the words of s. 971 of the Criminal Code, which permits the discharge of an accused upon suspended sentence, if “no conviction is proved against him,” indicated that (under that provision) the proper time for proving the previous conviction was not upon the trial, but after the trial, and suggested that it would not be out of place for the magistrate to proceed upon his own initiative: *Rex v. Bonnevie*, 1 E. L. R. 48.—Section 687 of the Criminal Code provides exhaustively for the cases in which and the conditions under which the depositions taken on the preliminary examination can be used on the trial in the event of the deponent’s decease, and the common law procedure as to this matter has been superseded. The accused in *Rex v. Snelgrove*, 1 E. L. R. 107, not being assisted by counsel upon the preliminary hearing before the magistrate, the depositions thereat of the complainant (who had since died) were held not receivable in evidence at the trial.

**Evidence in Action for Libel.]**—*McDonald v. Sydney Post Publishing Co.*, 1 E. L. R. 61, was an action for publishing in the defendants’ newspaper a paragraph to the effect that a certain person had made a written declaration before a justice of the peace accusing the plaintiff of attempted bribery. The Supreme Court of Nova Scotia en banc held that the statutory declaration mentioned in the publication was not admissible in evidence. It was contended that it constituted a step in proceedings to be taken before the municipal council to remove the plaintiff from office, but it was considered by the Court that the only testimony which could be given under the pleading that the declaration was “made with the

object of initiating such proceedings " would be of the declarant's intention to use it thus, something in his own breast, and such testimony would not be receivable. It was also pleaded that the publication was bona fide comment on a matter of public interest, and it was urged that the declaration was receivable under that, but the Court said that to bring the publication within that class of cases the comment must be a comment on admitted facts, or facts proved to be true, or comments on facts involved in a report of proceedings the publication of which would be privileged. This was an allegation, not a comment. If any part of the item was a comment on any fact, the statutory declaration would not be proof of the truth of the fact. The third and last contention was that the declaration should have been received in evidence in mitigation of damages, that is, that the publication was but a repetition of the written statement offered as evidence. As to this the Court was of opinion that, upon the proper construction of Order XXXIV., r. 30, the defendants, not having furnished particulars to the plaintiff as required by that Rule, could not give the evidence.

**Landlord and Tenant.]**—The short point of the decision of the Nova Scotia Supreme Court en banc in *Betcher v. Hagell*, 1 E. L. R. 20, is that where the goods of a tenant of part of a building were injured by reason of a hole in the roof caused by the act of God, there being no express liability on the part of the landlord to repair, no liability was to be implied, and he was not liable for the damage. The judgment of the Court, delivered by Russell, J., is an interesting one, and a part of it may usefully be quoted: "The real substantial question in this case, and the question which has to be decided in this action, is whether it was the duty of the defendant (landlord) to repair the roof. He certainly thought that it was, and undertook to do it, but that cannot render him liable for not doing it. It will not be pretended that his promise could be tortured into an estoppel. It was simply a promise without consideration to support it. There is a singular dearth of authority in the English cases, but I

think it may be taken to be absolutely settled that, even assuming the roof to have been retained under the control of the defendant, and not to be included in the demise to the plaintiff, there is no duty whatever upon the defendant to repair. "The duties of the landlord in such a case cannot rest upon any implied covenant, for there is no such covenant implied in the demise of such a property."

**Registry Laws.]**—The decision of Fraser, J. (Nova Scotia), upon motion for judgment in *Mooney v. McDonald*, 1 E. L. R. 78, is, in brief, that a registered judgment affects only such interest in land as the judgment debtor has at the time of registration, and that where the debtor had assigned all his interest in certain lands to the plaintiff after recovery of judgment against him, but before registration, the plaintiff, though his assignment was not registered, had priority.

**Service out of Jurisdiction.]**—The question raised before the Supreme Court of Nova Scotia en banc in *Sanders v. St. Helen's Smelting Co.*, 1 E. L. R. 56, is familiar to western lawyers. The action was brought on a bill of exchange drawn at Halifax upon the defendants in England, and accepted by the defendants, payable in England. By the Dominion Bills of Exchange Act, 1890, s. 71 (1 b), the interpretation of the acceptance is determined by the law of the place where the contract is made, that is to say, the place where the bill is accepted; and, interpreted by the law of England, this acceptance was not a qualified but a general acceptance. The result was, according to the judgment of the Court delivered by Russell, J., that the acceptor must seek out his creditor and pay him, and the non-payment by the defendants constituted a breach within Nova Scotia of a contract that ought to be performed there (O. XL., r. 1 (e)), and consequently an order for service upon the defendants in England of the writ of summons was permitted to stand.

**Statutes.]**—The rule of *ejusdem generis* was applied to the construction of an assessment section in the Halifax city

charter by the Supreme Court of Nova Scotia en banc in *City of Halifax v. McLaughlin Carriage Co.*, 1 E. L. R. 58. The section in question provided that every insurance company or association, accident and guarantee company, established in the city of Halifax, or having any branch office, agent, or agency therein, should pay an annual license fee, and every other company, corporation, association, or agency, doing business in the city of Halifax (banks, insurance companies or associations, and other corporations now exempt from taxation excepted), shall pay an annual license fee. The defendants carried on business in the city through a dealer or sales agent, and were held not to be a company ejusdem generis with the definite class indicated by the particular words. The parenthetical exception caused some difficulty, but it was suggested that it was inserted ex abundanti cautela.

**Trustee Limitation Act.]**—In *Cairns v. Murray*, 1 E. L. R. 87, Graham, E.J. (Nova Scotia), held that the onus was on the persons attacking the accounts of a trustee to shew that there had been a conversion of a certain sum mentioned in the inventory to the trustee's own use, and, that onus not being satisfied, that the Trustee Limitation Act applied in favour of the trustee committing an innocent breach of trust.

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## CASES FROM WESTERN CANADA.\*

**Appeal.]**—An objection that the order appealed against in *Bank of Hamilton v. Leslie* (N. W. T.), 3 W. L. R. 394, had not been entered or issued, was, on motion to quash the appeal, overruled by the full Court, the failure to take out the order being, at most, an irregularity which was waived by not raising it on the settlement of the appeal book. Leave to appeal granted before the issue of the order was held good.

**Bailment.]**—The plaintiff in *Consentino v. Dominion Express Co.* (Man.), 3 W.L.R. 391, went to the defendants' office in Winnipeg to send \$1,010 to his brother in Toronto, but, after placing that sum in one of the defendants' envelopes used for transmitting money, found their charges not to his liking, and mailed the packet by registered letter. Through the address being defective it did not reach the brother, and was returned unopened by the dead letter office to the defendants, whose name was on the outside, registered, and was received by their cashier in his cage, but placed by him, as was the custom with registered letters, on the chief clerk's desk, which was accessible to the public. The defendants had never received a registered dead letter before, and were accustomed to receive but few registered letters, and these containing only small sums. The letter was lost, and the plaintiff sued for the amount. Richards, J., in giving judgment for the plaintiff, said in part:—"Having once taken possession, they were, I think, under the same obligation to care for it as a finder of lost goods is under, after he has voluntarily taken them up. . . . They became subject to the same obligations, at least, as those undertaken by gratuitous bailees. They were bound to take reasonable care of it. . . . The receipt . . . should have shewn that it was out of the ordinary run of their business, and should have put them

\* Short notes of the most important cases in Volume III. of the *Western Law Reporter*, Nos. 4 and 5. pp. 281 to 448, inclusive.

on inquiry as to its contents before they took any risks as to it. To place it, unopened, on the exposed desk of the chief clerk was . . . gross negligence under the circumstances."

**Bankruptcy and Insolvency.]**—The plaintiffs (secured creditors) in *Bank of Ottawa v. Newton* (Man.), 3 W. L. R. 422, having proved their claim under the Assignments Act, valued their security, and claimed to rank for the balance, realized from such securities a sum greater than that at which they had valued them. They contended that the assignee had delayed to elect, under s. 29 of the Act, beyond what constituted a reasonable time to value such securities, and should be held to have thereby assented to their retention by the plaintiffs, and relied upon *Bell v. Ross*, 11 A. R. 458. Richards, J., considered that this case did not apply, since the Insolvent Act of 1875 contemplated the release of the debtor from all liability, and provided for the retention of "the property or effects constituting such security," whereas the first mentioned Act refers to the retention of "the security," and held that the amount for which the plaintiffs were entitled to rank on the estate was the amount of their original claim, less the amount realized on the securities after deducting costs, and less the amount at which any remaining securities might be re-valued.

**Champerty and Maintenance.]**—In *Newswander v. Geigerich* (B.C.), 3 W. L. R. 303, an action for damages sustained by the plaintiff by reason of the defendant having assisted the plaintiff in *Briggs v. Newswander*, 32 S. C. R. 405, to carry on that action against him for a share in the fruits thereof, a contention of the defendant that, since the plaintiff in the latter action had succeeded, Newswander's damages were attributable not to the wrongful action of the defendant, but to his own wrongful conduct in resisting the righteous demands made upon him by Briggs, was overruled by Duff, J., as was also a contention that Newswander had suffered no injury because in defending the action he only acted as



the agent of one Fleutot, to whom he had sold the property, it not appearing that Newswander was induced to defend the action by reason of any express promise by Fleutot to indemnify him, and there being no right of indemnity by Newswander against Fleutot.

**Company.]**—An appeal by the plaintiff from the judgment of Harvey, J., in *Paul v. Kobold* (N.W.T.), 2 W. L. R. 90, noted 25 C. L. T. 547, was allowed by the full Court (3 W. L. R. 407), on the ground that since the directors of a company and not the shareholders are the proper persons to make a call and give notice of a forfeiture of shares, the irregular action of the directors, so found by the trial Judge, could not be ratified by a resolution passed at a subsequent meeting of shareholders.

**Contract.]**—The question involved in *Grobe v. Doyle* (B.C.), 3 W. L. R. 285, was the interpretation of a clause in an agreement for the sale of certain mining claims under which the defendant acquired the right to go into possession of the claims and develop and work them, pending payment of his purchase money, providing that the “net proceeds” of the ore mined should be paid into the plaintiff’s account. Under another clause of the agreement, the plaintiff claimed cancellation thereof, on the ground of breach of the provision regarding net proceeds, whilst the defendant alleged that there were no net proceeds after deducting all expense of mining in addition to those named, which he claimed a right to do. Duff, J., having regard to the situation and objects of the parties, the nature of the obligations assumed by them, and the probabilities arising out of the circumstances, as well as the language of the claim itself, which speaks of the ore shipped (meaning shipped for conversion), held that the only deductions from the gross amount received therefrom would be freight and smelting charges.—The contract of hiring between the plaintiff and defendant in *Fernan v. Monitor* (B.C.), 3 W. L. R. 426, provided for the settlement of disputes by arbitration and also for the rescission of the agree-

ment in certain circumstances. The defendants rescinded the agreement, whereupon the plaintiff brought an action to establish his rights. The full Court (Irving, J., dissenting) dismissed an appeal from an order dismissing the defendants' application to stay proceedings on the ground that the arbitration clause was paramount, it appearing in the opinion of the majority of the Judges that the defendants were not, at the commencement of the proceedings, willing to submit the differences between them and the plaintiff to arbitration.

**Costs.]**—In an action for foreclosure, where a reference is rendered necessary by unwarranted and extortionate charges of the mortgagee, the Court has a discretion, notwithstanding Rule 517 of the Judicature Ordinance, to deprive him of the costs of such reference. Ruling of the full Court in *Bank of Hamilton v. Leslie* (N. W. T.), 3 W. L. R. 401.

**Criminal Law.]**—The decision of the full Court in *Rex v. Van Meter* (N. W. T.), 3 W. L. R. 416, on a case reserved, was that an order for the examination of a judgment debtor in aid of execution under clause 1 of Rule 380 of the Judicature Ordinance, which also provided for his examination in respect of the matters embraced in clause 2 of that Rule, was not bad, although objection might have been taken to such matters being gone into, and that on such examination the witness was giving evidence under properly constituted proceedings in which he was required by law to give sworn testimony; and that, therefore, his depositions on such examination, given without claim of privilege, were properly received in evidence against him on his trial on a criminal charge.

**Equitable Execution.]**—Notwithstanding that s. 3 of the Manitoba Judgments Act provides that a judgment creditor shall have a lien or charge upon the lands of his debtor, "the same as though charged in writing by the judgment debtor under his hand and seal," Richards, J., in *McDougall v. Gagnon* (Man.), 3 W. L. R. 387, decided that the plaintiff was entitled to succeed in his action to have his judgment declared a lien against the interest of the defendant Gagnon,

an infant, in certain lands of his father-in-law, who died intestate, descending to him from his wife, who also died intestate, in spite of the provisions of the enactments that lands of deceased persons should devolve upon their personal representatives. A personal representative in such case "holds on a bare trust for the beneficiary, who has an equitable interest of the same nature and extent as the legal interest that he would have taken if the law had remained unchanged."

**Gold Commissioner.]**—Upon a re-argument of *Graves v. McDonnell* (Y.T.), 3 W. L. R. 329, the full Court decided that the functions of the Gold Commissioner, on the hearing of a protest under s. 2 of the water regulations, are purely judicial, and that he is confined by the record to simply hearing and disposing of the rights of the parties before him. The division of water, in so far as it did not interfere with the vested rights of the plaintiff, was purely and simply a ministerial act, that should have been done by the mining recorder, representing the Minister of the Interior, and the Gold Commissioner, when he sat judicially, was not possessed of the ministerial functions of a mining recorder.

**Husband and Wife.]**—The decision of Duff, J., in *Park v. Park* (B.C.), 3 W. L. R. 281, is authority for the proposition that a married woman separated from her husband, without any fault of hers, can recover against him moneys necessarily expended by her out of her separate estate in the support and maintenance of their children.

**Mechanics' Liens.]**—What had to be determined in *Nelson v. Brewster* (N. W. T.), 3 W. L. R. 362, was whether the plaintiff had instituted proceedings under the Mechanics' Lien Ordinance, to realize the lien, within the proper time. The original statement of claim contained merely a claim for a judgment against the defendant personally for the amount for which the lien was registered. Although the items of particulars of claim were identical with those set out in the registered lien, the statement of claim contained no reference to the lien, and therefore the action, as then constituted,

could not be construed as one to realize the lien. After the expiration of 90 days from the completion of the work, the plaintiff amended his statement of claim, without leave, by claiming to realize the lien and by adding the necessary allegations to support such a claim. It was decided by Scott, J., that the plaintiff had not introduced a new cause of action. He had merely changed his remedy and not his "cause of action."

**Mines and Minerals.]**—It was contended for the plaintiff in *Windsor v. Copp* (B.C.), 3 W. L. R. 294, that the title to the mineral claim in question having been in the official administrator, the latter was excused from the performance of the duties imposed by s. 24 of the Mineral Act because his interest in or possession of the claim must be treated as an interest or possession vested in the Crown, but Duff, J., held that such was not the case, and that, if the official administrator was a government official within the meaning of s. 53 of the Act, the latter section would only apply to a failure to do something which a government official ought to do, or the doing of something which he ought not to do. While the certificate of work issued to the plaintiff after the expiration of the year would have the same effect under s. 28 as a certificate issued within the year if the conditions had remained the same, the Parkside claim (defendant's) having been meanwhile located, such certificate could not avail the plaintiff. Though in the affidavit to record the "Parkside" the words "initial post" were not stated to have been placed on No. 1 post, while as a matter of fact they were so placed, and there was no evidence that the locator had discovered rock in place, it was held that the claim was a valid one, the requirements of s. 16 having been substantially complied with.—The full Court in *Voight v. Groves* (B.C.), 3 W. L. R. 428, on appeal by the defendants, held that a plaintiff, in an adverse action, under s. 37 of the Mineral Act, who admits that he claims no interest in the property in question, and never intended to claim any, has no status to impeach the defendant's title. In this particular case, it was never intended that the

plaintiff's claim to the property in dispute should be prosecuted "beyond the moment when the light of day should fall upon it." The object was to impeach the "Olympia" (the defendants' claim) with a view to clearing the ground for a subsequent location by the plaintiff. It was also held that the case was not one for the exercise of the jurisdiction provided by s. 11, and that the defendants had not, by appearing and offering evidence without taking this objection, waived it, since at the close of the trial the point was argued without the plaintiff's counsel claiming such waiver.

**Municipal Elections.]**—The validity of the election of C. as councillor for division No. 2 of Local Improvement District No. 22 on the 8th January, 1906, was the matter in question in *Re Clark (N.W.T.)*, 3 W. L. R. 311, and depended upon the qualification of one B. to vote as either an owner or occupant of ratable land in such division under s. 18 of the Ordinance. On the 5th January, 1906, he applied to the sub-agent of Dominion lands at Wetaskiwin for an entry for a quarter section of land, and paid \$10, the entry fee therefor; the sub-agent was not authorized to grant an entry for lands or to issue certificate "E" under the Dominion Lands Act, but merely to receive applications and forward them to the Dominion lands agent at Edmonton for his consideration, and, upon receipt by such agent, an entry is usually granted to the applicant if he is the first applicant. The application was duly forwarded, and certificate "E" issued by the agent on the 11th January, 1906. It was held by Scott, J., that the fact that B. had applied for an entry, though giving him the first right to obtain it, would not in itself be sufficient to give him any right, title, estate, or interest under s.-s. 13 of s. 2, but, at most, merely the right to obtain such at a future period.

**Negligence.]**—In *Hinman v. Winnipeg Electric Street R. W. Co. (Man.)*, 3 W. L. R. 351, it appeared that the plaintiff's horse had been killed by a telephone wire which was broken by a severe thunderstorm, and which, falling on the

defendants' trolley wire, received a strong electric current from the trolley wire, and further that the horse came in contact with the telephone wire almost immediately after it was broken, so that neither the street railway company nor the telephone company could have known of it or repaired it before the accident, but it was contended for the plaintiff that the defendants were negligent in not providing protecting appliances of some kind at the spot to prevent such accidents. It appeared in evidence that certain systems if applied might have been effective, such as a guard or cradle over the trolley wire, but that these were not customary in Canada, the expert who spoke as to this saying he remembered only one case where such had been adopted. The full Court (Dubuc, C.J., and Mathers, J.) differed, the former being of opinion that there was no liability and the latter that there was evidence to go to the jury and that therefore the appeal should be dismissed.—The discharge of a gun at a prairie chicken in some dry upland prairie grass, about two feet high, by the defendant Hilton Snider, in *Turner v. Snider* (Man.), 3 W. L. R. 385, set fire to the grass, and, despite the efforts of that defendant to extinguish the fire, it was communicated to some hay stacks and grain of the plaintiff, for the destruction of which the action was brought against Hilton Snider and his father, relief being claimed against the latter on the ground that he should have known that danger would result from his intrusting the son, at the age of 14, with a gun, and that he was negligent in so doing. It appearing that the boy had been carefully trained for several years in the handling of a gun, and did ordinarily exercise great care in handling it, Richards, J., dismissed the action as against the father, on the ground that he was justified in supposing the son would exercise reasonable care. In the circumstances of the case the son was held guilty of negligence, and the plaintiff entitled to recover for the injury, including that suffered by the destruction of a building upon but not attached to the freehold, which latter the plaintiff

had sold to one Tempest, the plaintiff being in possession of such building.

**Nuisance.]**—The plaintiff in *Dale v. British Columbia Telephone Co. (B.C.)*, 3 W.L.R. 292, contended that the placing and maintaining by the defendants of a pole to support their wires, on the highway within 1 foot 8 inches of the outside of the wheel track, was a public nuisance, but Duff, J., did not find it necessary to decide this question, holding on the evidence that the plaintiff's injury was not the result of the pole being so placed, but was due to the plaintiff's heedlessness in not applying his mind to the circumstances in the situation in which he was placed.

**Public Schools.]**—*Clipsham v. Grand Prairie School District No. 833 (N.W.T.)*, 3 W. L. R. 313, resolved itself into a question whether the Commissioner of Education had power to correct a written decision given by him upon an appeal by the plaintiff under s. 153 of the School Ordinance. Newlands, J., in dismissing the action, held that the Commissioner had such power, and that, being empowered under the section mentioned to take evidence on such appeal, he might support the ruling of the board on grounds other than those given by the board.

**Registry Laws.]**—It was held by Wetmore, J., in *Re American-Abell Engine and Threshing Co. and Noble (N.W.T.)*, 3 W. L. R. 324, affirming the principle laid down by Scott, J., in *Re Greenshields Co.*, 2 W. L. R. 421, that where two mortgages on the same land, executed on the same day, with affidavits of execution dated on the same day, are received on the same day in the registry office by mail, so that the registrar cannot tell which was first received, the mortgagee who first produces before the registrar the duplicate certificate of title, is, by reason of s.-s. 2 of s. 33 of the Land Titles Act, as enacted by the Acts of 1904, c. 19, s. 1, entitled to priority.

**Sale of Goods.]**—An appeal by the plaintiffs from the judgment of Newlands, J., in *New Hamburg Manufacturing Co. v. Klotz* (N.W.T.), 1 W. L. R. 471, noted 25 C. L. T. 473. was dismissed by the full Court: 3 W. L. R. 404.—In *Knight v. Hanson* (N.W.T.), 3 W. L. R. 412, Harvey, J., in delivering the judgment of the full Court dismissing an appeal by the defendant from the judgment of Wetmore, J., in favour of the plaintiff in an action for the price of a horse, tried without a jury, where the testimony was oral and conflicting, after discussing some of the leading cases dealing with the principle upon which a court of appeal acts in such a case, made the following observations:—"If any case may arise where importance is to be attached to the opportunity the trial Judge has of seeing the witnesses and noticing their demeanour and manner of giving their evidence, and to the value of his decision reached in consequence thereof, it is such a case as the present. . . . It cannot be contended that the evidence which the trial Judge believed is inconsistent with facts or is incapable of supporting his decision, nor is there any preponderance of probability that would justify this Court in coming to the conclusion that he was clearly wrong." A new trial on the ground of the discovery of fresh evidence was refused because the evidence it was proposed to adduce only went to corroborate the defendant's witnesses and contradict the plaintiff's, and was not conclusive in character.

**Security for Costs.]**—A statement in an affidavit in support of a motion for security for costs: "I am informed and verily believe that the plaintiffs herein reside at Winnipeg, in the province of Manitoba, and out of the jurisdiction of this honourable Court, as appears by the writ of summons issued in this action," was held by Wetmore, J., in *Balcovski v. Olson* (N.W.T.), 3 W. L. R. 367, to be sufficient, without production of the writ of summons or a copy thereof, to call for an answer from the plaintiff.—Upon an application for security for costs an affidavit by the defendant, as follows. "I have, in my belief, a good defence to the action herein on the merits," was held by Wetmore, J., in *O. W. Kerr Co. v.*



Lowe (N.W.T.), 3 W. L. R. 400, to be sufficient, although if made by his legal adviser it would not be unless he also swore he had a knowledge of the matters in dispute between the parties.

**Small Debt Procedure.]**—The procedure prescribed by s. 602 of the Judicature Ordinance was held by Wetmore, J., in *Paradis v. Hotton* (N.W.T.), 3 W. L. R. 317, not to be applicable to a claim of a portion of the crop grown upon certain land by way of rental therefor, such claim not falling within the description “claims and demands for debt, whether payable in money or otherwise.” “In order to authorize an action under Rule 602 for a debt, payable otherwise than in money, there must be a debt created, in the proper sense of the word, and clearly recognized as such, and then there must be an agreement that such debt is to be paid in something else than money.” A claim cannot be split up so that action for part of it can be brought under the small debt procedure. The same Judge applied the principle of the foregoing decision to *Cosgrave v. Duchek* (N.W.T.), 3 W. L. R. 320, where the plaintiff claimed for the value of 2 loads of hay which the defendant agreed to deliver as part of the price of certain oxen.

**Statutes.]**—The Families Compensation Act, R. S. B. C. 1897 c. 58 (commonly called Lord Campbell’s Act), provides that an action to recover damages for the death of a workman must be brought within 12 months thereafter, while the private Act of incorporation of the company defendants in *Green v. British Columbia Electric R. W. Co.* (B.C.), 3 W. L. R. 347, 59 V. c. 55, s. 60, provides that “All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway or the works or operations of the company shall be commenced within 6 months,” etc. The action was brought after 6 months from the death, but within 12 months, and the defendants contended that the latter Act was a bar to the action; but Morrison, J., held that the latter Act is not grafted on and does not control the former, since

it would require express words to enable a special private Act to derogate from a special public Act, and, in any event, that the provisions of the two Acts do not conflict, the word "damage" in s. 60 having reference to mischief done to property and not being interchangeable with the word "injury."

**Stay of Proceedings.]**—In *Canadian Bank of Commerce v. McDonald* (Y.T.), 3 W. L. R. 396, Macaulay, J., granted a stay on the judgment delivered by him (3 W. L. R. 90) pending the hearing of the plaintiffs' cross-appeal to the Court en banc, holding that he was warranted in so doing in the special circumstances of the case, after having finally disposed of the action.

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## EDITORIAL REVIEW.

**Resignation of Chief Justice Taschereau.**

The Right Honourable Sir Henri Elzéar Taschereau resigned on the 1st May the great office of Chief Justice of the Supreme Court of Canada. His long services and advanced age entitle him to an allowance for the remainder of his life equivalent to his full salary as Chief Justice, and he will carry with him in his retirement the respect and affection of the Bar, with whom he has always been persona grata. He was an excellent Judge and a dignified and courteous president of the Court. His senior colleague, Mr. Justice Sedgewick, on the day following his resignation, spoke of him as follows: "Coming to us from the province of Quebec, well versed in the Roman law, the civil law of France, and the domestic law of his own province, he was equally erudite in the English system, which, together with the French, forms the law of Canada. By reason of his accuracy, experience, and ability, he was able to bring to our consultations a trained mind which was of the greatest possible advantage to the Court in the decision of the various cases coming before it from different parts of the Dominion. His uniform courtesy alike to his colleagues and to the gentlemen practising at the Bar was greatly appreciated and will long be remembered. We officially part with him with the most profound regret, and trust that in his well-earned retirement he may enjoy many years of health and happiness." Sir Henri is 70 years old, and has been on the Bench for 35 years, 28 of them in the Supreme Court of Canada. He was the fourth Chief Justice of that Court, and the first from the province of Quebec. Two of his predecessors came from Ontario and one from Nova Scotia. There are now two living retired Chief Justices of Canada.

**The New Chief Justice.**

The Honourable Charles Fitzpatrick, lately Minister of Justice, is the successor of Sir H. E. Taschereau as Chief Justice of Canada. He is unquestionably a man of extraordinary ability and a lawyer of the first rank. Under his leadership we hope to see the Supreme Court of Canada take its proper rank as a strong and sound legal tribunal.

**The New Minister of Justice.**

The Honourable A. B. Aylesworth naturally succeeds Mr. Fitzpatrick as Minister of Justice and Attorney-General for Canada. His position and experience at the Bar eminently fit him to deal with the many important questions which will come before him in his important office. He is somewhat new to politics, and his sudden rise is almost unprecedented. Previous occupants of the office hailing from Ontario, Sir John Macdonald, Mr. Edward Blake, Sir Alexander Campbell, Sir Oliver Mowat, Mr. David Mills, were experienced parliamentarians, but we venture to think that the new Minister of Justice will be the equal of any of them as a departmental head, and, after some probation, as a parliamentary debater. His enormous capacity for work will certainly stand him in good stead. Quite recently in the House of Commons there was a rather acrimonious debate on the propriety of Mr. Aylesworth continuing while a member of the Cabinet (he being then Postmaster-General) to practise at the Bar. Mr. Aylesworth defended his course with vigour, but at the same time stated that he had withdrawn almost altogether from general practice, mentioning a few cases in which he had appeared owing to promises which he had found it impossible to cancel. Mr. Fitzpatrick, who was still Minister of Justice when the debate took place, emphatically stated his opinion that the Minister of Justice should not appear as counsel except for the Crown, before the Judges whom he appoints and possibly promotes, and this declaration will, no doubt, bind his successor. Mr. Edward Blake, if we are not mistaken, did occasionally appear before the Court

as counsel for private litigants while he was Minister of Justice. There is at least one case in Grant's reports where it is recorded that "Mr. Attorney-General Mowat" appeared on one side, and "Mr. Attorney-General Blake" on the other. Of the other former Ministers of Justice mentioned above none was in active practice immediately before coming into office, so that their cases are not precedents.

#### **The Court of Appeal and High Court for Ontario.**

It is worthy of note that the Court of Appeal at its last session, one of nearly five weeks, which is about the average length, cleaned its slate, leaving no arrears properly so-called. Two cases, in which the notes of evidence were not ready, stood over till next sittings. There has been no such record for at least 25 years. The statutory re-arrangement of the appeal system has given good results, and steady and persistent hard work has gradually overcome all arrearages. More work has been thrown on the Divisional Courts of the High Court, but they too are well up with their list, being enabled by the increase in the number of Judges to maintain the weekly sittings almost without interruption, and this notwithstanding the absence of two Judges. Mr. Justice MacMahon has been enjoying a six months' holiday to recuperate after unintermitted judicial labour for 19 years, and Mr. Justice Street, who has been on the Bench for the same period, is, we regret to say, very ill. We sincerely hope that he may be able to resume his place in September.

#### **An Important Divorce Decision.**

In four States of the North American Union full faith and credit has been refused to a divorce decree where the defendant was domiciled without the jurisdiction and personal service was not effected. This minority view was recently adopted by the Supreme Court of the United States, four justices dissenting. The decision of the majority of five was that where a husband deserted his wife in New York, established a domicile in Connecticut, and secured a divorce a

vinculo, on notice, by publication only, the wife not appearing in the suit, this decree was not entitled to full faith and credit in a suit by the wife in New York for a separation and alimony: *Haddock v. Haddock* (1906), 26 Sup. Ct. 525. The Columbia Law Review (June, 1906, p. 450) finds fault with the decision, saying: "The majority, while not denying that a suit for divorce is a proceeding in rem, yet refuse to support the logical result of this theory, on the ground that if State A, where one party is domiciled, has jurisdiction to grant a divorce, which will necessarily affect the status of the defendant domiciled in State B, the inherent right of State B to determine the status of its citizens is impaired. But it would seem that as great an abridgment of the rights of both States occurs when neither is allowed to determine finally the status of a party domiciled within it, which is practically the result. . . . The case refuses to carry to its logical conclusion the accepted theory of divorce, is opposed to the weight of authority in this country, and is inconsistent with *Atherton v. Atherton* (1901), 181 U. S. 155. It is supportable, if at all, only on the ground that public policy demands that divorces shall be granted only where one party is domiciled in the State, and the other is therein personally served with process or voluntarily appears, or where the suit is at the matrimonial domicil. But these reasons would seem more appropriate for the consideration of the State legislatures than the Courts, whose regard for them must result in the abandonment of theory for a hopeless inconsistency in practice."

#### **Depriving Successful Party of Costs.**

In *Elms v. Hedges*, 121 L. T. Jour. 90, a County Court Judge deprived a defendant of the costs of a successful defence merely because that defence was the Statute of Limitations, but his decision was reversed by a Divisional Court. "It is important" (says the *Law Times*) "that the fact should not be lost sight of that, however unpalatable defences such as those of infancy and the Statute of Limitations may

be, they are, nevertheless, defences approved by the law of the land, and as such carry costs both in the High Court and in the County Courts when successful. . . . The judicial discretion over costs should not be allowed to interfere with statutory rights."

Depriving a successful party of costs is much too common in Canada. We believe that the kind of rough justice administered by some Judges, who seek to make a strictly legal result less onerous by withholding costs, does more harm than good. It is stated in an Ontario case that "the power over costs is an instrument of correction in the hands of the Court," but we think that, like the lash, it should be reserved for cases of gross misconduct.

#### **The Fruits of Learned Leisure.**

The marvellous energy of the Earl of Halsbury in undertaking the supervision and direction of a magnum opus, "The Laws of England," will (says the *London Law Times*) recall the circumstance that two holders of the Great Seal during the last century devoted their years of retirement to the production of works which have been accessions to the treasures of wisdom and learning in the literature of sociology, history, politics, and law. Lord Brougham has given to the world no fewer than eleven volumes dealing with critical, historical, and miscellaneous subjects, including an admirable treatise on "The British Constitution, its History, Structure, and Working," while Lord St. Leonards's "Handy Book on Real Property Law," written after he had filled the offices of Lord Chancellor, first in Ireland and subsequently in England, is in itself an admirable and lucid exposition of the very difficult and complicated domain of jurisprudence with which it deals. In Ireland, two holders of the Great Seal during the last century—the Right Hon. Sir Joseph Napier, Bart., and the Right Hon. John Thomas Ball—have written respectively after their resignation of the Lord Chancellorship the best exposition of Bishop Butler's Analogy and an Account of Irish Legislative Systems, characterized by

perfect arrangement and absolute accuracy, to which frequent references were made as a work of standard authority from both sides of the House of Commons during the debates on the Home Rule Bill in 1893. The great works, "Lives of the Lord Chancellors of England" and "Lives of the Chief Justices of England," were the productions of the learned leisure of Lord Campbell after he had held the Irish Great Seal in 1841, and before his appointment to the Chief Justiceship of England and eventually to the Lord Chancellorship.

The prospectus of Lord Halsbury's work states that it will be a complete statement of the whole law of England in about 18 to 20 volumes, the purpose being to supply in a convenient and easily accessible arrangement the whole body of English law.

#### **An Ontario Barrister in England.**

Personal notices are much more common in English law periodicals than in ours. We find the following in the *Law Times*, referring to a gentleman formerly well known in Toronto:—

Mr. Forster Boulton, M.P., of the Inner Temple and South-Eastern Circuit, who has just been appointed by the Attorney-General prosecuting counsel to the Post Office at the Central Criminal Court, is a well-known member of the Sussex Sessions. A member of the Canadian (sic) Bar, and the author of Canadian editions of Underhill on Torts, Beale on Bailments, and Smith's Master and Servant, he has considerable reputation as an authority on colonial and "inter-imperial" law. He is also the author of "The Law and Practice of a Case Stated." Mr. Forster Boulton has also quite a unique ancestry, his forefathers for some six generations past having been members of the Bar. Mr. Boulton's father represented the Crown in the first prosecution of the French-Canadian, Louis Riel; one of his uncles, Henry John Boulton, was Chief Justice of Newfoundland; another uncle was Chief Justice of Ontario; and James Forster, serjeant-at-law, and Sir John Strange, Master of the Rolls, were both



maternal ancestors. Mr. Boulton was called to the Bar at the Inner Temple in June, 1895.

#### **False Impressions.**

A delightful story—illustrative of false impressions—is being told, says the *Tribune*, concerning the recent president of the Baptist Union, His Honour Judge Willis, K.C. Those who are familiar with his personality can appreciate his genial qualities, and also the fact that he is known for his advocacy of temperance. Now that he is living in town he often travels by the omnibus which lands him at the “Green Man.” On one occasion, and according to his usual custom, he was journeying home by this route, and passed the time in friendly discourse with the passengers. To one housewife who had been marketing he remarked that owing to free trade she was enabled to buy much more for her money than if she lived in a tariff country. To others he talked freely and dispensed counsel and advice indiscriminately. Arrived at his destination he intimated to the conductor, “I want to get out at the ‘Green Man.’” Accordingly the omnibus slowed down, but as he was leaving his seat a lady touched him on the sleeve and earnestly inquired, “My good man, don’t you think you’ve had enough?”

#### **Recent American Decisions.**

*Assault.*—Assisting in the elopement of a minor girl is held in *Shoemaker v. Jackson* (Iowa), 1 L. R. A. (N. S.), 137, not to justify the father in administering a whipping to the one so doing, after the lapse of a sufficient cooling time.

*Carriers.*—A father paying full fare is held, in *Whitney v. Pere Marquette R. Co.* (Mich.), 1 L. R. A. (N. S.) 352, to be entitled to recover for loss of articles of his infant child, packed and carried with his baggage, although the child paid no fare.

*Contract.*—The general rule requiring a party seeking to rescind a contract for non-performance by the other, to restore or tender back what has been received from the latter,

is held, in *Timmerman v. Stanley* (Ga.), 1 L. R. A. (N. S.) 379, not to apply where one party agreed to teach another a certain thing, and, after beginning the course of instruction, refused to proceed further.

*Enticement.*—Hiring at his own request, without notice of the father's objection, a minor who has been hired out by the father to work for another, is held, in *Kennedy v. Baltimore & O. R. Co.* (Md.), 1 L. R. A. (N. S.) 205, not to support an action for enticement.

The right of a woman residing with her husband to maintain an action for the enticement of her minor child is denied in *Soper v. Igo, Walker, & Chenault* (Ky.), 1 L. R. A. (N. S.) 362.

*Evidence.*—A deduction that declarations were made under a sense of impending death, without hope of recovery, is held, in *Gipe v. State* (Ind.), 1 L. R. A. (N. S.) 419, to be warranted, although they were made several hours after the statement of the declarant that he did not believe he could get well, he having grown continually weaker in the meantime.

*Executors.*—A non-resident alien is held, in *Re Breen* (Mich.), 1 L. R. A. (N. S.) 349, not to be an incompetent executor, under a statute which provides that, if any executor shall reside out of the state, the Court may remove him.

That non-residents may be denied permission to act as executors of local estates is affirmed in *Re Mulford* (Ill.), 1 L. R. A. (N. S.) 341. The right of non-residents to act as executors or administrators is considered in a note to these cases.

*Found Property.*—Property hidden in the earth near a marked tree is held, in *Ferguson v. Ray* (Or.), 1 L. R. A. (N. S.) 477, not to have been lost, so as to vest title in the finder as against the owner of the soil, although it had remained so long as to indicate that the owner was dead or had forgotten it.

*Insurance.*—An injury to the hand, superinduced by numbness resulting from using it as a head-rest during sleep, is held, in *Ætna L. Ins. Co. v. Fitzgerald* (Ind.), 1 L. R. A. (N. S.) 422, to be covered by insurance against injuries through external and accidental means.

*Master and Servant.*—One who engages to work in saving property from the débris left by a fire is held, in *Gans Salvage Co. v. Byrnes* (Md.), 1 L. R. A. (N. S.) 272, to assume the risk of injury from falling walls, where the peril is open and obvious.

A youth sixteen years old is held, in *Mundhenke v. Oregon City Mfg. Co.* (Or.), 1 L. R. A. (N. S.) 278, to have assumed the risk of injury plainly apparent from coming in contact with exposed gears, though not expressly warned of the danger.

The right of an employee to hold his master liable for injuries caused by the latter's breach of duty to furnish an independent contractor with safe appliances for the performance of the work is denied in *Miller v. Moran Bros. Co.* (Wash.), 1 L. R. A. (N.S.) 283.

The diligence required of a master to learn the habits or characters of servants employed with due care is held, in *Southern P. Co. v. Hetzer* (C. C. A. 8th C.), 1 L. R. A. (N. S.) 288, to be reasonable diligence and care only.

*Motoring.*—That a statute limiting speed on the highway applies only to horseless vehicles is held in *Christie v. Elliott* (Ill.), 1 L. R. A. (N. S.) 215, not to render it void.

The driver of an automobile, upon meeting upon the highway a horse which is frightened and in such a situation that its driver cannot extricate himself from danger unless the machine is stopped, is held, in *Indiana Springs Co. v. Brown* (Ind.), 1 L. R. A. (N. S.) 238, to be bound to stop, and to be liable for injuries inflicted by his failure so to do. An extensive note to these cases covers the whole subject of the law governing automobiles.

*Negligence.*—The measure of duty of the owner of a place of amusement with respect to safety of places provided for the patrons is declared, in *Williams v. Mineral City Park Asso.* (Iowa), 1 L. R. A. (N. S.) 427, to be the exercise of reasonable care, and not the high degree of care analogous to that which a carrier is bound to exercise at common law.

*Physicians and Surgeons.*—A surgeon who had undertaken to perform an operation upon a patient's right ear is held, in *Mohr v. Williams* (Minn.), 1 L. R. A. (N. S.) 439, to be liable for injuries resulting from the performance of an operation on her left ear, which he deemed to be in greater need of an operation than the right ear, unless he had her express or implied consent; and whether she had impliedly consented was a question for the jury. A note to this case discusses the question of liability of physician performing surgical operation without consent.

*Time.*—The word "noon," used to denote the beginning and termination of the risk under an insurance policy, is held, in *Rochester German Ins. Co. v. Pearslee-Gauldert Co.* (Ky.), 1 L. R. A. (N. S.) 364, to be properly interpreted to be standard, and not sun, time, where the use of the former system of reckoning time has been the prevailing custom in the community for a long period.

*Will.*—Attestation of a will in another room, out of range of the testator's vision, is held, in *Calkins v. Calkins* (Ill.), 1 L. R. A. (N. S.) 393, not to be within a statutory requirement that it shall be in his presence; and the defect is not cured by the subsequent acknowledgment by the witness, or ratification and approval by the testator.

The right of an heir, under a will directing the residue to be divided between the testator's heirs, is held, in *Re Sigel* (Pa.), 1 L. R. A. (N. S.) 397, not to be cut down by a subsequent codicil giving him a specific legacy, "and no more."

## CORRESPONDENCE.

**A Clever Swindle.**

*To the Editor of the CANADIAN LAW TIMES.*

SIR,—I enclose the story of a rather clever swindle. There came into my office on Tuesday the 3rd instant, about 9.30 a.m., a respectable looking man of between 45 and 50 years of age, slightly gray, about 5 feet 11 inches in height, weighing about 185 pounds, smooth shaven, broad faced, rather than thin, and with some peculiar expression about the eyes, which I am unable to recollect, but I have a slight impression that his eyes were brown and rather small. I think that he was unusually square across the shoulders. He was dressed in a dark overcoat of medium length and light weight, suit of dark gray material and black hat (I think a stiff hat with rather flat brim).

I understood from my conversation with him that he was a gentleman farmer, and he looked the part.

The story he told me was about as follows: His name was A. B. Clark, he lived near Strathroy, and was on his way to visit a relative in Oil Springs, and while passing through he came in to get my opinion relative to some trouble he was having arising out of the sale of a horse. He claimed to have sold a horse to a man named George Brent living near Watford, for \$220, Brent to have the horse on 7 days' trial, and if satisfactory then to pay the money. Brent kept the horse for 10 days, and then returned it by his hired man, but when the horse was returned he was lame and my man refused to accept him, so he was returned to Brent's. Brent afterwards called on him and accused him of misrepresentation and attempt to defraud, and, after a heated discussion, he ordered Brent off his place. Brent had the horse, and I was asked my opinion as to whether or not he could be made to pay the \$220. I asked him if Brent had made him any offer, and he told me he had offered to pay \$150 and keep the horse, but that he, Clark, was not inclined to accept it. I

pointed out to him that if he sued he would be forced to bring his action in the County Court, where the costs he would have to pay, if he were unsuccessful, would possibly amount to \$300, that the amount in dispute was in reality only \$70, and that I did not feel sufficiently sure of his succeeding to give him much encouragement to go into Court over such an amount. He suggested that I write Brent a letter to Watford, threatening action, and he would call the latter part of the week on his return from Oil Springs and see what, if any, response Brent might make. I called in my stenographer and dictated a letter while he sat there. He suggested that, as he had to pass the post office on his way to the train, he would take the letter and drop it in the office. There is nothing uncommon in this, and I gave him the letter to mail. Two or three days afterward I received a letter post-marked Watford, purporting to be written by George Brent, in which he went into the details of the horse transaction and gave me his side of the story. He stated in conclusion that he was anxious to avoid litigation, that he had already offered \$150, leaving a difference of \$70, that he was willing to split this difference, and he enclosed a cheque for \$185 in full settlement, which I was to accept or return to him. A day or so following the receipt of this letter from Brent my client came in, presumably on his return from Oil Springs. I read him Brent's letter and told him he had better accept the cheque, to which he assented. The cheque from Brent was payable to my order. I indorsed it payable to the order of A. B. Clark, and it was taken to a local bank and cashed. There is, I believe, a man named A. B. Clark, living near Strathroy, and there is also a George Brent living near Watford, but of course these persons never had any such transaction. The whole was a neat swindle. The man took the letter I wrote, and, instead of posting it, went to Watford and answered it himself. At the time the cheque was dishonoured I was away and did not return for some days afterwards.

G.

## BOOK REVIEWS.

**Moyle's Translation of the Institutes of Justinian:**—The Institutes of Justinian Translated into English, with an Index, by J. B. Moyle, D.C.L., of Lincoln's Inn, Barrister-at-law. 4th edition. Oxford: At the Clarendon Press. London, New York, and Toronto: Henry Frowde. London: Stevens & Sons, Limited.

Accurate and readable is the verdict of critics of previous editions. Some few, but no substantial, changes have been made. The index is full and complete.

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**Kerly and Underhay's Trade Marks Act, 1905:**—Text of the Act (5 Edw. VII. c. 15), with Notes, Cross-references, and a Commentary, and the Rules, Forms, Fees, and Classification of Goods under the Act. By D. M. Kerly, M.A., LL.B., and F. G. Underhay, M.A., Barristers-at-law. London: Sweet and Maxwell, Limited: 1906.

The new Act is the outcome of repeated attempts during recent years to amend the law of trade marks, so far as that depends upon registration, and in particular to extend the scope of the classes of trade marks which can be entered upon the register. It is the fourth English statute dealing with the civil law of trade marks. The first, that of 1875, set up the register and introduced the principle that the registration of a trade mark is evidence of the proprietor's right to the exclusive use of the trade mark in connection with the goods for which it is registered. This Act was repealed by the Patents, Designs, and Trade Marks Act of 1883, which was amended by the Act of 1888. The new Act is intended to remove or mitigate three objections to the Act of 1883 as amended, viz.: that large numbers of perfectly good and often valuable trade marks were not registrable; that when trade marks were admitted to registration, it frequently happened

that disclaimers were insisted upon which hampered the owners of the marks in getting protection abroad; and that there was no effective statute of limitations to objections brought against registered trade marks. The Act also effects an important formal change by separating trade marks from patents and designs, and providing a detailed and nearly complete code of the law relating to registered trade marks. The authors approve of the separation, pointing out "that the idea that the registration of a trade mark confers a valuable privilege analogous to that which an inventor receives as consideration for the disclosure of his invention to the public, is a mistaken notion . . . fostered by the inclusion of trade marks in a Patents and Designs Act." "The registration of a trade mark is rather the recognition of a fact than the grant of a privilege." "The object of the Act is, as far as possible, to provide a record of every trade mark in use." These references and quotations will serve to give an idea of the changes made in the law by the new Act, but a number of minor changes have also been made. "Kerly on Trade Marks" is a well known book, and the present volume will serve as a supplement to it. There is a valuable introduction, the notes are concise and suggestive, and the index complete. The book may safely be commended to Canadian readers, though their interest in it will, for the present at least, not be of a practical nature.

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**Williams on Real Property:**—Principles of the Law of Real Property, intended as a First Book for the Use of Students in Conveyancing, by the late Joshua Williams, K.C. The Twentieth Edition, Re-arranged and partly Re-written by his Son, T. Cyprian Williams, Barrister-at-law. London: Sweet and Maxwell, Limited: 1906.

The 20 editions range from 1845 to 1906. The 19th was in 1901, so the 20th is really overdue. There is no better student's text book.



**Best on Evidence:**—The Principles of the Law of Evidence, with Elementary Rules for conducting the Examination and Cross-examination of Witnesses, by W. M. Best, A.M., LL.B. Tenth edition, with a Collection of Leading Propositions, by J. M. Lely, Barrister-at-law. London: Sweet and Maxwell: 1906.

Important matters which have aroused attention recently are perjury, the “seal of confession” and “mistaken identity,” and the parts of the book relating to these have been reconsidered and enlarged in this edition. There are other improvements and alterations, but the volume is not materially larger. *Best on Evidence* will continue to be a favourite both with students and practitioners.

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**Roberts's Divorce Bills in the Imperial Parliament:**—By James Roberts, M.A., LL.B., Barrister-at-law. Dublin: John Falconer: 1906.

The Matrimonial Causes Act, 1857, which established a Divorce Court for England, has no operation in Ireland, but, according to Mr. Roberts, has substantially altered the point of view from which Irish divorce bills are regarded by Parliament. The same may perhaps be said of Canadian divorce bills before the Senate and House of Commons of Canada; and it is not difficult to see that this collection of cases and precedents will be useful in Canada. There is much hitherto unpublished matter of considerable value, and the arrangement is excellent.

### PERIODICALS AND PAMPHLETS.

**Speech of the Provincial Secretary** in the Legislative Assembly of Ontario, on the introduction of the Bill to Amend the Liquor License Act, 20th March, 1906.

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**Calendar of the Law School of Dalhousie University,** Halifax, Nova Scotia, 1906-07.

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**The Law Magazine and Review** (London, England, May, 1906.) Leading articles: "Responsibility in Law," by Rankine Wilson; "The Law relating to Trade Unions," by J. A. Lovat-Fraser; "Our Local Records—A Policy," by W. P. W. Phillimore; "The Province of the Judge and of the Jury," by G. Glover Alexander; "Criminal Responsibility," by A. M. Rickett; "Ought the County Court to be Made a Branch of the High Court?" by Francis K. Munton.

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**Reports of Bankruptcy and Company Cases** decided in the High Court of Justice, the Court of Appeal, and the House of Lords, edited by Edward Mauson and Aubrey J. Spencer, Barristers-at-law. (Vol. XIII., part I.)

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**Harvard Law Review** (May). Leading articles: "Railway Rate Regulation," by Adelbert Moot; "Following Misappropriated Property into its Product," by James Barr Ames.

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**Columbia Law Review** (May). Leading articles: "John Jay, First Chief Justice of the United States," by James B. Scott; "Resulting Trusts and the Statute of Frauds," by Harlan F. Stone.

**Columbia Law Review** (June). Leading articles: "The Tobacco Trust Decisions," by Henry W. Taft; "An Abused Privilege," by W. A. Parrington; "Jury Trial and the Federal Constitution," by William Cullen Dennis.

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**The Green Bag** (Boston, May). Leading articles: "Francois Xavier Martin, Historian and Jurist," by Pierce Butler; "The Mediæval Innkeeper and his Responsibility," by Joseph H. Beale jun.; "Arbitrary Searches and Seizures as Applied to Modern Industry," by Andrew Alexander Bruce; "An Old-fashioned Law Office," by George Carling; "Limitation under which a Public Service Company must Conduct an Independent Business," by Bruce Wyman.

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**Michigan Law Review** (Ann Arbor, May). Leading articles: "The Doctrine of the Federal Courts as to the Validity of Irregular Municipal Bonds," by Charles L. Dibble; "Some Observations on Case Law Reporting," by John R. Rood; "Exchange of Stock for Capitalized Profits," by H. S. Richards.

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**Case and Comment** (Rochester, N.Y., April, May). Leading articles: "Immunity of Corporate Officers and Agents," "Negligence in Handling Dead Wire;" "Local Option in Cities;" "When it is Noon;" "An Agent's Double Liability;" "The Greatest of Divorce Decisions;" "Finding Long Hidden Property;" "Equitable Protection of Personal Rights."

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**Natal Law Quarterly** (March). Leading articles: "Sande's Commentary on the Cession of Actions;" "Native Labour."

**Insurance Cases for the Month**—Advance Sheets for “The Insurance Man’s Practical Digest,” published by the Murdoch Law Book Co., St. Louis, Missouri (April, May.)

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**Federal Reporter**—National Reporter System: West Publishing Co. (Vol. 142, Nos. 1, 2, 3, 4, May and June.)

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**Law Students’ Journal** (London, England, June). Leading articles: “Bolton v. London School Board;” “Bills of Lading;” “Some Recent Vendor and Purchaser Cases.”

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**Wayland’s Monthly** (Girard, Kansas, April). “The Appeal to Reason v. The Canadian Postmaster-General.”

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**The Law of the Land** (Texarkana, Texas, 15th April). A fortnightly legal-labour journal of an eccentric kind.

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**Chicago Law Journal** (27th April, 11th May, 1st June.)

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**Chicago Legal News** (28th April, 12th May, 19th May, 26th May.)

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**Central Law Journal** (St. Louis, Mo., 27th April, 4th May.)

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**Law Student’s Helper** (Detroit, May.)

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**Law Notes** (Northport, N.Y., May, June.)

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**Criminal Law Journal of India** (Lahore, 15th April, 30th April, 15th May.)

**Calcutta Weekly Notes** (2nd April, 23rd April, 14th May.)

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**Madras Law Journal** (February.)

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**Madras Law Times** (Vol. 1, No. 5.)

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**Madras Legal Companion** (January, February.)

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**The Digest** (Lahore, November-December, 1905.)

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**Punjab Law Reporter** (Lahore, February, March, April.)

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## Supreme Court of Canada.

ONTARIO.]

[1ST MAY, 1906.]

### TORONTO R. W. CO. v. CITY OF TORONTO.

*Street railway—Contract with municipal corporation—Breach of conditions—Liquidated damages—Penalty—Cumulative remedy—Operation of tramway—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control—Territory annexed after contract—Abandonment of monopoly.*

Except where otherwise specially provided in the agreement between the Toronto Railway Company and the Corporation of the City of Toronto, set forth in the schedules to 55 V. c. 99 (O.), the right of the city to determine, decide upon, and direct the establishment of new lines of tracks and tramway service, in the manner therein prescribed, applies only within the territorial limits of the city as constituted at the date of the contract.

Judgment in *City of Toronto v. Toronto R. W. Co.*, 10 O. L. R. 657, 6 O. W. R. 677, reversed.

The city, and not the company, is the proper authority to determine, decide upon, and direct the establishment of new lines, and the service, time-tables, and routes thereon.

Judgment appealed from affirmed.

As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon, and direct the time at which the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heating.

Judgment appealed from reversed.

Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, they cease to have any right of action against the city for subsequent grants of the privileges to others; the right of making such

grants accrues, *ipso facto*, to the city, but is not the only remedy which the city is entitled to invoke.

Judgment appealed from affirmed.

The cars started out before midnight as day-cars may be required by the city to complete their routes so connected, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight, *eo instanti*, their character would be changed to night-cars, and all passengers entering them after that hour could be obliged to pay night fares.

*W. Laidlaw*, K.C., and *W. Nesbitt*, K.C., for the appellants.

*A. B. Aylesworth*, K.C., and *J. S. Fullerton*, K.C., for the respondents.

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NEW BRUNSWICK.]

[8TH MAY, 1906.]

CUSHING SULPHITE FIBRE CO. v. CUSHING.

*Appeal—Winding-up Act—Amount in controversy.*

In proceedings under the Winding-up Act, an appeal lies to the Supreme Court of Canada only when the amount involved exceeds \$2,000.

*Held*, that an order for the winding-up of a company does not involve any amount, and no appeal lies from the judgment of a provincial court refusing to set it aside.

Appeal quashed without costs.

*Powell*, K.C., and *Hanington*, K.C., for the appellants.

*Pugsley*, K.C., *Hazen*, K.C., *Currey*, K.C., and *Ewing*, for the respondents.

MANITOBA.]

[14TH APRIL, 1906.]

## GILMOUR v. SIMON.

*Principal and agent—Sale of land—Authority to make contract—Specific performance.*

The defendant gave a real estate agent the exclusive right, within a stipulated time, to sell, on commission, a lot of land for \$4,270 (the price being calculated at the rate of \$40 per acre on its supposed area), an instalment of \$1,000 to be paid in cash, and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at \$40 per acre, \$50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments, and with the privilege of "paying off the mortgage at any time." This contract was in form of a receipt for the deposit and signed by the broker as agent for the defendant.

*Held*, affirming the judgment appealed from (15 Man. L. R. 205, 1 W. L. R. 417), that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.

*Held*, further, that the term allowing the privilege of paying off the mortgage at any time was not authorized and could not be enforced against the defendant.

W. Nesbitt, K.C., and L. W. Coutlee, K.C., for the appellant.

A. B. Aylesworth, K.C., and R. G. Affleck, for the respondent.

BRITISH COLUMBIA.]

[6TH APRIL, 1906.]

## MILNE v. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION.

*Principal and surety—Collateral deposit—Ear-marked fund—Appropriation of proceeds—Set-off—Release of principal debtor—Constructive fraud—Discharge of surety—Right of action—Common counts—Equitable recourse.*

K. owed the corporation \$33,527.94 on two judgments recovered on notes for \$10,000 given by him to R., and a sub-



sequent loan to him and R. for \$20,000. M., at the request of and for the accommodation of R., had indorsed the notes for \$10,000, and deposited certain shares and debentures as collateral security on his indorsement. K. and R. deposited further collateral security on negotiating the second loan, but K. remained in ignorance of M.'s indorsements and collateral deposit until long after the release hereinafter mentioned. These judgments remained unsatisfied for over six years, but, in the meantime, the corporation had sold all the shares deposited as collateral security, and placed the money received for them to the credit of a suspense account, without making any distinction between funds realized from M.'s shares and the proceeds of the other securities, and without making any appropriation of any of the funds towards either of the debts. On the 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for \$15,000, provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the \$15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had indorsed. These negotiations for compromise and the final settlement with K. took place without the knowledge of M., and K. was not informed of his remaining liability towards M. as surety.

*Held*, by SEDGEWICK, GIROUARD, DAVIES, and IDINGTON, JJ. (reversing the judgment appealed from, 11 B. C. R. 402), that the secret dealings by the corporation with K. and with respect to the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety; and that he was entitled to recover the surplus of what the corporation received applicable to the notes indorsed by him as money had and received by the corporation to and for his use.

*Held*, by MACLENNAN, J., that, on proper application of all the money received, the corporation had got more than sufficient to satisfy the amount for which M. was surety, and that the surplus received in excess of what was due upon the notes was, in equity, received for the use of M., and could be recovered by him on equitable principles or as money had and received in an action at law.

*A. B. Aylesworth*, K.C., and *Deacon*, for the appellant.

*Davis*, K.C., for the respondents.

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### Exchequer Court of Canada.

[BURBIDGE, J., 28rd OCTOBER, 1905.]

#### INDIANA MANUFACTURING CO. v. SMITH.

*Patent for invention—Pneumatic straw stackers—Combination—Assignment—Right of assignor to impeach validity of patent—Right to limit construction—Estoppel.*

The assignor of a patent, sued as an infringer by his assignees, is estopped from saying that the patent is not good; but he is not estopped from shewing what it is good for, i.e., he can shew the state of the art or manufacture at the time of the invention, with a view to limiting the construction of the patent.

2. In an action for infringement against the assignor of a patent for improvements in pneumatic straw stackers, it appeared that an earlier patent assigned by the defendant to the plaintiff excluded everything but the narrowest possible construction of the claims of the second patent. In the latter, speaking generally, the combination was old, each element was old, and no new result was produced; but in respect of one of the elements of the combination there was a change of form that was said to possess some merit. Beyond that there was no substantial difference between the earlier and later patents.

*Held*, that while, as between the plaintiff and any one at liberty to dispute the validity of the later patent, it might

be impossible on these facts to sustain the patent—as against the assignor, who was estopped from impeaching it, it must be taken to be good for a combination of which the element mentioned was a feature.

*W. Cassels*, K.C., and *W. D. Hogg*, K.C., for the plaintiffs.

*G. Lynch-Staunton*, K.C., and *C. A. Masten*, for the defendants.

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[25TH OCTOBER, 1905.]

ACTIESELSKABET BORGESTAD v. THE “THRIFT.”

DOMINION COAL CO. v. THE “THRIFT.”

*Ship—Collision action—Interlocutory application for consolidation of two actions—Appeal from order of local Judge—Costs.*

An action for damages against the defendant ship for collision was brought in the Nova Scotia Admiralty District by the owner of the injured ship on the 15th September, 1905. The following day a similar action was begun by the charterer and owner of the cargo of such injured ship. On the 28th September an application was made by the defendant to the local Judge for an order to consolidate the two actions, or in the alternative for an order that the defendant ship be released upon tendering bail to the amount of her appraised value, and that a commission of appraisement be issued, to ascertain her value in her then condition. On the 3rd October the local Judge made an order that a commission of appraisement issue, and that upon bail being given for the amount of such appraised value in each of the actions, the ship be discharged from arrest, and that the two actions be tried together. An appeal from such order was taken to the Exchequer Court. Upon the appeal no objection was taken to the order, so far as it directed an appraisement, or to the direction that the two actions be tried together, except so far as that direction might be held to affect the question of the amount of bail to be given—it only being necessary to give bail to the amount of her appraised value to secure the release

of the ship if the actions were consolidated. It was, however, urged that the local Judge should have ordered the consolidation of the two actions, and that the ship should be released in respect of both upon giving bail to the amount of her appraised value.

*Held*, that it was a matter within the discretion of the local Judge to grant or refuse an order for consolidation, and as such ought not to be interfered with on appeal.

2. That the order should be varied to allow in the alternative the ship to be released in respect of both actions and claims made, upon payment into Court of her appraised value and the amount of her freight, if any.

3. This relief not having been asked before the local Judge, the Court on appeal declined to allow the costs of appeal to either party.

*E. L. Newcombe*, for the appellants.

*R. L. Borden*, K.C., for the respondents.

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[9TH DECEMBER. 1905.]

### REX v. DUGAS.

*Crown—Public officer—Judge of Yukon Court—Living expenses—"Appointee of Dominion"—Recovery of money paid.*

The defendant was appointed a Judge of the Supreme Court of the Yukon Territory on the 12th September, 1898. By s. 5 of the Yukon Territorial Act, 1898 (61 V. c. 6), as such Judge he became a member of the council constituted to aid the Commissioner in his administration of the Territory. An order in council was passed on the 7th October, 1898, appointing him "to aid the Commissioner in the administration of the Territory," and since that time up to the action brought he had continued to act as a member of the council. In addition to the salary paid to him as such Judge, certain provision for living expenses was made from time to time by Parliament in his behalf. By orders in council of the 7th July, 1898, and the 5th September, 1899, relating to

officers for the administration of the Yukon District, it was provided that such officers were, in addition to their salaries, to be furnished with "quarters and such living allowance as may from time to time be fixed by the Minister of the Interior:" and it was further provided therein that the provision mentioned should apply to "all appointees of the Dominion" who had been or might be appointed to the staff for the administration of the Yukon Territory.

From the 19th October, 1900, until the 30th June, 1902, the defendant was furnished with a residence at Dawson City, and supplied with light and fuel, the bills for rent and for light and fuel, and for certain other domestic requirements, being paid by or under the authority of the Commissioner of the Yukon Territory. The payments so made were fully reported to the Minister of Public Works, who was responsible for the administration of the appropriation, and vouchers, shewing on the face of them the service for which the moneys were expended, and giving full particulars, were forwarded to the Department of Public Works at Ottawa, and no objection was taken thereto at the time by any one in that Department. The Commissioner, whose duty it was to administer the government of the Territory under instructions from the Governor in council or the Minister of the Interior, stated that he had directions from the latter that, in addition to payment for the services of the officers employed in the administration of public affairs, "all the public employees were to be sheltered and fed," and that it was in pursuance of these instructions that he made the arrangements and provisions mentioned on behalf of the defendant. Furthermore, a letter was produced in evidence written by the Deputy Minister of Justice to the Deputy Minister of Public Works by which it appeared that at that time the Minister of Justice considered it desirable and necessary that residences should be provided for the Judges of the Territory.

*Held*, that the defendant was an "appointee of the Dominion" on the staff for the administration of the Yukon

Territory within the meaning of the order in council of the 5th September, 1899, and so entitled to the quarters and a "living allowance" provided thereunder.

2. That the circumstances disclosed approval and ratification by the Minister of the Interior and the Minister of Public Works of the action of the Commissioner in making the expenditures in question for the benefit of the defendant.

*D. J. McDougal and A. Greene*, for the Crown.

*N. A. Belcourt*, K.C., for the defendant.

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[9TH JANUARY, 1906.]

### SPENCER v. THE KING.

*Revenue—Customs—Infringement by importation of cattle without payment of duty—Intention to infringe—Exercise of ownership in Canada.*

Where cattle are liable to the payment of duty upon importation into Canada, the bringing of such cattle to a point within two or three miles of the boundary line between Canada and the United States constitutes an element in the offence of smuggling.

2. That where cattle are brought to Canada for pasturage, or to a point from which they themselves may drift into Canada for pasturage, if the owner in Canada exercises any control over them, a contravention of the Customs Act is complete, more especially where the control exercised is that of putting Canadian brands upon such cattle.

*Philps and Kilgour*, for the suppliants.

*Mitchell and Johnston*, for the Crown.

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[25TH JANUARY, 1906.]

### PRICE v. THE KING.

*Crown—Public work—Injury to adjoining property by fire—Liability of Crown under s. 16 (c) of Exchequer Court Act—Injury not actually happening on the public work.*

It is sufficient to bring a case within the provisions of s. 16 (c) of the Exchequer Court Act to shew that the injury

complained of arose from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work. It is not necessary to shew that the injury was actually done or suffered upon the public work itself.

*Letourneux v. The Queen*, 7 Ex. C. R. 1, 33 S. C. R. 335, followed.

*G. F. Henderson* and *L. A. Carman*, for the plaintiff.

*C. E. Dorien*, K.C., for the Crown.

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[9TH APRIL, 1906.]

### PIGOTT v. THE KING.

*Crown—Public work—Contract for widening canal—Change of plans—Extra work—Recovery for—Quantum meruit—Waiver.*

The suppliants were contractors for widening and deepening the lower part of the Grenville canal. Some portions of the work described in the specifications could not be done without unwatering the canal; other portions of it could not be very well done in the winter season; and nearly all of it could have been done more cheaply and conveniently during the open season. There was, however, nothing to prevent the work being done in the way the contractors did it, that is, by doing during the season of navigation such work as they could do with the water in the canal, by making the best use possible of the time in the spring after the frost was out of the ground and before the water was let into the canal for the purposes of navigation, and also by using in the same way any time that might be available after the water was let out of the canal in the autumn and before the severe weather set in, and with regard to the rest, by work done in the winter season. It was also a term of the specifications that "parties tendering should consider in submitting their prices for the various items of work, that they must include the cost of removing snow and ice off dams, troughs, &c., and everything necessary to unwater the canal and weir pit during

the progress of the work, and that navigation should not be interfered with."

A large part of the work was done either in the winter season or with the water in the canal.

*Held*, that there was no such change in the conditions under which the contract was to be performed as to make its provisions inapplicable to the work that was done, and that the case was not one in which the contractors were entitled to treat the contract as at an end and to recover upon a quantum meruit, as was done in the case of *Bush v. Trustees of the Port and Town of Whitehaven*, 2 Hudson on Building Contracts, p. 121.

2. By s. 33 of the Exchequer Court Act, it is provided that "in adjudicating upon any claim arising out of any contract in writing, the Court shall decide in accordance with the stipulations in such contract, and shall not allow compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, nor shall it allow interest on any sum of money which it considers to be due to such claimant, in the absence of any contract in writing stipulating for payment of such interest, or of a statute providing in such a case for the payment by the Crown."

In this case an order in council was passed waiving certain clauses of the contract.

*Held*, that the words in the first clause of the above section, "the Court shall decide in accordance with the stipulations in the contract," may be treated as directory only, and that effect might be given to the waiver so far as it afforded relief from the clauses of the contract which would constitute a defence to the action if pleaded by the Crown, such as the absence of any written direction or certificate by the engineer with respect to the work done; but that the remaining clauses of the section were imperative, and there could be no valid waiver which would enable a contractor to obtain compensation for a larger sum than the amounts stipulated for in his



contract, i.e., the contract prices for the different classes of work done must be applied to such work.

3. Where a contract has been entered into for the construction of certain works at schedule rates, and the work has been completed in accordance with the contract, the contract prices cannot be increased so as to give the contractor a legal claim for higher prices without a new agreement made with authority, for a good consideration.

*G. H. Watson*, K.C., and *R. V. Sinclair*, for the sup-  
pliants.

*F. H. Chrysler*, K.C., for the Crown.

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## NEW BRUNSWICK.

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### In the Supreme Court.

#### IN EQUITY.

[BARKER, J., 18TH OCTOBER, 1905.]

#### LOGGIE v. MONTGOMERY.

*Easement—Origin in grant—Prescriptive title—Evidence—Referee's deed—  
Proof of decree.*

In 1854 R. B., owner of lot 8, conveyed the northern part thereof to M., together with the privilege of taking water thereto through a pipe, which M. was empowered to build, from a spring on the southern part of the lot. By mesne assignments M.'s lot, with the water privilege, became vested in T. B. In 1871 he executed to S. for 21 years, with covenant for renewal, a lease of the spring, with a right to lay a pipe therefrom through the southern part of lot 8 to lot 9. The ownership of the southern part of lot 8 was then in H., and in 1905 became vested in the defendant. In 1872 S. built a pipe from the spring across H.'s land to lot 9, and it has been in uninterrupted use ever since, a period exceeding 20 years. In 1904 lot 9 with the lease was assigned to the plaintiffs. The plaintiffs' predecessors in title always

rested their right to the easement on the lease and not upon adverse user.

*Held*, that a prescriptive title to the easement could not be set up.

A deed of a referee in equity, though purporting to have been made under a decree of the Court, is not admissible in evidence without proof of the decree.

*W. Pugsley*, K.C., A.-G., and *L. J. Tweedie*, K.C., for the plaintiffs.

*G. W. Allen*, K.C., *M. G. Teed*, K.C., and *R. A. Lawlor*, for the defendant.

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[20TH OCTOBER, 1905.]

### OUILETTE v. LEBEL.

*Deed—Maintenance—Enforcement of agreement—Breach—Onus of proof.*

In a suit to enforce performance of an agreement by the defendant to maintain the plaintiffs, husband and wife, in consideration of a conveyance of land by them to the defendant, the onus of proving a breach of the agreement is upon the plaintiffs.

*F. LaForest*, for the defendant.

*A. B. Connell*, K.C., and *W. F. Kertson*, for the plaintiffs.

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[19TH DECEMBER, 1905.]

### DUNCAN v. TOWN OF CAMPBELLTON.

*Arbitration—Injunction—Jurisdiction.*

An injunction will not be granted to restrain a party from proceeding with an arbitration, where the result of the arbitration will be merely futile and of no injury to the party seeking the injunction.

An arbitration to determine the value of land of the plaintiff taken by the defendants will not be restrained because a condition precedent to the taking of the land may not have been complied with.

*W. A. Mott*, for the plaintiff.

*A. S. White*, K.C., and *H. F. McLatchy*, for the defendants.

[9TH MARCH, 1906.]

*In re* CUSHING SULPHITE FIBRE CO.*Practice—Order—Variation—Mistake.*

A company, against which a winding-up order had been made, obtained, at the instance of the large majority of its shareholders and holders of its bonds, an order in an action by it against C. granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this province, confirming a judgment of the Supreme Court in Equity, and intrusting the conduct of the appeal to the company's solicitors. Subsequently the liquidators of the company moved to vary the order by adding a direction that the case on appeal should not be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of this province refusing to set aside the winding-up order was determined, and that the company's solicitors on the company's appeal in the action against C. should act therein only on instructions of the liquidators, or their solicitor.

*Held*, that, as there was no error or omission in the order resulting from mistake or inadvertence, the motion should be refused.

*J. D. Hazen*, K.C., for the applicants.

*M. G. Teed*, K.C., for the respondents.

[8TH MAY, 1906.]

## BAIRD v. SLIPP.

*Fraudulent conveyance—13 Eliz. c. 5—Consideration.*

In 1891 E. S., a farmer, since deceased, agreed with two of his sons, in consideration of their remaining on the farm and supporting him and their mother, and paying to their two sisters \$1,000 each, that the farm and his personal property should be theirs. The farm consisted of adjoining

pieces of land, each worth about \$3,200. Subsequently the sons paid more than \$3,000 in paying off balance of purchase money due on the farm, paid \$2,000 to the sisters, and supported the father and mother. On the 19th July, 1899, the father conveyed the farm to the sons for an expressed consideration of \$1. At that time he was not in debt, but he was surety with others for loans amounting to \$14,000 to a company, of which he and they were directors, the last loan being for \$3,000, made on the 7th June, 1899. On the 3rd May, 1901, the company went into liquidation, and the amount for which the directors were sureties was paid by them, except E. S. In a suit by them to set aside the conveyance as fraudulent and void under 13 Eliz. c. 5:—

*Held*, that the bill should be dismissed.

*A. B. Connell*, K.C., and *J. C. Hartley*, for the plaintiffs.

*L. A. Currey*, K.C., and *D. McL. Vince*, for the defendants.

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[8TH MAY, 1906.]

### PETROPOULOS v. F. E. WILLIAMS CO.

*Bill of sale—Injunction—Bringing amount into Court.*

An interim injunction order, in an action to set aside a bill of sale, to restrain the mortgagee from taking possession or selling the goods conveyed, will not be granted, except upon condition of the mortgagor bringing into Court the amount due on the mortgage.

*W. Watson Allen*, K.C., for the plaintiffs.

*W. H. Trueman*, for the defendants.

# THE CANADIAN LAW TIMES.

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JULY, 1906.

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## ENGLISH AND ONTARIO LAW.

THERE are some interesting points of distinction between the law in England and that in Ontario. In many respects Ontario is in advance of England in the matter of legal reform. It is proposed to point out in this article some of the most important and interesting of the differences between the two systems.

### ONE CHAMBER.

In the first place it is worthy of remark that legislation is carried on in Ontario with one chamber only.

Mr. Lecky (*Democracy and Liberty*, I., p. 361), utters a warning note as to the danger which may result from a single chamber.

“Of all the forms of government that are possible among mankind, I do not know any which is likely to be worse than the government of a single, omnipotent, democratic chamber.”

Such a chamber, he says, is as subject to the temptations of uncontrolled power as an individual would be, and is likely to act with much less sense of responsibility and real deliberation.

“Every considerable assembly, also, as it has been truly said, has at times something of the character of a mob. Men acting in crowds, and in public and amid the passions of conflict and debate, are strangely different from what they are when considering a serious question in the calm seclusion of

their cabinets. Party interests and passions; personal likings or dislikes: the power of rhetoric: the confusion of thought that springs from momentary impressions and from the clash of many conflicting arguments; the compromise of principles that arises from attempts to combine for one purpose men of different opinions or interests: mere lassitude and mere caprice—all act powerfully on the decisions of our assembly. Many members are entangled by pledges they had inconsiderately given, by some principle they had admitted without recognizing the full extent to which it might be carried, or by some line of conduct they had at another period pursued. Personal interest plays no small part: for the consequences and pecuniary interests of many members are bound up with the triumph of their party, while many others desire beyond all things a renewal of their mandate. They know that a considerable part of the constituencies to which they must ultimately appeal is composed of fluctuating masses of very ignorant men, easily swayed by clap-trap, by appeals to class interests or class animosities, and for the most part entirely incapable of disentangling a difficult question, judging distant and obscure consequences, realizing conditions of thought and life widely different from their own, estimating political measures according to their true proportionate value, and weighing nicely balanced arguments in a judicial spirit.”

Notwithstanding these pessimistic views, the majority of the provinces of the Dominion have tried the experiment of one legislative chamber, and so far with no disastrous results, Ontario being one of the number. In fact, in two only of the provinces, namely, Nova Scotia and Quebec, does the bicameral system exist.

In British Columbia, Manitoba, New Brunswick, Ontario, and Prince Edward Island, there is only one chamber, the lower, or, to use the words of Mr. Lecky, the “democratic chamber.”

In Prince Edward Island, the Legislative Council, the Upper House, was abolished as recently as 1894, as a wise measure of economy.

The Statutes of Canada (1905) by which the two new provinces of Alberta and Saskatchewan were formed and given a constitution, provide for one chamber only in each province.

This would seem to be a legislative indorsement of the one-chamber system.

In a recent debate in the House of Commons on a motion to abolish the Senate, Sir Wilfrid Laurier is reported to have used the following language: "For my part," said Sir Wilfrid, "I believe this would be a mistake, and I could not be induced to reconcile myself to such an idea. The second chamber seems to me absolutely indispensable under our system of government. A second chamber has been held to be necessary for two reasons. It is supposed to be a check upon hasty legislation—but this is an idea which has never made much impression on my judgment, at all events. Considering the course of such legislatures in the Dominion which are composed of a single branch elected by the people—the legislatures of Ontario, Manitoba, British Columbia, and some others—I do not believe that we need seriously apprehend any danger from the existence of one branch only of the legislature. But one consideration, which to my mind is absolutely conclusive and paramount, is that under our system of government, composed of several parts, a second chamber is absolutely needed as a safeguard for the smaller provinces against the possible invasion of their rights by the larger provinces."

#### UNANIMITY OF JURORS.

Lord Brougham, in a speech delivered in the House of Commons in February, 1828, said: "In my mind, he was guilty of no error, he was chargeable with no exaggeration, he was betrayed by his fancy with no metaphor, who once said that all we see about us, Kings, Lords, and Commons, the whole machinery of the state, all the apparatus of the system and its varied workings, end in simply bringing twelve good men into a box."

Various explanations are given for the choice of the number twelve. Twelve, "in which patriarchal and apostolical number" (says Blackstone; bk. iii. c. 23) "Sir Edward Coke (Co. Litt. 155) hath discovered abundance of mystery," is said to have been a favourite number for constituting political and juridical bodies with the various nations of the Teutonic group.

Mr. Lesser (History of the Jury System, p. 98) quotes a curious passage from a legal treatise: "Guide to English Juries, by a Person of Quality, published in 1682 and attributed to Lord Somers:—"In analogy, of late the jury is reduced to the number of twelve, like as the prophets were twelve, to foretell the truth: the apostles twelve, to preach the truth; the discoverers twelve, sent into Canaan, to seek and report the truth; and the stones twelve, that the heavenly Hierusalem is built upon."

Professor Thayer quotes from Duncomb's *Trials per pais* (1665) this account of the sanctity and fore-ordained character of the number twelve: 'And first as to their number twelve: and this number is no less esteemed by our law than by Holy Writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve: 1 Kings iv. 7. . . . Therefore not only matters of fact were tried by twelve, but of ancient times twelve Judges were to try matters of law, in the Exchequer Chamber, and there were twelve counsellors of state for matters of state; and he that wageth his law must have eleven others with him who believe he says true. And the law is so precise in this number of twelve, that if the trial be by more or less, it is a mistrial.' "

"The requirement of unanimity on the part of the jury in civil causes which we have inherited from England is indefensible in principle. In practice it has saved the institution from destruction. No one would feel himself safe if a



majority of the twelve men, of no special training in the study of legal rights, could strip him of his property." (Baldwin's *American Judiciary*, p. 185.)

"The rule of unanimity in giving a verdict was by no means universal at first." (Thayer.)

"A doctrine had a considerable application in Normandy and survived in England, that it was enough if eleven agreed; the ground of this being the old rule that a single witness is nothing." (ib. p. 86.)

But in the fourteenth century the requirement of twelve in the petit jury, unless by consent, and the need of unanimity, seems to have become the settled rule. (ib. 89-90.)

"And indeed," said Sir Matthew Hale, "this gives a great weight, value, and credit to such a verdict, wherein twelve men must unanimously agree in a matter of fact, and none dissent; though it must be agreed, that an ignorant parcel of men are sometimes governed by a few that are more knowing, or of greater interest or reputation than the rest."

"Our ancestors," it has been said, "insisted on unanimity as of the essence of the verdict, but were unscrupulous as to how that unanimity was obtained. Whether the minority gave way to the majority, or the reverse, appeared to them a matter of indifference; it was a contest between the strong and the weak, the able-bodied and the infirm, as to who best could bear hunger and thirst and all the discomfort incident to confinement."

Lord Campbell once explained the law to a stubborn jury as follows: "At the Assizes, according to the traditional law, a jury which could not agree were to be locked up during the Assizes, and then carried in a cart to the borders of the next county, and there shot into a ditch." To avoid such a catastrophe,—“for men are not to be forced to give their verdict against their judgment,”—“the jury are to be kept together without meat, drink, fire, or candle, till they are agreed.” (2 Hale P. C. 296.)

This “preposterous relic of barbarism,” as Hallam called it, and which Judge Caldwell of the United States Circuit

Court says "had its origin in the dark ages, and is one of the common-law relics of barbarism and superstition," still holds sway in Great Britain. It has been abolished in many of the United States and of the British Colonies.

In Newfoundland, in civil cases the jury consists of nine persons, of whom, if the nine cannot agree upon a unanimous verdict after three hours deliberation, seven may return a verdict. (R. S. N. c. 56, s. 30.)

In New Zealand, if three-fourths of any jury impanelled in any civil cause, after three hours, intimate that there is no probability of an agreement, the verdict of the three-fourths is to be received.

In British Columbia a verdict of three-fourths may be received on the trial of any action after the expiration of three hours from retirement, and is to be as binding as if it were the unanimous verdict of the jury.

In Jamaica five out of seven suffice.

In Ontario, in any civil case it is sufficient if out of the twelve jurors, ten can agree; the verdict of ten has the same effect as that of twelve.

No time limit is prescribed in this province; as soon as the ten agree, the verdict can be rendered.

In criminal cases, however, no change has been made by the Dominion Parliament; the unanimous verdict of the twelve good men and true is still necessary.

#### "ACTIO PERSONALIS."

Many years ago a learned counsel, afterwards a distinguished Judge, was consulted in an action for damages caused by the plaintiff falling into a hole dug by the defendant.

The learned counsel, who was for the defendant, said: "Why did you not dig the hole a little deeper? The plaintiff would then have broken his neck, and there could have been no action for damages."

To the layman this may seem a senseless jest, but the lawyer knows it was a sound exposition of the law.

Before Lord Campbell's Act, the Fatal Accidents Act, the maxim *actio personalis moritur cum personâ* relieved the person who caused the immediate death of another from any civil responsibility.

By the common law, if an injury were done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died with the person by or to whom the wrong was done.

This was expressed by the maxim *actio personalis moritur cum personâ*.

In the older English law the maxim was of general application, it extended both to actions based upon an obligation, and to all actions based upon tort. (*Phillips v. Homfray*. 24 Ch. D. 439.)

In modern times the scope of the principle was limited to actions of tort and breach of promise of marriage; the latter, though in form and substance contractual, from its peculiar character, and from the fact that "vindictive" damages may be given, being placed in respect of this maxim among actions arising out of tort.

This "barbarous maxim" (as Sir Frederick Pollock calls it) was held not to apply at common law to cases where, besides the commission of the wrong, property had been acquired by the deceased which had been subtracted from the estate of the injured person, where property or the proceeds or value of property of another person have been appropriated by the deceased and added to his own. (24 Ch. D. 439.)

Lord Mansfield points out the "fundamental distinction" thus:—"If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor.

As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's

trees, but for the benefit arising to his testator for the value or sale of the trees he shall." (*Hambly v. Trott*, 1 Cowp. 371).

In an action for an injunction and damages against a manufacturer for fouling a stream, the defendant having died, the action was carried on against his representatives.

The Court of Appeal held that the action could not be maintained.

Sir George Jessel, M.R., said: "It was an action on a simple tort. It did not appear that the defendant had got any benefit from fouling the plaintiff's stream; he had only injured the plaintiff. As I understand the rule at common law, it was this: you could not sue executors for a wrong committed by their testator for which you could only recover unliquidated damages." (*Kirk v. Todd*, 21 Ch. D. 484.)

This rule of common law has been modified in England by statute (4 Edw. III. c. 7, 25 Edw. III. stat. 5; 3 & 4 Wm. IV. c. 42); but except where so modified it is still in force.

Mr. Justice Williams (*Executors*, 10th ed., 607) puts the effect of these Acts as follows: "An executor or administrator shall now have the same action for an injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to the executor or administrator, as the deceased himself might have had, whatever the form of action may be."

It will be noticed that so far no remedy is given for injuries done to the freehold, or to the person of the testator or intestate.

In respect of injuries to the person resulting in death, relief has been given by Lord Campbell's Act, the "Fatal Accidents Act," 9 & 10 Vict. c. 93 (R. S. O. c. 166).

In regard to the freehold, the statute 3 & 4 Will. IV. c. 42 gave a right of action to the "executors or administrators of any person deceased for any injury to the real estate of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before

the death of such deceased person, and provided such action shall be brought within one year after the death of such person."

This statute also provides that an action may be brought against the personal representative for any wrong done by the deceased within six months before his death to real or personal property, such action to be brought within six months after the executors have entered on their office.

The present English law is contained in the common law and the statutes above referred to. The maxim still applies to all cases of torts to the person. If the cause of action is in substance an injury to the person, the personal representative cannot maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury.

An important change has been made in Ontario by "The Trustee Act" (R. S. O. c. 129, ss. 10, 11, 12). Under this statute executors or administrators of any deceased person may maintain an action for all injuries to the person or to the real or personal estate of the deceased, except in cases of libel and slander, in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do. Similarly in case any deceased person committed a wrong to another in respect of his person, or of his real or personal property, the person so wronged may maintain an action against the executors or administrators or the person who committed the wrong, except in cases of libel and slander.

The action under the statute must be brought within a year from the decease. The effect of this statute has been considered by the Court of Appeal for Ontario in a case where the original plaintiff brought an action against a municipal corporation in respect of serious injuries sustained by slipping on a sidewalk, which, he alleged, had been negligently left by the defendants in a dangerous condition.

Pending an appeal by the defendants from a judgment of a Divisional Court in favour of the plaintiff, the plaintiff

died, and the action was then revived in the name of the executors of his will as plaintiffs against the defendants.

When the appeal came on for hearing, a preliminary objection was taken that the right of action had not survived, and that, although perhaps the executors might commence a new action for relief, yet the original action had come to an end by the plaintiff's death.

This objection was, after argument, overruled by the Court.

Mr. Justice Osler said: "This Act would seem, subject to the express exceptions and limitations contained therein, to have practically abolished the ancient common law rule as to torts, expressed by the maxim *actio personalis moritur cum personâ*. This enactment embraces all former statutory changes made in the ancient rule, the principal alteration being that causes of actions for torts, where the injury done is of a personal nature, now survive to the executors, as well as those for injuries to the testator's real and personal estate. The injury which is the subject of this action is, therefore, one for which the representatives of the deceased might sue; in other words, the cause of action is one which by virtue of the Act survives to them. . . . As the cause of action in this case is one which survives, the plaintiff's representatives are not put to a new action, but may revive and continue that which was brought by the deceased." (*Mason v. Peterborough*, 20 A. R. 683.)

But, notwithstanding the wide language of this opinion, it has been held that the principle expressed in the maxim *actio personalis moritur cum personâ* is still recognized, and that s. 10 of the Trustee Act does not apply to a cause of action arising under Lord Campbell's Act, for the words used in that section, "for all torts and injuries to the person," are capable of reasonable and sensible application without extending them to include the death of the person (*McHugh v. Grand Trunk R. W. Co.*, 2 O. L. R. 600). It was held in that case that upon the death before judgment of the sole beneficiary on whose behalf an administrator has brought an

action under the Fatal Accidents Act, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative. "Lord Campbell's Act making express and special provision for a limited class of wrongs, viz., those cases in which death has been caused by the wrongful act, and for those only, those cases should be excepted from the operation of section 10, which applies only to torts and injuries unconnected with the death of the deceased" (ib. p. 610.)

The action for breach of promise of marriage would not seem to be affected by the statute, but is apparently left as at common law.

The present law in Ontario may be summed up as follows:

The right of action survives to and against executors whatever the nature of the tort may be, except for libel and slander, and except for injuries causing death. (See R. S. O. c. 166.)

In other words, every right of action in tort, except libel and slander, instead of dying with the person, survives to and against the personal representatives.

But the action must in every case be brought within a year from the death.

It would seem to be immaterial how long before the death the tort was committed, so long as it is not barred by the ordinary law of limitations.

It is perhaps possible also that any right of action which would survive at common law will still survive, and, therefore, if such action cannot be brought under the statute by reason of the lapse of more than a year after the death, it may still be maintained at common law.

#### RULE IN CUMBER V. WANE.

If A. promises to release B. (who owes him £15) from all further liability on his paying him £5, such a promise

is a mere nudum pactum, at common law, notwithstanding the payment of the £5.

The reason of this somewhat harsh decision is simply this—that A. gets nothing more for his promise than he was already entitled to receive, and B. suffers no further loss than he was bound to suffer under his existing obligation. (Plumptre, pp. 102-103.)

This doctrine, often spoken of as the rule in *Cumber v. Wane*, has provoked much criticism.

In the note to *Cumber v. Wane*, written by an eminent lawyer, and never disapproved by any of the editors of *Smith's Leading Cases*, including Willes and Keating, JJ., it is said:—"It can hardly have failed to occur to the observant reader of *Cumber v. Wane*, that its doctrine is founded upon vicious reasoning and false views of the office of a court of law, which should rather strive to give effect to the engagements which persons have thought proper to enter into, than cast about for subtle reasons to defeat them upon the ground of being unreasonable. Carried to its full extent, the doctrine of *Cumber v. Wane* embraces the exploded notion, that, in order to render valid a contract not under seal, the adequacy as well as the existence of the consideration must be proved:" 1 Sm. L. C. (11th ed.) p. 349.

"It would be difficult," says Professor Ames (39 Am. Law Register, N. S., p. 143), "to find an established rule of law more repugnant to the views of business men or more vigorously condemned by the Courts that apply it, than the rule that a creditor who accepts part of his debt in satisfaction of the whole, may safely disregard his agreement and collect the rest of the debt from his debtor. This unfortunate rule is the result of misunderstanding a dictum of Coke. In truth, Coke, in an overlooked case, declared in unmistakable terms the legal validity of the creditor's agreement."

The amusing reference to this doctrine by Sir George Jessel, M.R. (*Couldery v. Bartrum*, 19 Ch. D. 394, 399), may be cited here: "According to English Common Law



a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tom-tit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common Law, he could not take 19s. 6d. in the pound; that was *nudum pactum*. Therefore, although the creditor might take a canary, yet, if the debtor did not give him a canary together with his 19s. 6d. there was no accord and satisfaction; if he did, there was accord and satisfaction. That was one of the mysteries of English Common Law."

This time-honoured doctrine has been practically swept away in Ontario by the Judicature Act (R. S. O. c. 51, s. 58 (8)), which enacts that "Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation."

This provision has been made the subject of judicial consideration in two cases.

In *Bank of Commerce v. Jenkins*, 16 O. R. 215, the facts were as follows:—At a meeting of the defendant's creditors, at which the plaintiffs were not represented, an arrangement was made to accept 40c. on the \$, on the amount of the claims. A deed of composition with a covenant to accept the 40c. was prepared and was executed by C. N., the manager of the plaintiffs' branch at L. The execution was "for Bank of Commerce, C. N.," opposite to which was an ordinary seal. At the time the manager executed the deed, there were two creditors mentioned in the schedule who had not executed. Before either of these creditors had executed, and before the composition notes had been tendered to the manager, he wrote to the defendant's solicitor withdrawing from the arrangement. It did not appear that the head office had repudiated the manager's authority. The composition notes were subsequently tendered to the manager, but he refused to accept them.

Held, on the evidence, that the manager had authority to agree to accept less than the whole of the claim, and did so agree, and that the debtor performed his part by tendering the notes; and that under the statute the agreement was irrevocable.

Mr. Justice Rose, after quoting the words of the statute, says:—"It will be observed that where there has been an agreement for that purpose the acceptance by the creditor in satisfaction is not required. To give effect to the latter part of the section, it seems to me that it must be held that an agreement once entered into to accept part performance of an obligation is not revocable, otherwise a creditor might make the agreement, and, at any time afterwards, when the debtor tendered the part performance, the creditor might refuse to accept: and thus the provision would be ineffectual, for if the creditor accepted, the prior provision would apply."

In *Mason v. Johnston*, 20 A. R. 412, a judgment debtor had forwarded to the solicitor of the judgment creditor a bank draft, payable to the solicitor's order, as payment "in full;" the solicitor indorsed the draft and obtained and paid over the moneys to the judgment creditor, but wrote refusing to accept the payment "in full;" the judgment creditor was held entitled to proceed for the balance.

Mr. Justice Osler expressed a doubt as to whether the section of the statute would bear the construction that there may be a previous agreement without any new consideration to accept part performance of the obligation in satisfaction, and that if such part performance is afterwards "rendered," it may be sufficient, even though the creditor has in the meantime repudiated or withdrawn from the agreement, and will not accept such part performance in satisfaction of it.

In that case the facts did not bring it within the second branch of the section, as it was clear that the draft had not been sent in pursuance of any agreement that the debtor should send it, or, if sent, that it should be accepted in satisfaction.

It was further held not to come within the first branch, the same learned Judge saying that "What the statute requires in order that the debtor may be able to avail himself of it is that the part performance of his obligation shall be expressly accepted by the creditor in satisfaction of it. It merely enables the parties to make a valid and binding accord and satisfaction in a case where it could not have been made before the statute."

While the statement by the learned Judge as to his view of the construction of the second branch of the section was a mere dictum, yet it tends to throw doubt upon the correctness of the view taken by the Court in *Bank of Commerce v. Jenkins*.

#### CORROBORATION.

There is no rule of law in England that a plaintiff cannot recover on his uncorroborated evidence in support of a claim against the estate of a deceased person. In the absence, however, of corroboration the evidence is regarded with suspicion: *Beckett v. Ramsdale*, 31 Ch. D. 177 (C. A.)

In Ontario, on the other hand, in actions by or against the representatives of a deceased person, the statutory rule is that the opposite or interested party to the action may not recover therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

#### SEDUCTION.

The common law action of seduction was based upon a fiction, the relationship, not of parent and child, but of master and servant, and the gist of the action was the loss of service caused by the illness resulting from the connection. Where the daughter was an infant residing at home, this service was presumed, but where she was adult or residing elsewhere the service had to be proved.

Sir Frederic Pollock says: "The capricious working of the action of seduction in modern practice has often been

the subject of censure. Thus Serjeant Manning wrote more than forty years ago: 'The quasi fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers.' All devices for obtaining what is virtually a new remedy by straining old forms and ideas beyond their original intention are liable to this kind of inconvenience. It has been truly said that the enforcement of a substantially just claim 'ought not to depend upon a mere fiction over which the Courts possess no control.' We have already pointed out the bolder course which might have been taken without doing violence to any legal principle. Now it is too late to go back upon the cases, and legislation would also be difficult and troublesome, not so much from the nature of the subject in itself as from the variety of irrelevant matters that would probably be imported into any discussion of it at large."

But such legislation has been passed in the province of Ontario. By the Act respecting seduction (R. S. O. c. 69), the father or mother of any "unmarried female who has been seduced and for whose seduction the father or mother could maintain an action in case such unmarried female was at the time dwelling under his or her protection, may maintain an action notwithstanding such unmarried female was at the time of her seduction serving or residing with another person, upon hire or otherwise."

At the trial of any such action it is "not necessary to prove any act of service performed by the person seduced, but the same shall in all cases be presumed, and no evidence shall be received to the contrary."

"Whatever differences of opinion may exist on the construction of this Act, it seems to be conceded on all hands that the principal object the legislature had in view, was to give a right of action to parents for the seduction of their daughters when residing away from home. And the most revolting feature of the law as it formerly stood was, and

still **is** in England, that the master with whom the female **might** be residing at the time of her seduction was often **himself** the seducer, and yet no action could be maintained **against** him:" Richards, C.J., in *Hogan v. Ackman*, 30 U. C. R. 14.

**There** is under the Ontario Act, in an action by a parent, **an** irrebuttable presumption of service: *Harrison v. Prentice*, 24 A. R. 677.

**For** a modern instance of this "most revolting feature of **the** law" in England reference may be made to the case of *Whitbourne v. Williams*, [1901] 2 K. B. 722.

**In** the Law Quarterly Review (XVIII., 13), in commenting upon this case, which was one where a master seduced a maid servant while in his service, and she in consequence gave birth to a child, it is said: "The fact that **the** seducer is the girl's employer, which in itself aggravates the moral guilt of his conduct, protects him from an **action** for seduction. This is a logical deduction from the **principle** that the action for seduction rests on the loss of **service**, generally fictitious, occasioned to the person, generally **the** father, who is the plaintiff in the action. No one can quarrel with the decision of the Court of Appeal, but it points **towards** the conclusion that since the Judges cannot entirely get **rid** of the fiction that the action for seduction depends upon **the** loss of service, the time has come when the legislature should brush aside the pretences of the law courts and **determine** on grounds of expediency the conditions under **which** the action should be maintainable."

#### WILLS.

**By** c. 18 of 2 Edw. VII., An Act respecting Wills of Personal Estate, most of the provisions of the Imperial statute known as Lord Kingsdown's Act (24 & 25 V. c. 114), were enacted for Ontario. The clauses adopted dealt with **wills** of British subjects dealing with personal estate made out of Ontario. (See 22 C. L. T. pp. 251-253).

For some reason not easy to understand, the beneficial provision contained in s. 2 of Lord Kingsdown's Act was ignored.

That section, dealing with the wills of British subjects made within the United Kingdom, provided that, whatever the domicile of the testator at the time of death, the will should be held to be well executed for the purpose of probate if it complied with the forms required by the laws for the time being in force in that part of the United Kingdom where it was made.

That is to say, in cases to which the Act applies, the *lex loci actus* is added to the *lex domicilii*, as an alternative, to support the validity of the will.

This beneficial provision might well be made applicable to wills of British subjects made within Ontario.

#### CONTRACTS OF INFANTS.

The better opinion would seem to be that the contracts of an infant were, at common law, voidable, not void, and could be ratified by him on attaining his majority.

Where they were for necessities, or when they were for services to be rendered by the infant, they were not even voidable, but binding.

The effect of a contract being voidable and not void was that the infant could, on attaining his majority, ratify it, and so render himself liable thereon.

This ratification might at common law be inferred from any act done or declaration made by the quondam infant, provided such act or declaration amounted to a recognition of his liability, and in the case of continuing contracts, such as partnership, it was held that unless within a reasonable time after attaining his majority, he did something clearly shewing his intention to disaffirm such contract, he must be taken as having ratified it: *Goode v. Harrison*, 5 B. & Ald. 147.

By s. 5 of Lord Tenterden's Act (9 Geo. IV. c. 14), now embodied in R. S. O. c. 146, s. 6, it is provided that

“no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless the promise or ratification is made by some writing signed by the party to be charged therewith, [or by his agent duly authorized to make the promise or ratification.]”

Lord Tenterden's Act did not, as is done by the Ontario Act, authorize the ratification to be made by an agent.

The law in Ontario is still the common law doctrine, as modified by the above quoted Act.

In England, however, by the Infants Relief Act, 1874, all contracts of infants other than contracts for necessities are utterly void, and no such contract can be ratified after full age, nor can any binding promise be made by an infant after full age to pay any debt contracted during infancy.

This legislation has not been adopted in Ontario.

#### SALE OF INFANTS' LANDS.

By R. S. O. c. 168, it is provided that “where an infant is seised or possessed of or entitled to any real estate in fee or for a term of years or otherwise howsoever, in Ontario, and the Court is of opinion that a sale, lease, or other disposition of the same or of any part thereof, is necessary or proper for the maintenance or education of the infant, or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by such disposition, the Court may order the sale, or the letting for a term of years, or other disposition of such real estate.”

But no such disposition is to be made against the provisions of any will or conveyance under which the infant has obtained the estate.

In order to safeguard the rights of other parties, it is provided that the proceeds of such sale, or the surplus there-

of, is to remain of the same nature and character as the estate sold or disposed of, so that the heirs, next of kin, or other representatives of the infant, shall have the same interest in any money which may remain at the death of the infant, as they would have had in the estate in question had no disposition been made of it.

There is no similar legislation in England; it is said that "internal evidence" would seem to shew that the origin of this statute is to be found in the New York law of 1814: *Re Hibbard*, 14 P. R. 179.

"The jurisdiction can only be exercised in the cases specified in the statute, and cannot be used to sell an infant's estate for a father's benefit; not even if that be to repay for past maintenance:" *ib.*

#### WAGERING CONTRACTS.

In England by the statute of 8 & 9 V. c. 109, s. 18, all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, are null and void; and no suit can be brought or maintained, in any court of law or equity, for recovering any sum of money or valuable thing, alleged to have been won upon any wager, or which shall have been deposited in the hands of any person, to abide the event on which any wager shall have been made.

This legislation has not been adopted in Ontario.

By R. S. O. c. 329 (1902), the law as it was in England under the statute 5 & 6 Wm. IV. c. 11, s. 2, has been adopted, substantially, as the law for this province, and the more sweeping legislation of the Imperial Parliament was not followed.

#### BARRISTERS.

In England a barrister cannot sue for fees due to him for services rendered in the ordinary course of his professional duties, whether the action be framed as arising upon an implied contract to pay for services rendered on request,



or upon an express contract to pay a certain sum for the conduct of a particular business. Counsel fees are considered as honoraria not recoverable by legal process.

A very strenuous argument in favour of the application of this rule to Ontario may be found in the opinion of Harrison, C.J., in *McDougall v. Campbell*, 41 U. C. R. 332. The Judicial Committee of the Privy Council expressed serious doubts whether in an English colony, where the common law of England is in force, this special rule of the English Bar could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law: *Regina v. Doutre*, 9 App. Cas. 745.

It has since that case been held that the present law of Ontario, in contrast with that of England, permits counsel to sue client for the value of professional services, and that where counsel are retained by solicitors, and not directly by the client, these solicitors have implied authority to pledge the client's credit for the payment of counsel fees, and that legal privity exists between client and counsel though a solicitor has intervened in the usual way. The client, therefore, is for such services *prima facie* the proper and only person to be sued: *Armour v. Kilmer*, 28 O. R. 618.

Toronto.

N. W. HOYLES.

## RECENT CASES FROM THE TIMES REPORTS.\*

**Attachment of Debts.]**—In *Martin v. Ladel*, 22 T. L. R. 561, the Court of Appeal act on the very important principle that the granting of an attaching order is a matter of discretion and that an order ought to be refused if it is inequitable to grant it. The defendant, a German, residing in Berlin, had appealed to the House of Lords against a judgment, and a Berlin bank, which had a branch in London, became sureties on the bond upon his paying to them in Berlin an amount equal to the amount of the bond. The appeal failed, and after payment of the costs a substantial balance remained of the sum in question, and the plaintiff obtained against the bank in England an order attaching the money. It was proved that payment in England under such an order would be no defence to the bank in an action in Germany by the defendant for the balance of his deposit, and the Court of Appeal held that it would be inequitable to compel the bank to pay in England, with the probability of having to pay again in Germany, and set aside the order.

**Company.]**—*Brookes v. Hansen*, 22 T. L. R. 475, will be of interest under the recent Ontario company prospectus legislation. It is there decided that the Imperial Act requiring a statement of the consideration in respect of the acquisition of property was complied with where the prospectus gave the amount paid to the company's immediate vendor, though that vendor had purchased for a very much smaller sum, and really for resale to the company. Another statement that a company for a similar purpose "with a nominal capital of £300,000 was largely oversubscribed," the fact being that only £60,000 had been offered for subscription, was also, while thought to be misleading, held not sufficient to make out liability, the good faith of the defendant being successfully made out.—In *re Alfred Melson* and

\* Including the cases in No. 26, Vol. 22, to the 22nd June, 1906.

Co., Limited, 22 T. L. R. 500, is a winding-up case of some importance. The general rule is that a winding-up order should not be made if no advantage to the petitioning creditor will result, but in the case in hand an order was made where debenture holders were in possession, carrying on the business and incurring debts, and able at any moment to seize all the assets, such a state of things calling it was thought for the intervention of the Court.—What amounts to an “issue” of debentures is the point dealt with in *In re Perth Electric Tramways*, 22 T. L. R. 533. The company assigned their assets to trustees to secure an issue of debentures which were to be in a prescribed form and each in favour of a named payee. A large number were issued in this form, and then the company borrowed money from their bankers, giving to them debentures duly signed and sealed but not dated, and without a payee’s name. The loan having been repaid, the debentures were handed back to the company, who subsequently filled in the names of payees and dealt with the debentures afresh. It was held that the transaction with the bank was an “issuing” of the debentures, and that, as there was no power to re-issue, the subsequent transactions were invalid, the debentures on repayment of the bank loan having been wholly satisfied and put an end to.—An important principle is laid down by the majority of the Court of Appeal in reversing the judgment below—21 T. L. R. 499, noted 25 C. L. T. 385—in *Corbett v. South Eastern R. W. Co.*, 22 T. L. R. 550. It is that a provision in a private Act of incorporation for the protection of an individual who has dealt with the company (for the construction and maintenance of a station) imposes a statutory obligation until released by the beneficiary, and that any agreement by the company which involves a breach of it is ultra vires.—It was decided in *Foster v. Coles*, 22 T. L. R. 555, on the construction of special articles and resolutions, that holders of preferential shares were entitled to a cumulative dividend.

**County Court.]**—The fact that an action in the High Court has been remitted to the County Court for trial, does not, it is held in *Toon v. Stanbury-Eardley*, 22 T. L. R. 536, enable the latter Court to exercise jurisdiction if the title to land comes into question in the course of the proceedings.

**Criminal Law.]**—It is decided in *Rex v. Linneker*, 22 T. L. R. 495, that the accused was rightly convicted of “feloniously attempting to discharge a revolver . . . with intent to do grievous bodily harm” (see Criminal Code, s. 241), when he had drawn a loaded revolver from his pocket, with an expression of intention to use it, but was seized before he could take any further step towards discharging it. —There may, it is held in *Rex v. Duguid*, 22 T. L. R. 506, be a conviction for conspiring with the mother of a child to take it from lawful custody, though the mother herself would not be guilty of an offence if she herself attempted to get possession of the child. See the Criminal Code, s. 284, as re-enacted by 63 & 64 V. c. 46.

**Expropriation.]**—After expropriation proceedings have been duly taken, the relationship between the owner of the land in question and the expropriating power is, it is held in *In re Cary-Elwes's Contract*, 22 T. L. R. 511, that of vendor and purchaser, and the expropriating power may be compelled, just as in the case of an ordinary purchase, to accept a conveyance. It is an implied term of every contract for the sale of real property that the contract shall be followed by a deed conveying the property to the purchaser. The expropriated owner is entitled to give a conveyance defining the boundaries of and interest in the property taken.

**Illegal Consideration.]**—*Cooper v. Willis*, 22 T. L. R. 582, while dealing to a considerable extent with questions of County Court procedure, is worth noting for the main point, that an agreement not to set up the defence of the Gaming Act in an action on a cheque given for bets, is illegal, and cannot be invoked as against the defendant who afterwards refuses to abide by it.

**Landlord and Tenant.]**—Dartford Brewery Co. v. Till, 22 T. L. R. 502, and Palethorpe v. Home Brewery, 22 T. L. R. 505, deal with leases of inns. It was held in the first case that a covenant to use the premises as an inn, and not to do anything whereby the business or goodwill might be prejudicially affected, etc., was not broken by a regulation by the lessee that on Sunday only guests and travellers would be served with refreshments, and that on week days no one would be served with alcoholic drink more than once during any morning or afternoon or evening. In the second case a covenant to conduct the business in a proper manner and not “knowingly or willingly” to do or suffer any act whereby the license might be forfeited, was held, as to the first part thereof, to have been broken by the entirely unauthorized act of a sub-lessee.

**Life Insurance.]**—The judgment for rescission on the ground of misrepresentation granted in Molloy v. Mutual Reserve Life Ins. Co., 22 T. L. R. 59, noted ante p. 18, has been set aside by the Court of Appeal (22 T. L. R. 525), the defence of the Statute of Limitations being given effect to. The plaintiff in 1898 brought an action against the defendants to recover back, as having been wrongly charged, part of a premium paid by him. All the facts were then known to him, and it was held that the present action for rescission brought in 1904, after another action had been determined by the House of Lords against the company, could not be maintained.—The insurance company also succeeded in Horncastle v. Equitable Life Assurance Society, 22 T. L. R. 534, an action claiming under a paid-up policy the amount which at the time it was taken the company's agent had represented it would be worth, the amount tendered by the company being considerably less. The policy contained a provision as to the mode in which the paid-up value was to be ascertained, and the agent's representation was held, assuming his authority to make it, to be inconsistent with this and not admissible in evidence.

**Master and Servant.]**—The effect of delegation of duty was the point considered in *Harris v. Fiat Motors, Limited*, 22 T. L. R. 556. A driver in the employment of the defendants was ordered by them to take to its owner a motor car which had been repaired by them, and his instructions were not to give up the driving to any one. At one stage of the journey a man not in the employment of the defendants joined the driver, who hearing some noise went to the back of the car to ascertain the cause, letting his companion drive, and he by negligent driving ran into and damaged plaintiff's van. It was held that the defendants were not liable because there was no necessity for keeping the car going while the cause of the noise was being investigated, and therefore no necessity for delegating the duty of driving.

**Municipal Corporations.]**—While it is the right and the duty of a municipal corporation to keep its highways in repair, it cannot, it is decided in *The King v. Mayor of Brighton*, 22 T. L. R. 497, spend large sums in alleged repairs which are really not repairs at all but construction work to enable a road to be used for motor racing.

**Partnership.]**—In the agreement for a partnership at will in question in *Sturgeon Brothers v. Salmon*, 22 T. L. R. 584, there was a provision that in the event of any partner desiring to retire he should give "one calendar month's notice to allow his shares to be purchased by the remaining partners." It was held that a sale by one partner to another of his share, without notice to the third, did not operate as a dissolution, and that the selling partner was liable to a creditor whose claim had accrued after the sale. But it is important to note that the judgments turn to some extent upon a section in the Partnership Act, and there is much to be said in favour of the view that in a partnership at will a transfer of interest works ipso facto a dissolution.

**Photograph.]**—*Marie Corelli* was held in *Corelli v. Wall*, 22 T. L. R. 532, not entitled to an interim injunction restraining the defendants from selling picture post-cards

having upon them her likeness, and purporting to depict incidents in her life. The relief was asked on two grounds: first, that the likeness was untrue and the incidents fictitious and therefore the cards libellous. But while the principle that there may be libel by photograph was admitted, the injunction was denied because the fact of libel was not shewn with the distinctness required in *Bonnard v. Perryman*, [1891] 2 Ch. 269. The second ground was that the plaintiff as a private person had the right to restrain the publication without her leave of what purported to be a likeness of herself. But in the absence of authority for this contention it was held that it could not on interlocutory motion be given effect to.

**Solicitor.]**—The amount paid to the government on the incorporation of a company should not be, it is held in *In re Blair and Girling*, 22 T. L. R. 547, a disbursement in the bill of costs, but an item in the solicitor's cash account.—There cannot be, the Court of Appeal hold in *Lumsden v. Shipcote Land Co.*, 22 T. L. R. 559, except on special circumstances being shewn, after judgment in the solicitor's favour on a bill of costs, a reference of the bill for taxation with all the accompanying possibilities: see Solicitors Act, s. 37 (R. S. O. 1897 c. 174, s. 37). There may, however, be under the general jurisdiction of the Court a reference of the bill to a taxing officer to ascertain the proper amount to be allowed.

**Trade Union.]**—The attempt made in *Denaby and Cadeby Main Collieries v. Yorkshire Miners Association*, 22 T. L. R. 543, to obtain damages from a trade union for fomenting and maintaining a strike, failed on the facts, improper interference not having been made out.

**Will.]**—It was held in *In re Hawkins*, 22 T. L. R. 521, that a gift to trustees of a leasehold house, in which, at the expense of the testatrix, religious and elementary teaching had been carried on, with a direction to the trustees to carry

on the work, was a good charitable gift. But that a gift to trustees of another leasehold house which had been used by her, and was to be used by them for the storage of books advancing certain views, pending the distribution to publishers from time to time of these books for sale, was not a good charitable gift.—In *In re Blundell*, 22 T. L. R. 570, a question of satisfaction is dealt with. A father on his daughter's marriage covenanted to pay a sum of money to trustees, to be held in trust for her for life and then for her children. He left her by will for her own use absolutely one-third of his estate, this third being much more than the sum he had covenanted to pay. It was held that the bequest was, however, a satisfaction only as far as the daughter's life interest was concerned.

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## THE LATEST ONTARIO DECISIONS.\*

**Appeal to Court of Appeal.]**—An application by the defendants in Kirby v. Township of Pelee, 7 O. W. R. 864, to extend the time for setting down an appeal from the report of the Drainage Referee, on the ground that, owing to the isolated condition of the island township in winter, some of the exhibits sent them could not be got back in time, was refused by Osler, J.A. (but without costs, owing to the statements in the plaintiff's affidavit, "especially objectionable in the affidavit of a professional gentleman," stigmatizing statements in the affidavit of another deponent as "absolutely false to his knowledge," and as "cunningly devised and deliberately made to produce innuendoes false to his knowledge and intended to mislead"), it appearing that, whatever delay and difficulties there may have been at times in communication with the islands, there was plenty of time to have procured the necessary papers in time to have got the appeal books ready for the session of the Court which begun on the 23rd April, the reasons against appeal having been delivered on the 27th February, and communication having been uninterrupted for over a month before the time for setting down the appeal, and that the application had not been made until long after the last session of the Court began. Besides, there was no affidavit filed by the defendants' solicitors as to the steps taken to procure the papers required, and nothing to shew why, owing to the importance of the case, if it were so, the delay should, on some terms, be overlooked.

**Assignments and Preferences.]**—The execution creditors in Federal Life Assurance Co. v. Stinson, 7 O. W. R. 778, a foreclosure action, were added as defendants in the Master's office, proved their claims, and were given the usual opportunity to redeem, which was taken advantage of by their

\* Short notes of the most important cases in Volume VII. of the Ontario Weekly Reporter, Nos. 19, 20, 21, pp. 777 to 888 inclusive, and Volume VIII., No. 1, pp. 1 to 16, inclusive.

transferee, who took an assignment of the plaintiffs' mortgage to himself. A further time was then allowed within which the mortgagor was directed to redeem such transferee, both as assignee of the plaintiffs, and as assignee of the execution creditors, and, before the period for redemption had expired, the mortgagor made a general assignment for the benefit of creditors under R. S. O. 1897 c. 147, s. 11, as amended by 3 Edw. VII. c. 7, s. 29 (O.), and the assignee claimed to be entitled to redeem as to the mortgage only, on the ground that the amount of the executions should be treated as the claims of judgment or execution creditors whose executions had not been completed by payment; but a Divisional Court held that, the priorities of the parties to the mortgage action having been determined by the Court to the exclusion of all the creditors, including those represented by the assignee, these claims had passed beyond the judgment and execution stage, and were not within the meaning of the Act.

**Banks and Banking.]**—When it was learned that a certified cheque, received for the plaintiff in *Smith v. Traders Bank of Canada*, 7 O. W. R. 791, by one Williscroft, captain of a boat belonging to the plaintiff, and his agent with authority to receive freight and cash cheques, and by him indorsed payable to the plaintiff's order, had gone astray, Williscroft went to the defendants, upon whom the cheque was drawn, and it was shewn to him and he was told that it had been paid by the defendants to the Bank of Toronto at Sarnia. Williscroft at once informed the defendants' manager that the indorsement of the plaintiff's signature was a forgery, and was told by him that the defendants would make a draft on the Bank of Toronto at Sarnia, and that the amount would probably be paid by the latter bank in a few days; on the same day the defendants returned the cheque to the Bank of Toronto at Sarnia without objection on the part of Williscroft, and without the latter making any demand for its return, at least until afterwards, and without demand for payment. On the 24th August the plaintiff's solicitors wrote to the defendants demanding payment, and, on receiving an answer that the

defendants had, on the 22nd August, sent the cheque to the Bank of Toronto, and that they were ready to pay it "on presentation by the proper holder," on the same day commenced the action. On appeal from a judgment in favour of the plaintiff, the action was dismissed by a Divisional Court, on the ground that the defendants, in the circumstances, were justified in refusing to pay until the cheque had been presented in due course.

**Carriers.]**—Costello v. Grand Trunk R. W. Co., 7 O. W. R. 846, was distinguished by Mabee, J., from Booth v. Canadian Pacific R. W. Co., 7 O. W. R. 593, in that in the former case the company had sought to limit their liability in consideration of a special rate. In spite of the finding of the jury that the plaintiff was not aware of the different freight rates, and did not assent to the terms upon which the lower rate was granted to him, having had an opportunity of reading the contract, and having signed it, and no advantage having been taken of him by the defendants' agent, his right to recover was held limited to the amount specified therein.

**Cheque.]**—On appeal by the plaintiffs from the judgment of Boyd, C., in Bank of Ottawa v. Harty, 6 O. W. R. 925, noted ante 22, a Divisional Court (7 O. W. R. 869) granted a new trial confined to the two questions, whether the indorsement was a forgery, and, if it was, what was the amount of the plaintiffs' loss, the Court holding that, if the indorsement were a forgery, the defendant Harty was liable, since he, "having in his possession the cheque purporting to be properly indorsed, was, if not by express words, by unequivocal conduct, throughout asserting that he was the agent of the lawful holder and authorized by him to employ the plaintiffs to make collection and to receive from them the proceeds, and by such conduct also invited the plaintiffs to do as they did."

**Company.]**—An appeal by the liquidator in Re International Mercantile Agency, Limited, 7 O. W. R. 795, from the report of a referee in a winding-up, whereby the Snowball

Co., creditors, were found entitled to be paid their claim in priority to the general creditors of the company, in respect of moneys collected by the "agency" for the claimants, was dismissed by Teetzel, J., it appearing that the relationship between the Snowball Co. and the "agency" was that of principal and agent and not that of banker and customer, so that the money collected was impressed with a trust in favour of the principal. The moneys collected were deposited in a bank, where they formed part of a balance made up of moneys collected in the same way, and therefore were easily identified and traceable, and subject to a charge in favour of the beneficiary.

**Costs.]**—Where in the course of an action certain interlocutory costs had been awarded to the defendant "in any event," and the action was afterwards settled by an agreement in writing, which provided that each party should pay his own costs, it was held by the Master in Chambers that the defendant was not in a position to tax his interlocutory costs: *McDonald v. Crites*, 7 O. W. R. 795.

**Criminal Law.]**—The gist of the decision of the Court of Appeal in *Rex v. Wilkes*, 7 O. W. R. 854, is that a husband is not guilty of a criminal omission to provide necessaries for his wife, where she, justifiably living apart from him, is maintained by the charity of others, or gains her livelihood by her own means and exertions. It must be shewn that by reason of such neglect on the part of the husband her life is endangered, or that her health is or is likely to be permanently injured. Notwithstanding the amendment made to s. 215 of the Criminal Code by the Act of 1893, the rule laid down in *Regina v. Nasmith*, 42 U. C. R. 242, still obtains.

**Deed.]**—In the deed in question in *Purcell v. Tully*, 7 O. W. R. 848, there was a typewritten grant of the lands mentioned therein to the party of the second part named therein, for and during the term of his natural life, and upon his death unto those children of his who should have survived him

or should have died before him leaving lineal descendants surviving at his death, their heirs and assigns forever, in equal shares, in fee simple, as tenants in common. The estate granted the children was charged with the support and maintenance of his wife. By mistake of a stenographer (as was alleged) a printed form was attached to this grant, containing the usual habendum clause and short form covenants. It was held by a Divisional Court, that the words of limitation in such clause were repugnant to the earlier portion of the deed, which clearly shewed by the charge upon the estate given the children that that given the father was not intended to be an estate in fee simple, and that such words, following the rule in *Meyers v. Marsh*, 9 U. C. R. 244, and that line of cases, must be disregarded.

**Default Judgment.]**—An appeal by the defendant from the order of the Master in Chambers in *Piggott v. French*, 7 O. W. R. 679, was allowed by Anglin, J. (7 O. W. R. 783), on the ground that the service of the writ of summons and the judgment by default entered thereupon were nullities and not irregularities which could be waived. The defendant's conduct could only operate by way of estoppel, and it was not shewn that other parties to the litigation had been led by any action of his to alter their position to their prejudice, nor ought the motion to fail because the order of the local Master for judgment and the order allowing service had not been formally set aside. The defendant was refused costs owing to her delay and her course of conduct.

**Disqualification of Referee.]**—A reference to the local Master at Berlin and the proceedings thereupon were set aside by Anglin, J., in *Livingston v. Livingston*, 7 O. W. R. 830, because, after the taking of voluminous evidence covering a long period of time, at great expense, and after many points had been settled by agreement, and the Master's finding upon a number of other points on which he was required to adjudicate, had been notified to the parties, though no

formal report had been drawn up, the defendant employed a firm of solicitors in which the Master was a partner to conduct for him some non-contentious business.

**Division Court.]**—It was held by Boyd, C., in *Re McDonald v. Richmond*, 7 O. W. R. 844, on a motion by the defendant for prohibition to the 3rd Division Court in the county of Peel, that although in answer to the plaintiffs' claim for rent of land held under the plaintiffs and the testator, whom the plaintiffs represented, the defendant set up the Statute of Limitations and the Real Property Limitation Act, no question about the title to land arose or could arise, and the motion was accordingly dismissed.

**Highway.]**—In 1855 a portion of the "River road" between Burgar and Dorothy streets in the town of Welland was lawfully conveyed by the municipality to the owners of the properties abutting on the eastern side thereof, under the authority of a by-law which provided for the closing of that portion of the River road as soon as Main street and Burgar street should be opened for public travel, which did not happen until 1873 or 1874. The River road was ever since 1855 used as before. The action of *Maccomb v. Town of Welland*, 7 O. W. R. 876, was brought to have it declared that the plaintiffs, successors in title of such owners, were the owners of the strip of land forming such roadway. Anglin, J., dismissed the action, holding that such uninterrupted enjoyment of this strip as a highway, especially during the last 30 years, sufficiently established re-dedication thereof.

**Husband and Wife.]**—The question for decision in *Re Tolhurst*, 7 O. W. R. 780, answered by Anglin, J., in the negative, was: Does the fact that a married woman has by contract disentitled herself to claim alimony from her husband, dispense with her concurrence in a conveyance by him of land subsequently acquired, under the statute (R. S. O. 1897 c. 164), which enables a Judge to make such an order "when the wife of an owner of land has been living apart

from him 2 years under such circumstances as by law disentitle her to alimony?" "A right which is barred by contract is not usually spoken of as a right to which a person is disentitled 'by law.' Indeed, this result of contractual stipulation has been more than once contradistinguished in the construction of statutes from the like result attributable to the mere operation of law, where the meaning and effect of the phrase 'by law' has been presented for the consideration of the Courts: *Wilkinson v. Colvert*, 3 C. P. D. 360; *Barlow v. Teal*, 15 Q. B. D. 501; *Percival v. The Queen*, 33 L. J. Ex. 289."—Owing to some misunderstanding as to the terms of the consent on which the Court was supposed to be acting, the judgment delivered by the Court of Appeal (7 O. W. R. 298) was directed to be withdrawn in *Milloy v. Wellington*, 7 O. W. R. 862, and the defendants' appeal from the judgment of a Divisional Court dismissed, because the case (an action of crim. con.) could not have been withdrawn from the jury on the ground of abandonment of the wife by the husband. The case was distinguished from *Patterson v. MacGregor*, 28 U. C. R. 280, by the fact that, on the evidence fairly read, the jury might have found that there had been no final abandonment of his wife by the plaintiff, nor any final separation between the parties, though they were, no doubt, and had for a long time been, living apart. In *Patterson v. MacGregor* it was held by a divided Court, upon demurrer, that abandonment or separation was a defence in an action of this kind. Osler, J.A., in the present case, while pointing out the distinction between the cases, expressed his own agreement with the dissenting judgment in *Patterson v. MacGregor*. The result in *Milloy v. Wellington* is that the judgment of a Divisional Court, 4 O. W. R. 82, directing a new trial, stands.

**Illegal Contract.]**—*Wampole & Co. v. F. E. Karn & Co.*, 7 O. W. R. 810, was an action for damages for breach of contracts, whereby the defendants, in consideration of the plaintiffs supplying them with certain preparations, at certain prices, agreed that they would not sell such prepara-

tions wholesale at a price less than an agreed wholesale price, nor retail at a price less than an agreed retail price; and for an injunction to restrain further breaches. This agreement was used not simply in relation to these commodities between the plaintiffs and their various customers, but is the form adopted by the committees representing a large part of the wholesale and retail trade of Canada. The defendants set up that these contracts were null and void as being in restraint of trade, and that they constituted a conspiracy in restraint of trade under s. 516 of the Criminal Code. In dismissing the action, Clute, J., said in part: "I find as a fact from the evidence that the agreements in question, and each of them, were procured by an unlawful conspiracy between the plaintiffs, defendants, and other manufacturing chemists, and the Association of Wholesale and Retail Druggists, and that the conspiracy was entered into for the purpose of unduly preventing or lessening competition in the purchase, barter, and sale of the articles in question, being articles of trade and commerce, and for the purpose of unreasonably enhancing the price of said commodities, and are contrary to the provisions of the Criminal Code, and are null and void."

**Infant.]**—An appeal by the grandmother of the infant from the order of Anglin, J., in *Re Faulds*, 7 O. W. R. 759, noted ante 406, was dismissed by a Divisional Court: 7 O. W. R. 867.

**Land Titles Act.]**—An appeal by the plaintiff in *Yemen v. Mackenzie* from the order of Britton, J., 7 O. W. R. 701, noted ante 406, was dismissed by a Divisional Court (7 O. W. R. 866), it being held that the plaintiff had no status to apply to discharge the caution registered by the defendants under Rule 22 in the schedule to the Land Titles Act, and that ss. 75 and 82 did not assist him; but that the Master had no authority to deal with the merits of the case as regards the mortgage, and his finding thereon should not prejudice the plaintiff in any subsequent proceeding.



**Municipal Corporations.]**—The wooden section of the bridge whose maintenance and repair were in question in *Re County of Victoria and Township of Carden*, 8 O. W. R. 1, was 243 feet long and spanned Mud Lake at low water, but at high water it spread out for practically the whole width of the bridge and its two embankments, respectively 140 and 260 feet in length. A Divisional Court held that this bridge was over 300 feet in length within the meaning of s. 617a of the Consolidated Municipal Act, 1903, and that this section applied not only to bridges crossing rivers, streams, ponds, or lakes, but also to bridges crossing ravines, and that therefore this was a proper case for declaring the bridge in question a “county bridge.” It was considered that s. 605 had no application to the case.

**Patent for Invention.]**—*Woodward v. Oke*, 7 O. W. R. 881, was an action to restrain the defendant from infringing the plaintiff's patent for improvements in automatic drill-turners, in which, it was held by a Divisional Court, that a patent for a similar device taken in the United States by one Swan was not an anticipation of the plaintiff's, since in the Swan patent a ratchet or clutch was used to turn the drill, whereas in the plaintiff's it was turned by friction imposed by the weight of the machine itself; that the plaintiff's device was a new discovery, filled a long-felt want, and produced a machine of great mercantile value, at half the cost of the ineffective Swan patent, and of very great utility; and that the defendant's machine was substantially the same as the plaintiff's, the only differences being the presence of a ratchet supposed to serve the same purpose as that in the Swan patent, but having no real utility whatever, being used as a means to make defendant's machine different, but only making it colourably different from plaintiff's, and of a square bearing instead of a bevel bearing.

**Pleading.]**—An appeal by the defendants from the order of Anglin, J., in *Black v. Ellis*, 7 O. W. R. 490, noted ante 351, was dismissed by a Divisional Court: 7 O. W. R. 869.

**Postponement of Trial.]**—A postponement of the trial in *Lefurgey v. Great West Land Co.*, 7 O. W. R. 868, was granted by the Master in Chambers, on the ground that one of the defendants was a member of the House of Commons, then in session, that his testimony and that of at least one other member of the House would be required in support of the defence, and that they were unwilling to attend the trial during the session.

**Railway.]**—The defence set up in *Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co.*, 7 O. W. R. 814, an action of trespass, was that the plaintiffs' deed of their right of way over the portion of the Don Valley in question reserved to the vendors, subject to the plaintiffs' right at any time to fill up such part of their bridge or viaduct as might not interfere with the privilege reserved, a right of way under the bridge, as then enjoyed by the vendors, described in a schedule as two undercrossings for farming purposes as shewn on a sketch attached, to be maintained by the plaintiffs in an efficient state of repair; and that the defendants had secured leave and license to lay their tracks underneath the bridge from the successors in title to the vendors, Clute, J., held that, reading the deed as a whole, as it must be read, the right reserved was limited to that of a farm crossing, and that, on this branch of the case, the defendants must fail, the user claimed being at a point other than that reserved, and for a purpose other than that intended. With respect to an order of the Board of Railway Commissioners, previously made, authorizing the defendants to make certain changes and extensions asked, and approving and ratifying the construction, maintenance, and operations of the sidings already laid, which was moved against by the plaintiffs when all the objections were raised that were now raised, it was held that such order was as effective as if made on notice to the plaintiffs in the first instance, and objections thereto under ss. 175 and 177 of the Railway Act were overruled; and that this extension, though authorized by provincial legislation only, was brought, as to this crossing, under the Dominion Railway Act, by s. 7 thereof. In any

event the plaintiffs' objections to the jurisdiction of the Board should have been raised on an appeal to the Supreme Court of Canada under s. 44 of that Act.

**Vendor and Purchaser.]**—An appeal from the judgment of Meredith, J., in *McConnell v. Lye*, 6 O. W. R. 314, noted 25 C. L. T. 457, was dismissed by the Court of Appeal: 7 O. W. R. 851.

**Venue.]**—The ruling of the Master in Chambers in *Farmer v. Kuntz*, 7 O. W. R. 829, where, as an objection to a change of venue, it was urged that the plaintiff was dominus litis, was that, the defendant having counterclaimed, and a counterclaim being for all purposes treated as a cross-action, and, so far as it was concerned, the preponderance of convenience being in favour of the change, the order should go. An appeal by the plaintiff was dismissed by Meredith, C.J.: 8 O. W. R. 4.

**Waste.]**—The judgment of Boyd, C., dismissing the action of *Morris v. Cairncross*, 7 O. W. R. 834, brought by remaindermen for a declaration that a certain lease for 21 years made by an executor and the life tenant, since deceased, was not binding on the plaintiffs, and for other relief, contains an instructive review of the authorities as to the liability of tenants for years and for life for permissive waste. The effect of the judgment, to state it very shortly, is, in so far as the terms of the lease in question cannot be distinguished from those of the instrument under consideration in *Davies v. Davies*, 38 Ch. D. 499, to disapprove that decision. A distinction might, however, be made in that the covenant to repair there considered was a compound one both to keep in repair and deliver up in repair, "fair wear and tear and damage by tempest excepted," but in this lease the saving clause, by the statutory collocation followed in the lease, refers only to want of repair at the end of the term, so that the wear and tear which was exempted would only refer to a short period before the expiry of the last year of the

term, but when the wear and tear were so long continued that they would take the aspect of "want of repair," they would be covered by the covenant to keep in repair.

**Way.]**—Facts that led Mulock, C.J., in *Adams v. Fairweather*, 7 O. W. R. 785, to dismiss an action for a declaration that the plaintiff was entitled by prescription to a right of way appurtenant to his premises, were, that for 10 years of the 20 immediately preceding the commencement of the action, various tenants of the stables now the property of the defendant were in occupation of the strip of land in question, and making such use of it as to interrupt the plaintiffs' driving over it, unless the obstruction were removed; that sometimes, in response to his friendly request, the person in occupation would remove such obstruction and allow him to pass; at other times the plaintiff would remove the obstruction, and on passing it, replace it; and that on no occasion did he remonstrate with any one of the persons causing such obstructions, or claim a way as of right. The user by the plaintiff was, on these occasions, the enjoyment of a privilege not as of right but by leave and license of the owner. His testimony that he used the strip in the belief that it formed part of the public street put the case without the statute, which applies only to a case of dominant and servient tenement.

**Will.]**—In *Re Rutherford*, 7 O. W. R. 796, the construction of this clause in a will was sought: "It is my will that upon the death of my wife Mary the whole of my real estate above described, and the whole of my personal estate then remaining, shall belong to my sons George and James conjointly, to have and to hold the same for their use during their lifetime, and at their death to their children, their heirs and assigns forever. But if my sons George and James both die without issue, then the said real and personal estate shall be equally divided among my grandchildren then living, share and share alike. It was held by Teetzel, J., that the estate given to George and James was not a joint estate

tail, but a joint life estate only, and that, James having died without children, the children of George were entitled to the property in question in fee simple.—The testator in *Re Moody*, 7 O. W. R. 808, bequeathed all his personal estate to his son William, to whom he also specifically devised a farm, and he devised the residue of his real estate to his executors upon certain trusts. The debts and funeral and testamentary expenses were directed to be paid out of his estate. On motion by the executors to determine questions arising on the construction of the will, Teetzel, J., held that, there being nothing in the will to shew any intention to exonerate the personal property, it must be first applied, as far as it would go, in payment of debts. Section 7 of the Devolution of Estates Act did not apply, its application being only to cases where both real and personal property are comprised in a residuary gift, and here the bequest of personalty was not residuary. The balance of debts after exhaustion of the personal estate should be borne by all the real estate pro rata.—By the will in question in *Re Harkin*, 7 O. W. R. 840, the testator directed “the N. E.  $\frac{1}{4}$  of lot No. 1 in the 4th concession of the township of Sunnidale and the N. E.  $\frac{1}{4}$  of lot No. 12 in the 1st concession of the township of Nottawasaga, and also that part of lot No. 4 in the 7th concession of the said township of Sunnidale now owned by me,” to be sold by his executors and the proceeds divided among five daughters. The testator did not own the N. E.  $\frac{1}{4}$  of the first mentioned lot, but did own the N. W.  $\frac{1}{4}$  thereof, and some of his sons contended that as to this there was an intestacy. Boyd, C., held that the words “now owned by me” might without violence be treated as applicable to the other devises of lots earlier in the same sentence. Besides this, certain introductory words,—“I devise . . . all my real and personal property of which I may die possessed, in the manner following—” would “suffice to let in evidence whereby the erroneous course given by the will would be rectified or made applicable to the actual locality of his property.”—The words “dying without issue” or “children,” it is pointed out

by Boyd, C., in *Re Johnson and Smith*, 7 O. W. R. 845, are of flexible or ambiguous character, and have been variously interpreted as meaning "dying without having had a child," and "dying without leaving children." There being no gift over in this case, as there was in *In re Booth*, [1900] 1 Ch. 768, these words were interpreted as giving an absolute estate in fee to the devise upon the birth of her child, which happened after the death of the testator.—It was the purpose of the testator in *Re Totten*, 7 O. W. R. 886, to provide an income for his 4 sons during their lives, and on the death of each to hand over the principal to the children of the deceased son, on their attaining 21 years of age. Two sons died leaving children who have attained 21, and one, Henry Totten, died recently without any children. Having regard to a clause in the will providing that all portions of the estate of which, but for this clause, testator might have died intestate, should be treated as residuary estate, the intention being "that all legacies or shares lapsing or failing of effect shall revert to and be divided among my remaining sons and their issue, in the manner, shares, and proportions hereinbefore directed, as far as may be possible," Falconbridge, C.J., held that the income on the principal representing Henry's share should go to the remaining son for life, and the principal itself should go to his children if they fulfilled the conditions as to attaining 21.

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## CASES FROM WESTERN CANADA.\*

**Arrest.]**—Craig, J., being satisfied upon the evidence in *Grant v. Rimer* (Y.T.), 3 W. L. R. 506, that the defendant had no intention to leave the Territory permanently with intent to defraud; that he was simply going out on a business trip; and that he left in the Territory sufficient means to satisfy the debt; and it appearing that the defendant disputed the plaintiff's claim and set up what, if established, would constitute a good defence thereto, and having regard to the peculiar conduct of the plaintiff in failing to meet the defendant when requested to do so, that the accounts might be gone over and adjusted (the claim being for moneys intrusted by the plaintiff to the defendant), and in passing the defendant on the latter's way "out" without saying anything to him, and then having him arrested on a wire at White Horse, a frequent practice, but one in the opinion of the Court not to be encouraged—discharged the defendant from custody under a writ of *capias* and ordered to be refunded to him \$2,500 deposited by him with the sheriff as security. It was decided that, on this motion for the defendant's discharge, cancellation of a bond wrongly conditioned as security for the debt could not be ordered.

**Bill of Sale.]**—The goods which were the subject of interpleader in *Svaigher v. Rotaru* (N.W.T.), 3 W. L. R. 486, were seized under an execution at the suit of Svaigher against Rotaru and claimed by one Niculescu under a bill of sale from Rotaru, in which they were described as a stock of general merchandise, chattels, and effects as set out in a stock list attached, and situated in a certain designated building. There was in fact no stock list attached, and Newlands, J., held that the description did not satisfy s. 12 of the Bills of Sale Ordinance. The goods were in two stores, leased by the

\* Short notes of the most important cases in Volume III. of the *Western Law Reporter*, No. 6, pp. 449 to 516, inclusive.

debtor, over one of which the debtor lived and which he managed, while the claimant, then a clerk in his employ, managed the other, residing, however, with the debtor. After the sale, the defendant continued to reside over the first store as before, and was in and about the premises, and for 10 days or two weeks after the alleged sale assisted in the store and instructed the man hired by the claimant how to run the business. The claimant still continued in the other store; the defendant paid the rent for it, and he also purchased goods for the business, which were charged to him, and afterwards paid for by him in part, and the business was carried on exactly as it was while the defendant was the owner of it. It was held that, so far as the general public was concerned, there was no actual and continued change of possession, and the alleged sale was void as against the creditors of Rotaru.

**Contract.]**—The defendant's contention in *Smith v. Finch* (B.C.), 3 W. L. R. 476, an action for the price of work done, that the plaintiff, having violated s. 74 of the Partnership Act by failing to register a declaration as to the name in which he carried on business, and so rendered himself liable to the penalty provided for by s. 76, was, by implication arising out of the enactments referred to, prohibited from recovering, was overruled by the full Court. Duff, J., put the matter thus: "The Act provides that if A. B. shall carry on business under the name of C. D., without complying with the statutory provisions relating to registration, he shall be subject to a penalty; but, in my opinion, that does not in itself involve the exaction of a penalty from A. B. for entering into a contract with X. Y. under the name of C. D."

**Deed.]**—The success of the plaintiff in *Oleson v. Jonasson* (Man.), 3 W. L. R. 467, depended upon his contention that the first part of the description in a certain deed should govern and that the latter part should be rejected as *falsa demonstratio*, being sustained. The description read: "All and singular that certain parcel or tract of land . . . being composed of the east half of the fractional north-west



quarter of section 9, or that part of the said quarter section lying on the east side of the Gimli road in said section 9 of said township, containing 66 acres more or less." Applying the rule laid down by Park, J., in *Smith v. Galloway*, 5 B. & Ad. 51, "that where there is a sufficient description set forth of premises by giving the particular name of a close or otherwise, we may reject a false demonstration, but that, if premises be described in general terms, and a particular description be added, the latter controls the former." Mathers, J., held that the plaintiff would not succeed, there being, in the circumstances, no certainty in the expression "east half."

**Discovery.]**—Discovery may be ordered in divorce proceedings, but not when it is sought for no other purpose than to prove a party guilty of adultery; consequently, in *Levy v. Levy* (B.C.), 3 W. L. R. 514, Irving J., refused to grant an application by the respondent, who had charged desertion and adultery by the petitioner, for an order for production, until satisfied by affidavit: (1) that there was reason to believe that the petitioner had in his possession or control documents relating to the matters in question in the cause, other than his adultery; and (2) that the affidavit of documents is required for the purpose of discovering such documents, and not for the purpose of proving adultery by the petitioner.

**Distribution of Estates.]**—The judgment of Irving, J., in *Re Watkins* (B.C.), 1 W. L. R. 457, noted 25 C. L. T. 464, that the deceased by her will having devised certain lands and earmarked other lands to provide a fund for the payment of her funeral and testamentary expenses and debts, the balance to go into the residue of the estate, an accumulation of arrears of taxes upon the land specifically devised should be paid out of the fund provided for the payment of debts, was affirmed by the full Court: 3 W. L. R. 471.

**Liquor License Ordinance.]**—The complainant in *Re Bell* (N.W.T.), 3 W. L. R. 489, was an applicant for a wholesale liquor license in the town of Moosomin, as was also one

Dixon. The commissioners refused the complainant's application and granted that of Dixon, and Bell then filed a complaint under s. 57 of the Liquor License Ordinance, C. O. c. 89. With respect to the adjournment of the hearing of Bell's application from the 20th to the 27th March, when Dixon's also came up, and to the procedure on the latter occasion, Wetmore, J., found that there was nothing fraudulent or in violation of any of the provisions respecting licenses, and that therefore as regards these matters, he had no jurisdiction to entertain the complaint. The question of the qualification of one of Dixon's bondsmen, he held to be entirely a matter for the board to decide. An appointment was made to inquire whether Dixon was the lessee of the premises in respect to which the application was made.

**Mines and Minerals.]**—In allowing the appeals of Edward Leckie and others in *Re Leckie* (B.C.), 3 W. L. R. 497, from the order of Martin, J., prohibiting the County Court Judge of the County of Kootenay and the appellants from further proceeding with the prosecution and consideration of certain petitions presented by the appellants alleging that a dispute had arisen respecting the right or title to a prospecting license over certain areas and asking a determination under s. 9 of the Coal Mines Act, R. S. B. C. 1897 c. 137, that the appellants were severally entitled to prospecting licenses over such areas, the full Court, after particular consideration of the history of the Act in question and of ss. 2, 3, 9, and 12 thereof, decided that the jurisdiction given to the County Court by s. 9 is not limited to disputes respecting the right or title to a prospecting license in esse or respecting an area defined by an existing prospecting license, but extends to disputes between rival claimants to a given area, or a prospecting license over a given area, when founded on some adverse right or claim, and raised by objection under this section; and that, while the licenses authorized by the Act are exclusive licenses, and, in this particular case, the license of the respondent was granted before presentation of the appellants' petitions, such license, being subject to conditions

unwarrantably imposed by the Lieutenant-Governor in council, and which deprived it of its character of an exclusive license, was not a license under the Act, and its issue was not an exercise of the power conferred by s. 3, and could not prevent the Chief Commissioner from exercising his powers under the latter section to grant a license of the character thereby authorized—An appeal from the order of Martin, J., in *Re Baker and Smart* (B.C.), 2 W. L. R. 45, noted 25 C. L. T. 511, was allowed by the full Court: 3 W. L. R. 505. The feature distinguishing this case from that of *Re Leckie* was that both parties had secured prospecting licenses over the area in question.

**Municipal Corporations.]**—It was decided by Irving, J., in *Re MacLean and City of Fernie* (B.C.), 3 W. L. R. 512, that no person except the applicant and the corporation had any status before the Court on proceedings to quash a municipal by-law. The by-law in question, being one granting to the Crow's Nest Pass Electric Light Company an electric light franchise in the city, was quashed because there were not cast in favour of it three-fifths of the votes polled, as required by s. 79 of the Municipal Clauses Act. Two persons who voted as representatives of companies were held not to be thereunto authorized as required by the Act; and at least 8 persons voted whose names were not on the assessment roll, and who were not duly qualified electors, so that there was not even a bare majority in favour of the by-law.

**Parties.]**—In *Tait v. Canadian Pacific R. W. Co.* (Man.), 3 W. L. R. 452, several plaintiffs joined in one action their respective claims for damage to their several parcels of land by fire from an engine of the defendants. The fact that they were suing in respect of separate claims plainly appeared on the face of the statement of claim. Richards, J., held at the trial, without expressing any opinion as to whether King's Bench Rule 218 justified the joining of the plaintiffs, that the defendants lost the right to object to the alleged improper joinder when they pleaded to the statement of claim.

**Railway.]**—Under s.-s. 4 of s. 237 of the Railway Act, 1903, Richards, J., decided, in *Carruthers v. Canadian Pacific R. W. Co.* (Man.), 3 W. L. R. 455, that a railway company are liable in damages where animals, after getting at large otherwise than through the neglect or wilful act or omission of their owners or custodians, or owners' or custodians' agents, get, in any way, upon the railway company's property, and are there killed or injured by the railway company's trains, elsewhere than at a point of intersection with a highway; and that it made no difference that the animals killed or injured were not lawfully (as by straying from the owner's land) on the land from which they got upon the company's property.—*Shellenberg v. Canadian Pacific R. W. Co.* (Man.), 3 W. L. R. 457, an action for damages for the killing of a cow of the plaintiffs, which strayed from his land (unfenced) upon the defendants' right of way (also unfenced) and was run over, by a train of the defendants, necessitated an interpretation of the words "not improved or settled, and inclosed," in s.-s. 3 of s. 199 of the Railway Act, 1903. In dismissing the action, Dubuc, C.J., decided that the natural and grammatical sense, "improved and inclosed" or "settled and inclosed," being neither absurd nor repugnant to nor inconsistent with the rest of the clause, was the proper one to be attributed to this expression.

**Replevin.]**—A writ of replevin was set aside in *Thornquist v. Peters* (N.W.T.), 3 W. L. R. 488, by Wetmore, J., because the affidavit upon which it was issued did not comply with Rule 427, in that it did not set forth the manner in which the goods in question were wrongfully or fraudulently taken or got out of the plaintiff's possession, and did not state, as required by the Rule, the judicial district in which the property was situated.

**Sale of Goods.]**—The consideration for the "lien note" sued on in *McKenzie v. McMullen* (Man.), 3 W. L. R. 460, was the sale by the plaintiffs to the defendants of a span of horses. The plaintiffs promised that the horses to be fur-

nished the defendants should be a good, sound young team, suitable for farm work, and warranted them to be so. The "lien note" made no reference to this warranty. It was contended for the plaintiffs that evidence outside of the "lien note" should not be admitted, but Perdue, J., was of opinion that the latter document was not intended to contain all the terms of the agreement, that the representations as to the quality of the horses were what induced the defendants to enter into the contract, and that the case was within the principle of *De Lasalle v. Guildford*, [1901] 2 K. B. 215.

**Security for Costs.]**—In *Cizowski v. West Kootenay Power and Light Co. (B.C.)*, 3 W. L. R. 515, a proceeding by way of arbitration under the Workmen's Compensation Act, 1902, the applicants resided in Austria, and Hunter, C.J., on application of the respondents, held that the object of Rule 34 of the Workmen's Compensation Rules, 1904, was to make the proceeding subject to the same rules as in an action in this regard, and that the respondents were entitled to security.

**Trial.]**—An appeal by the defendants in *Fernie Lumber Co. v. Crow's Nest Southern R. W. Co. (B.C.)*, 3 W. L. R. 472, from an order refusing an application for a change of venue from Nelson to Vancouver, and for a special jury, the defendants contending that there was no machinery by which a special jury could be obtained at Nelson, was dismissed by the full Court, who held that the practice in the district of Kootenay allowed a trial by special jury, as it had done in Victoria prior to the year 1884, when the Jurors Act of 1883 came into force. The Court referred to the Imperial Act 6 Geo. IV. c. 50, the Jurors Act, 1860, and to many cases in which special jury trials were had.

**Vendor and Purchaser.]**—*Dillabough v. Scott (Man.)*, 3 W. L. R. 449, was an action in which it was sought to rescind an agreement by the plaintiff to purchase two lots in Winnipeg entered into under the following circumstances.

One Allan, having secured the confidence of the plaintiff, who was a widow keeping a boarding house, and without experience in buying and selling real estate, and knowing that the plaintiff relied upon his integrity, went to the defendant, husband of the owner of these lots, which were worth from \$250 to \$300 each, and asked if he would pay a commission of \$50 if a purchaser were procured for \$1,200. He then told the plaintiff that the lots were on the bank of the Red River at the end of the Elm Park pontoon bridge, that they were especially valuable as a hotel site, that lots near them had been sold for as much as \$900 each, and that the owner was about to leave Winnipeg, and that the plaintiff was likely to lose the chance to buy if she did not close at once, all of which was untrue. Relying upon these representations, the plaintiff executed the agreement to buy the lots for \$1,200. Richards, J., found that the execution of the agreement had been procured by the fraud of the defendants' agent and ordered it to be delivered up and cancelled.

**Will.]**—Land devised by will, where the devisees are directed to pay certain legacies and annuities, was held by Wetmore, J., in *Re McVicar* (N.W.T.), 3 W. L. R. 492, to be intended to be charged with the payment of such legacies and annuities, and the executors should not convey such lands to the devisees without seeing that such charges were made or maintained as good and valid charges. In spite of s. 3 of the Land Titles Act, 1894, and s. 5 of c. 21 of 63 & 64 V. (1900), the Court, without so expressly deciding, was of opinion that the law was not changed, and that personalty was still primarily chargeable with the payment of the testator's debts, funeral expenses, and the expenses of administration. In this case the testator having devised the several parcels of land subject to specific charges, it could not have been his intention to make them liable at all, if there was sufficient movable property and cash to satisfy these requirements.

## EDITORIAL REVIEW.

**The Revision of the Ontario Statutes.**

The time for the decennial revision of the Ontario statutes has again come round, and a commission has been appointed by the Lieutenant-Governor in council to do the work. Mr. Justice Osler is chairman. The other Judges are Sir W. R. Meredith, Chief Justice of the Common Pleas, Mr. Justice Garrow, Mr. Justice Street, Mr. Justice Teetzel, and Mr. Justice Anglin. All the members of the executive council and Mr. A. G. MacKay, K.C., M.P.P., representing the opposition, make up the commission. Mr. Allan M. Dymond, Law Clerk of the Legislative Assembly, is secretary. No fault can be found with the composition of the commission, unless it be that the practising members of the Bar should be more largely represented.

**The Ontario Statutes of 1906.**

The Session of the Ontario legislature of 1906 was perhaps the most fruitful of legislation that has been. It is praiseworthy that so large a volume of statutes should have been issued within a short time after the close of the session. In the August number of this journal the usual review of the legislation will be given in an article by Principal Hoyles of the Osgoode Hall Law School.

**The Saturday Half Holiday.**

Twenty-five years ago "the usual Saturday half holiday" was well established. The phrase occurs in Gilbert & Sullivan's eccentric opera "Patience," produced in the early eighties. It is now more firmly established than ever, and extends to many more callings that it did then. The tendency now is to make it a whole holiday where the nature of the occupation makes it possible to so arrange. In the case

of the legal profession in Ontario there is a formal provision for a Saturday half holiday in the Rule that the offices of the Courts shall close at one instead of at four, as on other days. And in regard to Divisional Courts, Saturday is specially excepted in the Rule providing for their sittings. In other respects informal arrangements are generally made which make it possible for Saturday to be largely utilized for rest and recreation by members of the legal profession who so desire. In England there seems to be some demand for the legalizing of the Saturday half holiday or whole holiday, or else abolishing the custom which has grown up of adjourning the Courts from Friday to Monday. Lawyers want to know where they "are at." It seems safer, however, to leave it in the hands of the Courts. Our experience in Ontario has been a happy one. There is rarely a Saturday sittings unless necessity or convenience absolutely demands it, and although warrants and appointments may be issued for Saturday, there is a growing sense that they should not be issued unless to suit the convenience of all parties.

**Sir Æmilius Irving.**

Among the birthday honours bestowed by the Sovereign was that of knighthood upon Mr. Æmilius Irving, K.C., Treasurer of the Law Society of Upper Canada. In a hale and vigorous old age Sir Æmilius is still doing important work, and doing it well, and the whole Bar will agree that the honour was worthily bestowed upon its foremost member. The Toronto Globe says: "The Dean of the Bar of Ontario was knighted yesterday. Sir Æmilius is an old man, but he carries his eighty-three years remarkably well. He has been a barrister of Upper Canada since 1849, and as Treasurer of the Law Society has seen two generations pass through Osgoode Hall. For many years Mr. Irving had a place among the counsel in all the big provincial cases, and his services in the matter of accounts in dispute between the Dominion and Ontario have been invaluable. He sat for Hamilton in the Commons from 1874



to 1878 as a Liberal. His connection with the Liberal party was by birth as well as inclination. His father, the Hon. Jacob Æmilius Irving, served as an officer of dragoons during the Napoleonic wars, and was present at Waterloo. He came to Canada in 1834, and after the union of 1840 sat in the Legislative Council. He was a friend and ally of Baldwin and Lafontaine, and it was in the atmosphere of Reform that Æmilius Irving grew up."

**Sir Robert Weatherbe.**

The Chief Justice of the Supreme Court of Nova Scotia, the Hon. Robert Linton Weatherbe, has also been knighted. He was born at Bedegue, Prince Edward Island, on the 7th April, 1836. He was educated at Prince of Wales College and Acadia College, Wolfville. He edited the "Acadian Recorder," and was admitted to the Bar in 1863. He became Judge of the Supreme Court of Nova Scotia in 1878, and was appointed Chief Justice in 1905.

**Retirement of Lord Justice Stirling.**

Lord Justice Stirling has retired from the English Court of Appeal. He had a great reputation as an equity lawyer. Not long ago the Chancellor of Ontario referred to him as "a great master of equity." The London Law Times says of him: "There may have been on the long list of brilliant equity lawyers more profound Judges and Judges of greater superficial brilliance, but Lord Justice Stirling will ever be remembered, when a Judge of first instance, as one who spared no pains to get at the bottom of every case brought before him. His unfailing patience and quiet dignity were models to which certain of his common law brethren might conform to the public profit. No suitor could ever leave his Court without feeling that the Judge had addressed his mind with tranquillity to the questions before him, and that no inopportune obiter dictum, or appeal to the gallery, had done anything to prejudice his contentions. Such Judges, as a rule, do not get the cheap advertisement of the newspaper

reporter, but they do earn the more solid gratitude of those members of the legal profession who entertain high ideals of what the administration of justice should be. A perusal of the reports over a long period of years will reveal many decisions of knotty points of law to which the Lord Justice has been a party. *Litera scripta manet*. Far more numerous are the unreported cases where questions introducing all sorts of domestic or family difficulties have been solved or smoothed away by his calm examination and his transparent desire to do justice."

**English Appointments to the Bench.**

Mr. Justice Farwell goes from the Chancery Division to take Lord Justice Stirling's seat in the Court of Appeal, and Mr. Ralph Neville, K.C., succeeds to the vacancy in the Chancery Division.

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## BOOK REVIEWS.

**Hudson's Law of Compensation** with Appendices of Forms, Rules and Orders, etc. By Alfred A. Hudson, Barrister-at-law, assisted by H. E. Miller, W. A. Peck, and S. Humphries, Barristers-at-law. London: The Estates Gazette, Limited, and Sweet and Maxwell, Limited.

Mr. Hudson, the well known author of "The Law of Building and Engineering Contracts" and joint author of "The Law of Light and Air," has, he tells us, been for six years engaged upon the present work, which is contained in two large volumes, comprising nearly 2,000 pages. With the arrangement, style, and appearance of the work every one must be favourably impressed. The method is to explain the rules of law under the different sections of the statutes dealt with, and then to set out in chronological order a short digest of each case from which such rules have been deduced. In this way the author has placed before the reader, in a simple and intelligible form, every decision and statute relating to the law of compensation, besides giving an introductory chapter containing practical hints on procedure both before as well as after the special Act authorizing the undertaking. The statutes dealt with are: The Lands Clauses Consolidation Act, 1845, and Acts affecting the same; Statutes relating to Railways, including the Railways Regulation Acts and the Railways Clauses Consolidation Acts; Acts relating to Gas, Water, and Electric Lighting Undertakings; Miscellaneous Clauses Acts; Acts as to Taking Lands for Government Purposes; Acts as to Taking Lands by Local Authorities; Acts as to Taking Lands by other Public Bodies; Acts relating to Sale to Private Landowners; and General Acts. We have most of these enactments in some shape or other in Canada; the book should have a wide circulation here. It would be folly to affect a familiarity with so large a work; but in turn-

ing over the pages one cannot help being struck with the practical character of the notes and the excellence of the brief digests of cases illustrating the provisions of the many statutes dealt with.

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**Wilshire's Outlines of Evidence and Procedure in an Action in the King's Bench Division:—For the Use of Students. By A. M. Wilshire, LL.B., Barrister-at-law. London: Sweet and Maxwell.**

A useful and thoroughly practical little handbook.

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## PERIODICALS.

**Albany Law Journal** (May). Leading Articles: "Death of Justice Henry A. Childs;" "Right of Pardoned Convict to Act as Executor;" "The Next Constitutional Convention of the United States," by Walter Clark, Chief Justice of North Carolina; "Expressions which are not Defamatory;" "Remedies for Graft," by Duane Mowry, of Milwaukee, Wis.; "Liability of Insurance Company for Damages by Earthquake."

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**Madras Law Journal** (March). Leading Article: "Third Parties' Consent in the Law of Alienation of Property in India."

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**The Digest** (Lahore, January-February, 1906.) The leading article is a reprint from the Harvard Law Review of Dr. Silas Alward's article "A New Phase of Equitable Estoppel," which is a commentary on the Ontario case of *Ewing v. Dominion Bank*, 35 S. C. R. 133.

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**Calcutta Weekly Notes** (21st and 28th May.)

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**Federal Reporter** (National Reporter System, 14th June.)

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**Central Law Journal** (St. Louis, 1st, 8th, 15th June.)

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**Chicago Legal News** (9th, 16th June.)

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**Chicago Law Journal** (15th June.)

## Supreme Court of Canada.

QUEBEC.]

[12TH JUNE, 1906.]

### WILSON v. SHAWINIGAN CARBIDE CO.

*Appeal—Jurisdiction—Declinatory exception—Interlocutory judgment  
—Review of judgment on exception—Practice.*

The action was dismissed in the Superior Court upon declinatory exception. The Court of King's Bench reversed this decision, and remitted the cause for trial on the merits. On motion to quash a further appeal to the Supreme Court of Canada:—

*Held*, that the motion should be granted, on the ground that the objection to the jurisdiction of the Superior Court might be raised on a subsequent appeal from a judgment on the merits.

*Per* GIROUARD, J.:—The judgment of the Court of King's Bench was not a final judgment, and consequently no appeal could lie to the Supreme Court of Canada.

Appeal quashed with costs.

*Errol Languedoc*, for the motion.

*Aylen*, K.C., contra

NOVA SCOTIA.]

[14TH MAY, 1906.]

### LEAHY v. TOWN OF NORTH SYDNEY.

*Water and watercourses—Riparian rights—Easpropiation—Trespass  
—Torts—Diversion of natural flow—Injurious affection—Dam-  
ages—Execution of statutory powers—Arbitration—Injunction—  
Mandamus—59 V. c. 44 (N.S.)—Construction.*

A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor, and may also

obtain relief by injunction restraining the continuation of the tortious acts so committed.

The powers conferred upon the town council of the town of North Sydney, N.S., by the Nova Scotia statute 59 V. c. 44, for the purpose of obtaining a water supply, give them no rights in respect to the diversion of watercourses, except subject to the provision of s. 4 of the Act, and after arbitration proceedings taken to settle compensation for injurious affection to property resulting from the construction or operation of the waterworks.

*Saunby v. Water Commissioners of London*, [1906] A. C. 110, followed.

Judgment of the Court below affirmed.

*Drysdale*, K.C., for the appellant.

*E. L. Newcombe*, K.C., and *W. F. O'Connor*, for the respondents.

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### Exchequer Court of Canada.

[BURBIDGE, J., 26TH JANUARY, 1906.]

REX v. CONNOR.

*Partnership—Payment of debt by partner—Subrogation.*

Under the principles of the common law as it obtains in England and in Ontario a partner who pays a partnership debt cannot be subrogated to the rights of the creditor against his co-partner.

The law as applied in similar cases by the Courts of Quebec and of the United States discussed.

*F. H. Chrysler*, K.C., and *C. J. R. Bethune*, for the plaintiff.

*A. B. Aylesworth*, K.C., and *C. Murphy*, for the defendant Connolly.

*W. D. Hogg*, K.C., for the defendant John Connor.

*T. A. Beament*, for the defendants Katie A. Connor, Johanna Connor, and P. L. Connor.

*A. A. Stockton*, K.C., for the defendant T. P. Connor.

*J. J. Gormully*, K.C., and *J. F. Orde*, for the defendants the Canadian Bank of Commerce.

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[29TH MARCH, 1906.]

### REX v. DODGE.

*Crown—Expropriation of land—Compensation—Witnesses—Error in valuation—Report of Referee—Reducing assessment on appeal.*

Where the witness on whose evidence the referee seemed to rely were, in the opinion of the Judge, led into the error of applying to a large number of acres (in this case 623) a value which appeared to represent the value of a portion of the property, but not the whole, the amount of compensation recommended by the referee was reduced.

2. Where average values are applied to ascertain the value per acre of land taken by the government, such average values should be applied with great care and moderation.

*R. T. McIlreith*, for the plaintiff.

*W. E. Roscoe*, K.C., for the defendants.

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[5TH MARCH, 1906.]

### COPELAND-CHATTERSON CO. v. HATTON.

*Patent for invention—Patent Act, s. 37—"Reasonable price"—Infringement resulting from breach of agreement—Infringing by inducing others to infringe.*

Section 37 of the Patent Act, R. S. C. c. 61, provides, among other things, that the patentee must, within a certain



time after the date of his patent, commence and continuously carry on the manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price. For the plaintiffs it was contended that such price need not be a money price, but that conditions may be imposed, the value of which may constitute part or the whole of the price for which the thing covered by the invention is sold.

*Held*, that while there is nothing in the Act to prevent parties from entering into a binding agreement embodying such conditions, the patentee cannot prescribe his own conditions as part of such price and impose them upon all persons who may desire to use the invention. The "reasonable price" mentioned in the statute means a reasonable price in money; and for such a price the purchaser is entitled in Canada to acquire the complete ownership of the thing that the patentee is bound to manufacture or permit to be manufactured in Canada.

2. The defendant H., having purchased a binder from the plaintiffs on the condition that it was to be only with sheets sold by or under the plaintiffs' authority, contrary to such condition used the binder sheets supplied by the defendants G.

*Held*, that H. had not only broken his contract, but had also infringed the patent.

3. One who knowingly and for his own ends and benefit, and to the damage of the patentee, induces or procures another to infringe a patent, is himself guilty of an infringement.

4. The defendants G., being aware of the terms upon which the defendant H. had purchased a binder from the plaintiffs, viz., that only sheets that were supplied by or under the authority of the plaintiffs were to be used in it, furnished H. with sheets prepared and adapted by them for use in such binder, and to induce him to buy sheets from

them they undertook to indemnify him against any action the plaintiffs might bring against him in that behalf.

*Held*, that the defendants G. had thereby infringed the patent.

*W. Cassels, K.C., and W. E. Raney, for the plaintiffs.*

*Mignault, K.C., and Perron, for the defendants.*

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# THE CANADIAN LAW TIMES.

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AUGUST, 1906.

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THE STATUTES OF ONTARIO, 1906, 6 EDW. VII.

THE session of the legislature of Ontario which has just closed has been in many respects a remarkable one.

In point of time it was exceeded by that of 1904, but in regard to the volume and great importance of the legislation the present session surpasses any of its predecessors.

The speech from the throne is said to have been the longest ever read in the Ontario House; in view of the wealth of excellent legislation it could not well have been shorter, and even the keenest critics of the government appear to admit that, to use the words of the speech, "The work undertaken and accomplished is of such extent, variety, and value as to make the session now closing without a parallel in the history of this province in that respect."

But many of the valuable public bills which have been passed do not lend themselves readily to the purposes of this review, which is limited mainly to matters of practical interest and importance to the profession. Some may, however, be briefly referred to.

Take for example the University Bill, dealing with a subject of greatest moment to the province. For the first time in its history the Provincial University is given its proper status, and is freed from the humiliating necessity of applications to the government in formâ pauperis, which has heretofore been laid upon it. The admirable report of the commission appointed by the government to consider the position of the institution, has been accepted almost entirely by

the legislature, and the guarantee of a revenue from the province, in addition to the revenue from other sources, of \$250,000 a year, places higher education in Ontario upon a firm basis.

"The Mines Act, 1906," (c. 11), the statute commonly known as the Power Act (c. 15), and "The Department of Education Act" (c. 52), are also valuable and far-reaching in their character, "*cum multis aliis*," to use the familiar words of the grammar of our boyhood, "*quæ nunc perscribere longum est*."

Chapter 7, "An Act to amend the Ontario Election Act."

The Election Act (R. S. O. c. 9) has been changed in two important particulars by chapters 7 and 8.

Chapter 7 does away with the numbered ballot.

This will, of course, have a serious effect where a scrutiny is necessary, as the Premier pointed out. But both political parties now seem to be agreed that numbered ballots are objectionable.

Chapter 8 makes it no longer obligatory to appoint sheriffs and registrars as returning officers, and leaves the selection of these officials to the Lieutenant-Governor, who may appoint any person "being a voter of the electoral district for which the election is to take place."

This is opposed to British precedent, and is very liable to be abused.

Chapter 19, "The Statute Law Amendment Act."

Section 1 provides for the suspension of part 3 of the Ontario Voters' Act, which relates to the preparation of voters' lists in unorganized territory. Under the Act as it stands this should be done annually, a useless expense where no election is pending.

Sections 3 and 4 provide for placing the Judges of the Exchequer Division upon the rota for the trial of election petitions.

Section 5. This is again a further interference with "the rule of public policy which safeguards proceedings in the

higher legislatures" (per Boyd, C., In re L'Abbé and Blind River, 7 O. L. R. 230, 233); other instances are 3 Edw. VII. c. 7, s. 6, and 4 Edw. VII. c. 2 (see 24 C. L. T. 252).

Section 10 (2) of the Act respecting the Legislative Assembly reads as follows: "Nor is any person ineligible nor shall any person be deemed to have been ineligible as aforesaid by reason of his being, or having been, a shareholder or stockholder in an incorporated company having any such contract or agreement as aforesaid (i.e., with the government, etc., see s. 10 (1)), *unless such contract or agreement is for the building of a public work for the province.*" The italicized clause is now much weakened by adding thereto the words, "and such building or work has not been let by tender to the lowest bidder."

Section 6. Section 161 of the Judicature Act directs the investment of moneys under the control of the Court "in the public funds of the Dominion of Canada or of this province, or in such other securities as the Court may from time to time direct."

This amendment gives more latitude of investment without diminishing the security, and would, for example, allow Court funds to be lent for University purposes where guaranteed by the province, as is provided in some cases under the University Act.

Section 7. Heretofore the power of the Inspector of Legal Offices was limited to offices outside of Toronto. This amendment gives him power to inspect the offices at Osgoode Hall.

Section 8. Section 2 of the Public Service Act provides that "no allowance or compensation shall be made for any extra services whatsoever which an officer or clerk may be required to perform in the department to which he belongs."

Section 24 provides that in an emergency the deputy head of a department may require the temporary services of clerks at leisure in other departments, but such clerks are not to receive additional remuneration. The amendment

makes a distinction between extra services, that is, work done over time but forming part of the ordinary duties of an officer or clerk, and "special services" not forming part of the ordinary duties of such officer or clerk, but in addition to them, and provides for remuneration being made for these.

The amendments to the Succession Duty Act are mainly matters of procedure.

Section 11 (1). The clause now being amended provides that no "allowance or reduction be made for the expense of administration of the estate (except surrogate fees)." The present amendment is designed to make it clear that the term "surrogate fees" shall cover only the actual disbursements paid to the Surrogate Registrar on the grant.

(2) By regulations issued in 1902 it was provided that affidavits of value and relationship should be filed on every application for letters probate or administration. Sub-section (2) of s. 5 conflicted with this, and is therefore now repealed.

(5) This amendment improves the payment of the sheriff. The former allowance was a fee of \$5 a day, no matter how long or difficult the business might be.

(6) The only change made in the section as re-enacted is that it gives the Surrogate Registrar power "to fix and settle the debts, incumbrances, and other allowances and exemptions within the meaning of this Act." No express power to do this was given either to the sheriff or Surrogate Registrar under the statute as it stood before this amendment.

(7) Provides for an appeal from the sheriff's report without the necessity for an assessment by the surrogate registrar.

(8) Reduces the rate of interest payable on overdue succession duty from 6 to 5 per cent.

(9) Solicitors are required by the succession duty office to adduce proof of valuations, prove dates of birth and adoption, and to perform other services, which are properly chargeable against the estates and for which there has not heretofore been any statutory right to charge fees.

The object of this amendment is to allow them the same fees as for similar work done in the Surrogate Court.

Section 12. At one time the clerks and bailiffs of Division Courts were appointed by the County Judge; a question has arisen as to who has the right to dismiss or suspend them. The amendment provides that, however or whenever they have been appointed, they are to hold office during the pleasure only of the Crown.

Section 13. This is intended to make it clear that the Arbitration Act covers the submission of present or future differences to valuation as well as to arbitration.

There seems to have been some doubt raised on this point.

For an illustration of the distinction between the two, see *Re Langman and Martin*, 46 U. C. R. 569.

Section 14 provides for an increase in the salaries of the police magistrates of Toronto to \$5,000 and \$3,000 respectively, but prohibits them from practising, or acting as directors of companies.

Section 16 fixes a definite remuneration for District Judges in respect of work done by them under the named statutes, instead of payment being made to them by fees as heretofore. Fees are in future to be payable in stamps.

Section 17 amends the Unorganized Territories Act, so as to provide for the selection of jurors by the District Judges, and the sheriff of the district, or if there is only one Judge, then by the Judge, the sheriff, and the clerk of the district Court. This assimilates the practice to that in organized territories, where the County Judges are always among the selectors of the jurors.

Section 19 amends the Quieting Titles Act:

(1) Repeals s. 6 of the Act. Under this it was necessary that a certificate of the filing of a petition under the Act should be registered in the registry office, in order, apparently, to give notice of the pendency of the proceedings. But s.-s. (2), subsequently added to s. 6, made it unnecessary

to register this immediately upon the filing of the petition, and provided that it should be filed prior to a certificate of title being granted, the reason probably being that the registration of a certificate of filing the petition, if not followed by the certificate of title, created a cloud upon the title.

The whole section is now repealed, and it is therefore no longer necessary to register a certificate of the filing of the petition.

(2) Is a change necessarily following upon the previous one.

(3) Section 27 of the Act requires the certificate of title to be signed by "one of the Judges and by one of the Registrars of the High Court." The amendment substitutes the Clerk of the Crown and Pleas or the Clerk of Records and Writs for the Registrar.

The seal of the High Court is now in the custody of the Clerk of the Crown and Pleas instead of as formerly in the custody of the Registrars.

Section 20 (2). By 3 Edw. VII. c. 12, s. 5, the assurance fee in cases under the Land Titles Act was reduced in respect of the value of buildings on the land to one-tenth of one per cent. This was effected by the substitution of a new s.-s. 2 in s. 130 of the Land Titles Act, the original s.-s. 2 of which required payment of "a sum equal to one-fourth of one per cent. of the value of the land."

The present amendment makes the lower scale applicable in proceedings under ss. 169, 170, 171, relating to the registration of newly patented lands in districts. As no alteration had been made in these sections by 3 Edw. VII. c. 12, it was considered that the amendment did not apply to them; this misconception is now removed.

Section 21. The section repealed related to agreements as to the place of trial contained in "any lien note, hire receipt, contract for the conditional sale of chattels," etc., and provided that they should have no effect unless on the face of the note, etc., there was a warning in red ink that a



Division Court action in respect thereof might be tried in a Division Court other than where the maker or person liable resided or in which the contract was made. This section was held to apply to Division Court actions only, and agreements as to venue in other actions have been enforced; see *Goodison v. Wood*, 6 O. W. R. 19; *Green v. Sawyer-Massey Co.*, 6 O. W. R. 594; *Wright v. Ross*, 11 O. L. R. 113.

Section 22 apparently results from the decisions just cited, and seems to go much further than public policy, in the modern acceptation of the term, would require. Its words are: "No proviso, condition, stipulation, agreement or statement which provides for the place of trial of any action, matter or other proceeding shall, subject to the provisions hereinafter set out, be of any force or effect."

This is not, it will be observed, an amendment to "The Act respecting Conditional Sales of Chattels."

Whatever might be said in defence of restrictions upon the right to contract as to the place of trial in Division Court actions in respect of lien notes, etc., it seems difficult to defend this sweeping general enactment applying to "any action, matter or other proceeding." Why may not persons contract as to the place of trial?

The familiar and oft quoted words of Sir George Jessel may well be repeated once more:

"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

The "provisions hereinafter set out" refer (a) to Division Court actions, (b) to actions in other Courts.

In (a) the general rule is not available unless and until a notice is filed disputing the jurisdiction of the Court in

which the action is brought, and also an affidavit swearing to a good defence upon the merits and further stating the Division Court in which the cause of action arose or partly arose, and the defendant resides. In (b) the rule shall not be available unless and until the defendant moves to change the venue.

The section does not explain what is to be the result in these cases. But it is obvious that the section gives opportunity to an unscrupulous defendant to evade this condition of a contract "entered into freely and voluntarily," and which may have been of much weight with the other contracting party—an opportunity which, we may be sure, will be freely used.

"How oft the sight of means to do ill deeds makes ill deeds done."

Section 23 goes back to and amends the Conditional Sales Act, and requires that all receipt notes, etc., "given by bailees of chattels other than manufactured goods and chattels, where the condition of the bailment is such that the possession of the chattel passes without any ownership being acquired by the bailee until payment," etc., shall be filed in the office of the County Court clerk within 10 days from their execution in order to be "valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration."

The application of the Conditional Sales Act was limited to "manufactured" goods or chattels.

Under ss. 1 and 2 of the Act, the bailor or vendor parting with the possession, but reserving a right of property in such goods or chattels, could, as against subsequent purchasers or mortgagees, secure himself by either having his name painted on such chattels, or by filing a copy of the receipt note, etc., with the clerk of the County Court.

The object of the amending section is, apparently, to widen very much the scope of the Act, and to make it cover

all chattels, and not merely manufactured goods and chattels; this will apparently include household furniture, which was exempted under s. 2 from the provisions of the Act, though of course coming under the Bills of Sale Act.

Section 24. This necessarily follows from the extension of the Act. As it is no longer limited to "manufactured" goods, the right to information as to the amount remaining unpaid, which, under s. 6, a proposing purchaser has a right to demand from a manufacturer, etc., should not be restricted to the case of manufactured goods.

Section 25. The original s. 8 gives to a bailee of goods, of which the bailor, etc., has retaken possession for breach of condition, the right to redeem them on payment of the amount in arrear, etc., "and expenses of taking possession." But in some cases there may be expenses incidental to the "keeping" possession; the amendment provides for payment of these as a condition of redemption.

Section 26. Note that ss. 23, 24, and 25 do not apply to receipt notes, etc., made or given prior to the 1st day of January, 1907.

Section 28. The effect of this amendment, broadly speaking, would seem to be to make all companies, whether incorporated by special Acts or otherwise, and which come under the jurisdiction of the legislature of Ontario, subject to all the provisions of the Ontario Companies Act. They may thus avail themselves of these provisions where beneficial without the necessity of applying for special legislation, and they are, on the other hand, subject to any coercive provisions such as, e.g., the necessity for making annual returns, etc. Under the repealed sections there were complicated distinctions in regard to companies incorporated in divers times and manners under "Ontario" legislation. The amendment sweeps all these distinctions away, and applies the Companies Act to companies incorporated not only under Ontario legislation, but also under that of the Province of Upper Canada and

of the Province of Canada, so far as these latter companies can be reached by Ontario legislation.

The proviso, however, exempts companies incorporated for (a) the construction and working of a railway, (b) the business of insurance, and (c) the business of a loan corporation within the meaning of the Loan Corporations Act.

It further enables the Lieutenant-Governor in council to relieve a company incorporated before the 1st July, 1897, from any provisions of the general Act militating against the powers conferred by its special Act.

Section 29. The amendments to the Loan Corporations Act are not very numerous this year.

(1) Provides for further particularity and detail in any agreement between corporations for amalgamation or for the sale or purchase of the assets of one corporation by the other.

(2) Section 48, dealing with a sale of the assets of one company to another, provides that "the company purchasing shall thereupon become and be responsible for the liabilities of the company or society so selling."

The amendment makes better provision for the rights of creditors by establishing direct privity of contract between them and the purchasing company, and a direct right of action for the enforcement of their claims is given to them against the purchaser.

(3) Provides that in the case of a sale or an amalgamation between loan corporations, the selling corporation, or the several companies amalgamated, are to be deemed to be dissolved. It has been usual to provide for this in the agreement of amalgamation, but a legislative provision was deemed necessary to effectuate this and to completely dissolve the company.

(5) Section 99 deals with the annual statement required to be sent in to the department. The amendment requires that this statement shall not only, as heretofore, be "signed and sworn to by the president or vice-president, and the manager

or secretary," but shall also, previously to this, have been definitely adopted by a resolution of the board of directors. The object of this is to commit the whole board to the statement, and prevent any disclaimer of responsibility by them.

(6) Is to prevent vexatious delays in appeals from convictions under the Loan Corporations Act; these were often lodged but not prosecuted vigorously. This is directly in line with the policy in regard to appeals from summary convictions. (See R. S. O. c. 90, s. 9 (2), as amended by 3 Edw. VII. (1903) c. 7, s. 21).

Section 30. Under s. 388 of the Municipal Act it is provided that the county council may raise \$20,000 on debentures in any year without submitting the matter to the electors. The amendment is to make it plain that money raised for a house of refuge, up to \$40,000, may be in addition to this \$20,000, and may be raised without the consent of the electors being obtained.

Section 31 is surely a step in the right direction. It raises the age at which minors may frequent billiard, pool, or bagatelle rooms, from 16 years to 18.

#### Chapter 20. "An Act to amend the County Courts Act."

This Act enables High Court actions, by agreement of the parties, to be tried in the County Court of the county, the county town of which is named as the place of trial.

A written agreement must be filed in the proper office at or before the time of setting the action down for trial.

The costs to be as of a trial in the High Court.

Even where an action has been entered for trial in the High Court, it may, by a similar agreement, be transferred to the County Court for trial only.

#### Chapter 22. "An Act to amend the Act respecting Actions of Libel and Slander."

This is doubtless the result of a libel action against a Toronto daily paper, which caused some comment recently.

The Act is substantially a reproduction of the Imperial "Law of Libel Amendment Act, 1888."

Section 1 very materially changes the character of publications affected by R. S. O. c. 68, "The Act respecting Actions of Libel and Slander." By that statute, the "newspaper" had to be printed at intervals not exceeding 26 days. The Act, therefore, had no application to monthly magazines, monthly trade papers, etc. This is still the law in England.

The change to "thirty-one days" instead of "twenty-six" would seem to bring many such periodicals within the protection of the statute.

Section 2, repealing s.-s. 1 of s. 8 of the Revised Statute, and substituting a much more comprehensive one, gives privilege to reports of proceedings in the Parliament of Canada, or any Legislative Assembly of any province, or of any committee of these bodies. Was this necessary? Since the decision in *Wason v. Walter* (1868), L. R. 4 Q. B. 73, the law has been thought to have been "clearly and most satisfactorily settled" that every fair and accurate report of proceedings in Parliament was privileged, even though containing matter defamatory of an individual. Privilege is further extended, not only to reports of proceedings at public meetings, as heretofore, but also to meetings of a municipal council, school board, board of education, etc., and also to "*the publication of the whole, or a portion or fair synopsis, of any report, bulletin, notice or other document, issued for the information of the public from any government office or department, or by any provincial board of health, medical health board, or medical health officer, or the publication, at the request of any government or municipal official, commissioner of police or chief constable, of any notice or report issued by him for the information of the public.*" The part above printed in italics is not in the Imperial statute, which is more restricted in its character, and affords protection only where such documents as are in question are "published at the request of" public officials.

The last few lines of the amending section have made clear what has in England "given rise to considerable controversy." The wording of the Imperial statute is: "or to protect the publication of any matter not of public concern, and the publication of which is not for the public benefit."

The doubt was as to whether it would be sufficient to prove (1) that the matter complained of is of public concern, and (2) that the publication thereof is for the public benefit; or whether it will be sufficient to prove either (1) or (2). (See Odgers (1905) p. 316).

The Ontario statute, by using the disjunctive word "or" instead of "and," has resolved the doubt in favour of the last construction.

The enlarged definition of a public meeting contained in the Imperial Act has not been adopted by the legislature.

It may be pointed out that although the new Act allows the publication of many notices and official documents, it excludes blasphemous and indecent matter, and still leaves it the duty of the editor of every newspaper to edit all reports of public meetings, and excise all defamatory matter that is "not of public concern, and the publication of which is not for the public benefit." (Odgers, p. 311). See the discussion in Odgers (1905), p. 316, as to the meaning of the words "a matter of public concern."

Chapter 23. "An Act to amend the Devolution of Estates Act."

By s. 18 of the Statute Law Amendment Act, it is provided that this statute shall not come into force, either in whole or in part, until a date to be named by the Lieutenant-Governor in council by proclamation in that behalf, and then as to such part only as may be mentioned in the said proclamation.

This locus pœnitentiæ, it is respectfully suggested, might well be made use of by referring this amending Act to the

revision commission for very careful consideration when revising and remodelling the principal Act.

It is to be hoped that a consistent, simple, and intelligible statute on the subject may thus be produced; the present Devolution of Estates Act has certainly not got these characteristics. The proposed amendments do not seem free from criticism.

Section 1. The genesis of this section may probably be looked for in the case of *Kennedy v. Foxwell*, 11 O. L. R. 389. It is certainly a distinct departure from the theory of the principal Act, and reverts to the practice before the Act was passed.

The section provides that an action to foreclose the equity of redemption in mortgaged land, where there is no personal representative of a deceased mortgagor, shall be sufficiently constituted by the presence as defendants of the persons beneficially entitled thereto, either under a will of the deceased mortgagor or under the Devolution of Estates Act.

This expression "when there is no personal representative" is not free from doubt; it may apparently apply either to the case of (a) an intestacy, or (b) a will where no executors are named, or (3) a will where executors are named but they have not taken probate, and have not renounced.

In all these cases the beneficiaries might have much difficulty in raising money to redeem in the absence of a personal representative, and might, in consequence, be foreclosed without having any real opportunity to redeem, should this section become law.

The "highly anomalous state of affairs produced" in case (a) is pointed out by Mr. Armour in his book on the Devolution of Land, p. 89, etc.; the difficult position of beneficiaries under such circumstances is clearly shewn. In case (c), where executors are appointed but have not taken probate and have not renounced, the land would, nevertheless, under the statute, vest in them. How can an action be properly framed without them?



If the principle of the section be adopted, why not make it applicable to actions for sale as well as foreclosure?

Section 3 repeals s. 16 of the principal Act, and substitutes a new one for it.

The effect of the repealed section was declared in *Re Ross and Davies* (1904), 7 O. L. R. 433, to be intended to make it clear that executors had power to sell for purposes of distribution where there were no debts as well as where there *were* debts, and that the consent of the official guardian on behalf of infants, lunatics, and non-concurring heirs or devisees is only necessary where the sale is for the purposes of distribution only (p. 442).

The substituted section aims at making the law on the subject clear. Sub-section 1 substantially enacts and gives legislative sanction to the words quoted above from *Re Ross and Davies*. Sub-section 2 provides that where the sale is for the purpose of distribution only, it shall not be valid as respects heirs or devisees beneficially entitled thereto without their consent.

But it further provides that where there are heirs or devisees who do not concur by reason of their place of residence being unknown, "or where in the opinion of the official guardian it would for any reason be inconvenient to require the concurrence of such heirs or devisees, or where in his opinion it would be advisable to dispense with such concurrence," the sale may take place without such concurrence, and "shall be valid and binding upon such non-concurring heirs and devisees to all intents and purposes whatever."

This provision may, no doubt, be useful in many cases, but it leaves very large powers in the hands of the official guardian. The words "inconvenient" and "advisable" are extremely elastic, and give to the official guardian great power over the property of an adult beneficiary, sane, present, and perhaps protesting against the sale of his property, which he believes to be neither convenient nor advisable.

Section 4 repeals an amendment made to s. 16 of the principal Act, which is now unnecessary, as that section has been repealed and a new one enacted in its place.

Chapter 27. "An Act respecting Prospectuses issued by Companies."

It has been said that the "joint stock company now-a-days

'Doth bestride the world like a colossus,'

We are all shareholders or debenture holders, if we are not directors, of companies."

The present Act is, therefore, one of very general interest and importance.

Many unwary persons have been seduced by a misleading prospectus, containing not only a *suggestio falsi*, but also a *suppressio veri*.

This statute aims at protecting the unwary by requiring extremely full disclosure in every prospectus.

In the main it embodies provisions taken from the Imperial Companies Act, 1900.

Section 2 (s. 8 of Act of 1900) (1) authorizes to a limited extent what is known as underwriting, and also the payment of commission for subscribing or agreeing to subscribe for shares, so long as this is authorized by the letters patent, and the particulars are fully disclosed in the prospectus. Otherwise all payments for underwriting, or placing shares, or taking shares, are illegal; unscrupulous promoters will no longer be as free as they were in this respect.

The great object of this section is "to ensure that the public who are asked to subscribe for shares shall do it with their eyes open and with full knowledge of the circumstances under which the invitation has been issued to them."

Sub-section 2 makes it *ultra vires* on the part of any company to apply its money or shares for underwriting or commissions save as provided in clause (1).

Directors would be personally liable to replace any money so paid.

Sub-section 3 does not alter the existing law as to brokerage, namely, that when paid bona fide as such in moderate amount it is lawful (*Metropolitan Coal Consumers' Association v. Scrimgeour*, [1895] 2 Q. B. 604).

It should be noticed that the payment of such commission is only legal where the company offers its shares "to the public for subscription."

Section 3 seems to be peculiar to this statute. It provides (1) as to what companies must file a prospectus; (2) that all sales, etc., of shares, etc., "shall be deemed as against the company or the signatories to the prospectus to be induced by such prospectus;" and (3) declares that no subscription, "induced or obtained by verbal representations," shall be binding unless prior to the subscription the subscriber shall have received a copy of the prospectus.

Section 4 is taken from the Imperial Act (s. 9). It requires a copy of every prospectus to be dated, and to be signed by every person who is named therein as a director or proposed or provisional director, and to be dated and filed with the Provincial Secretary "on or before the date of its publication."

The requirement for filing removes a difficulty which has sometimes arisen in the past. Owing to the fact that there has been no public record of prospectuses, it has been hard to prove and bring home liability for misstatements to those responsible for making them.

Section 5 (s. 10 of Act of 1900) deals with the contents and particulars which every prospectus "shall state."

These words impose a new statutory duty, that of stating in a prospectus the facts as to all matters mentioned in this section, which "contains a statement of all the facts which, in the opinion of the legislature, it is material for persons subscribing for shares to know."

The legislature here aims at enforcing "that golden legacy left us" by Vice-Chancellor Kindersley in *Brunswick, etc., Co. v. Muggeridge* (1861), 1 Dr. & Sm. at p. 381. •

Reference may well be made to Palmer's Company Law (1905), p. 301, as to the effect of this "onerous" section, and indeed as to the Act generally, which, in many parts, seems to be open to criticism and even to evasion.

It may be useful to direct attention to some of the particulars required to be stated under this section.

Clause (1) (g) of this section, the "vendor clause" in the prospectus, has recently been considered in the first case relating to the clause which has come before the Court. The object of that clause is, as Lord Davey expressed it, to "strip off the mask" which so often conceals the real vendor, and to get at the truth of who is the person really profiting by the promotion, and what amount of profit he or the successive vendors are making at the expense of the company. "It is to compel every company by its prospectus to give the public information as to the purchase price to be paid for the property to be acquired by the company, and as to the manner in which such price is to be divided between the various vendors, if more than one." With this view the prospectus is to state the names and addresses of the vendors of any property purchased or to be purchased, and the amount payable in cash, shares, or debentures to the vendor, and where there is more than one separate vendor, *or the company is a sub-purchaser*, the amount so payable to each vendor. It was the meaning of these italicized words which was in question in *Brookes v. Hansen*, 22 Times L. R. 475.

It is interesting to learn that the decision "furnishes an illustration of the impotency of statutory enactments, however elaborate, to protect the public against the arts of the experienced or well-advised promoter."

Section 5 (1) (k) requires the amount paid or intended to be paid to any promoter, and the consideration for any such payment, to be stated in the prospectus.

"This is a most important provision, and places promoters in a better position than they have ever previously occupied. It is the first statutory recognition of the right of

a promoter to be paid for his services, and puts an end to any doubt as to the legality of such payments."

Section 5 (1) (l). Particulars as to "every material contract" must be stated.

"Every contract is material which would influence the judgment of a prudent investor in determining whether he would subscribe for the shares or debentures offered by the prospectus."

It is said to be doubtful as to whether a verbal contract is within this section.

Section 5 (1) (n) requires a disclosure in the prospectus of the nature and extent of the interest (if any) of every director in any property taken by the company. This to a large extent embodies an existing rule of common law resulting from the fiduciary character of directors and their consequent incapacity to retain any secret profits received by them in that character.

Section 5 (5) deals with the "waiver clause", which so often defeated actions brought in respect of a misleading prospectus under the former law: see *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421.

In future any waiver of compliance with the section shall be void.

Referring to such clauses, Lord Lindley has recently said: "In most of the cases in which the effect of a waiver clause has been discussed, the clause has been unsuccessfully relied on as a protection against trickery; but in the first of these it was pointed out that although such clauses were worthless for such purposes, yet they might prove useful to protect honest men from unjust demands:" *Macleay v. Tait*, [1906] A. C. 24.

This case discusses the effect of non-disclosure of a contract in a prospectus under s. 38 of the Act of 1897, 30 & 31 V. c. 131 (2 Edw. VII. c. 15, s. 34 (D.))

Under the Imperial Act of 1900, no provision is made in case of failure to observe the provisions of the preceding sections. Such failure would doubtless be a breach of a

statutory duty, and would render the directors liable to an action for damages at the suit of any shareholder or debenture holder injured by the breach.

Section 6 of the Ontario Act expressly provides for every violation of ss. 3, 4, and 5. A penalty not exceeding \$200 and costs may be imposed upon every person responsible for the issue and publication of a prospectus offending against these sections. This penalty may be sued for by "any one," and the prosecutor is entitled to half of any fine imposed: s. 7 (3).

But under s. 6, the penalty may be escaped if the director, etc., did not know of the matter not disclosed, or if the non-compliance arose from an honest mistake of fact on his part.

Section 6 (2) provides that any liability under the general law apart from this statute shall remain unaffected.

The Act is not limited in its scope to Ontario companies, but applies (s. 1 (2)) to "every company which offers for subscription or sale shares, debentures or other securities, and to every company, whether incorporated under the laws of the Province of Ontario or otherwise, the shares, debentures or other securities of which are dealt in within the Province of Ontario."

Chapter 30, "The Ontario Railway Act, 1906."

Two "revolutionary railway measures" were carried through. These have been well described as forming together "an important body of railway legislation covering pretty well that heart's desire, railways that will serve the people rather than a people that serves the railways."

The first bill, c. 30, "The Ontario Railway Act, 1906," is a general railway Act, consolidating all the existing statutes relating to steam, electric, and street railways under provincial jurisdiction, and adjusting many difficult questions of railway control in the province.

A standard of practically two cents a mile is settled for fares on electric roads. Provision is made for the settlement

of the vexed question in regard to the admission of outside lines into municipalities.

A term of 25 years is set for the franchise of street railways, with provision for a renewal, or a taking over by municipalities if so desired, at the end of that term on proper conditions. The provisions of the former law as to the running of cars on Sunday remain unchanged; thus companies not now having the power of running cars on Sunday will not be able to acquire it.

A most useful section of the Dominion Railway Act, 1903, has been made applicable to all the railways under provincial jurisdiction. Briefly, it provides that on the receipt of information to the effect that any railway is dangerous to the public from want of renewal or repair, insufficient equipment, or faulty construction, the board may direct an inspector to examine the road and report. If the charges are well founded, the board may order the repairs to be made immediately, and in case of non-compliance on the part of the railway company will be empowered to collect a penalty of \$500 a day. This is now a section of the Ontario Railway Act, 1906, and it is followed by the short but significant sentence: "This section shall apply to street railways."

Chapter 31. The second Act, ancillary to the last mentioned one, is c. 31, "The Ontario Railway and Municipal Board Act, 1906." The Board shall be composed of three members, and, as far as Ontario railways and railway matters are concerned, will have the same powers practically as the Dominion Railway Commission has over Dominion roads. But whereas under the Dominion Act the government can sit in appeal from the commission and can make orders about railways and vary or rescind any regulation, decision, or order of the commission, no such power of interference is given to the provincial government under this Act; the Railway Committee of the Executive Committee is superseded by the Board. Where the parties agree, the Board are to act as arbitrators in case of threatened railway strikes, and may mediate where one is in progress. All cases relating

to the enforcement or construction of agreements between municipalities and railways and street railways operating on highways, are to be heard and determined by the Board and not by the Courts, which are expressly forbidden to interfere by prohibition, injunction, etc., with the proceedings or decisions of the Board.

For the better enforcement of agreements between municipalities and railways, the Board may enter on the property, and take over the entire management and control, of the railway until it is operated in accordance with the agreement; the costs of this to be paid by the company.

The finding of the Board upon any question of fact within its jurisdiction is to be conclusive. The Board may state a case for the opinion of the Court of Appeal upon any question of law.

The only power of interference given to the Courts is that an appeal shall lie from the Board to the Court of Appeal upon a question of jurisdiction, or upon any question of law, but leave must be given by the Court or else the appeal will not lie; the appellant must pay \$250 into Court by way of security for costs.

Many municipal powers are also given to the Board, e.g., in regard to certain assessment appeals, questions of annexation of territory, alteration of municipal boundaries, confirmation of financial by-laws, and by-laws relating to highways, bridges, and public utilities. These powers will be found most beneficial if exercised, as no doubt they will be, with firmness and tact, and will remove the numerous occasions of friction and discord which have heretofore constantly arisen between municipalities and railways.

Important provisions are made for the examination, under the control of the Railway Board, of motormen as to "habits, physical ability, and intelligence," in addition to capability for the position; an examination must be had as to colour blindness in cases where the power to "distinguish form or colour signals" is important. It is wisely required



that in the future construction of open cars an aisle shall be provided for the use of conductors, which will prevent the accidents so frequently resulting from the present dangerous system.

Passengers may no longer "stand" on the side steps of a car. Does this prevent them from sitting there? is the question now asked.

It is further provided that in cars built after the passing of the Act the motorman shall be completely enclosed, so as to stop the ingress and egress of passengers by the front of the car.

Conductors are authorized, if the company does not provide them with reasonable shelter, to ride inside of the car.

Employees are to have a fair chance of rest by the limitation of hours of labour.

Strict rules are laid down for the equipment of the cars with effective life-saving appliances. On passenger cars, other than those of street railways, conductors are to have the powers and authority of constables, and may wear badges of such authority.

Resort has been had not merely to provincial Acts in the framing of the statute, but also to the Dominion Railway Act, and the Massachusetts, New York, and Ohio railway laws.

"In short," it has been said in regard to the two Railway Acts, "the best ideas floating in the air both here and in the United States have been seized and placed in these bills."

Chapter 34, the Municipal Amendment Act, 1906. Notwithstanding the reported pronouncement of the Premier last year against numerous amendments to the Municipal Act, and his suggestion that "one remedy might be to allow no amendments oftener than once in four years" (25 C. L. T. p. 429), the present session has produced a goodly grist of them. The following seem to be the most important:

Section 1 repeals an ill-advised piece of legislation enacted in 1905 in regard to the addition of territory to a city or town, and substantially re-affirms the principle of the

original s. 24 of the Consolidated Municipal Act, by which the initiative in such cases was left to the city or town to be affected.

The legislation of 1905 permitted territory to be added to a city or town by the Lieutenant-Governor in council without either the application or consent of the city or town in question.

Under the present section, the Lieutenant-Governor can only act where there is a declaration by the council of the city or town declaring that it is expedient that territory should be annexed, and also a petition by the majority of the ratepayers in the portion in question favouring the annexation.

Section 2 provides machinery for the separation of a junior county from a union of counties. R. S. O. c. 223, ss. 40-54, which provided for such a case, was repealed by 3 Edw. VII. c. 18, s. 13, since which time special legislation was the only remedy where it was desired to form a new county or to dissolve a union of counties. The present section provides for a separation, at the instance of a junior county, where the municipal councils of at least one-half in number of the several municipalities constituting the junior county pass and transmit to the Lieutenant-Governor resolutions in favour of a separation, and where, a vote having thereafter been taken on the subject, the majority of the electors of the junior county are also in favour of it.

Solicitors should notice the new s. (39) (m) (4), as to writs of execution in the hands of the sheriff of a union of counties at the time of the separation, and also s. (39) (n) (1), as to change of place of trial of pending actions where necessary.

Section 3. By s. 80 of the principal Act it was provided that "no member of a school board for which rates are levied" "shall be qualified to be a member of the council of any municipality." These words have been held to mean that such persons "are under the ban of disqualification for the office of member of the council of *any* municipality." and

that it was immaterial whether the rates were levied by the municipal corporation for which the person in question was elected or by any other municipality. (*Rex ex rel. Zimmerman v. Steele* (1903), 5 O. L. R. 565; *Rex ex rel. O'Donnell v. Broomfield* (1903), 5 O. L. R. 596.) The effect of the change made by the amendment would seem to be to limit the disqualification to membership of the council of the city, town, or village where the school board is situate, and by which rates in its favour are levied; that is to say, a limited disqualification is imposed instead of the general one resulting from the original section.

Section 4 allows of a two years' term of office for members of councils when a by-law sanctioning this has been submitted to the electors and assented to by a majority of them.

Section 5 requires that in all municipalities poll clerks shall be appointed by the council.

By the Act of 1905 this was only necessary in the case of cities having a population of over 100,000 inhabitants.

It will be remembered that in cities of the latter class the poll clerk must in all cases be recommended to the council by the city clerk, under the Act of 1905.

Sections 6-11, inclusive, may raise a curious question for scrupulous voters. Has it been drawn with the provisions of the Naturalization Act in view?

It provides that the oath to be taken at all elections by freeholders, tenants, income voters, and farmers' sons, and also the declaration to be made by persons appointed under the Consolidated Municipal Act to any office requiring a property qualification in the incumbent, must deny that the deponent or declarant is "a citizen or subject of any foreign country."

But under the Naturalization Act (R. S. C. c. 113), a naturalized alien may well be regarded in the foreign state from which he came as a subject of that state and as bound by its laws. Colonial naturalization has been said to be "a qualified naturalization" only; its operation is "in effect the same as though privileges were given in the colony to aliens

under certain conditions." It is "incapable of investing a naturalized person with the quality of a British subject in foreign states." Will a German naturalized in Canada be able to take the oath now prescribed?

Section 12 prohibits in cities having over 100,000 inhabitants the use or delivery on polling day of election cards "or other device soliciting votes," under a penalty not exceeding \$20.

But if doing this is wrong in principle, why should the prohibition be limited to Toronto?

Section 13. The gist of this amendment seems to lie in the words "or in a township adjacent thereto." The object of this change is to enable the council of a township to keep its public offices, and for that purpose to acquire property, in an adjacent township.

This would seem to conflict with and overrule some of the principles enunciated in *City of Toronto v. Toronto Railway Company*, 2 O. W. R. 225.

Section 14 makes it no longer a necessary qualification for the office of controller in the city of Toronto to have "served for at least two years as a member of the city council prior to his nomination as controller."

Section 16 is a legislative enigma. The words in question were inserted in 1904—no one knows why, except perhaps as a wise restraint upon municipalities. They are struck out in 1906, for no apparent reason, except that some municipality may have found the restraint embarrassing.

Section 17 contains one important addition to the powers of municipal councils, and that is the right to pass by-laws "for regulating the erection of signs or other advertising devices on buildings or vacant lots." There was no provision expressly allowing this before.

Section 18. Under s. 544, now amended, a petition of a majority of ratepayers was necessary before a by-law could be passed by the council of a town or village for the purchase of a fire engine and appliances for the purpose of fire protection.

The amendment allows the council to act on its own motion, without petition, where there is a two-thirds majority in favour of such action, and to pass a by-law for the purchase of such appliances at a cost not exceeding \$5,000.

Section 21. The effect of this amending section is to simplify and make uniform the procedure for advertising all by-laws requiring the assent of the electors: see for an illustration of the importance of this, *Cartwright v. Napanee*, 11 O. L. R. 68.

In all cases the procedure under s. 338 must now be followed, but in cases coming under s. 566 (4) and s. 569 (1), together with a copy of the proposed by-law the estimates of the intended expenditure must be published.

No change is made in the other parts of the repealed sub-section, which is re-enacted in its amended shape.

Section 23 deals with the case of lands acquired by municipalities (by virtue of s. 577) for burial purposes, without the municipality, and provides that where such lands have not been used for burial purposes and are disposed of by the purchasing municipality, they shall revert to and become the property of the municipality to which they originally belonged. This would, probably, have been the result of the transaction apart from express legislation.

Section 26 shifts the onus of proof in all cases of prosecutions against hawkers, pedlars, etc., not being licensed as required by by-law, where the defence is that no license was necessary in the particular case. The proof that the party prosecuted does not require a license is laid upon him; the prosecution need not shew affirmatively that a license is required.

Section 27 legislates away the decision of the Judicial Committee of the Privy Council in *Virgo v. City of Toronto*, [1896] A. C. 88, where it was held that a statutory power conferred upon a municipal council to make by-laws for regulating and governing a trade did not, in the absence of an express power of prohibition, authorize the

making it unlawful to carry on a lawful trade in a lawful manner. In other words, power to regulate did not contain power to prohibit a lawful trade. The express power of prohibition is now given in the case of pedlars of fruit, etc., in public streets.

Section 31. The object of s. 26 of the Act of 1904, which is now repealed, was probably two-fold, (a) to make it clear that a council might give a bonus in the shape of a grant of land for the benefit of a manufacturing industry, and (b) to enable this to be done without the submission of a by-law to the electors where the passing of the by-law did not involve expense to the municipality.

The repeal of s. 26 does not affect the right to give a bonus by means of a grant of land, which was reasonably clear, apart from (a), under s. 591 a (c), but does make it necessary to submit such a by-law to the electors for their assent, just as in the case of any other by-law granting a bonus under s. 591 (12). On the subject of these grants see *Re Inglis and Toronto*, 9 O. L. R. 562.

Section 38 makes a serious inroad upon the principle under which local improvements have heretofore been regulated.

This principle has been to allow the local property owners to select the kind of local improvement which in their judgment was most suitable for the circumstances of their property. These owners were specially taxed for the cost of the improvements selected. The present amendment gives the council of any municipality an unlimited discretion as to the kind of pavement to be laid down, both as to material and cost, regardless of the protests and wishes of the ratepayers concerned, who will still, however, be specially assessed for the cost. The only restriction upon this novel proceeding is the requirement that it be concurred in by two-thirds of "all the members of the council" as desirable in the public interest.

Section 39 carries the principle of the preceding section further still. These improvements may in future be con-

structed without any notice being given to the property owners affected; no opportunity need be given to them to state their own wishes or to present their objections to the plan proposed by the council; they may be improved out of their property without even the right to protest.

It is true that after the work has been done, notices under s. 674 must still be given, that is, notices of their assessment for the cost of the improvements forced upon them, and of the sittings of the Court of Revision, but this looks rather like shutting the stable door after the horse has gone.

This section is a legislative reversal of *Hodgins v. Toronto*, 26 O. R. 480, 23 A. R. 80. "A notice from which flow such serious consequences to owners should not be dispensed with in whole or in part, nor should any verbal or constructive notice be substituted therefor: *In re McRae and Brussels*, 8 O. L. R. p. 160.

"The process of assessment is in the nature of a judicial proceeding:" per Strong, J., *Nicholls v. Cumming*, 1 S. C. R. 427.

"An assessment charging lands has always been considered a judicial act, of which the party affected must have notice and be allowed to be heard:" per Hagarty, C.J., *In re Hodgins*, *supra*.

Chapter 35. An Act respecting County Councils. A very important change has been made in the Municipal Act by this statute, dealing with the composition of county councils. The variations of opinion on this subject have been interesting (see Biggar's *Mun. Manual*, 8, 93). In 1841 district councils were established; the members of these bodies were chosen directly by and from the people; the rate-payers of each "township or reputed township" being entitled to elect to this council one or two representatives.

The "comprehensive and statesmanlike enactment known as 'The Baldwin Municipal Act of 1849'" provided that each of the county councils thereby established should consist of "the town-reeves and deputy town-reeves of each of the several townships, villages, and towns within the county."

In 1896 an Act was passed, reverting to the original principle of "The District Councils Act" of 1841, viz., the election of county councillors directly by and from among the ratepayers; this was the system in force at the time the present Act was passed.

Now the pendulum swings back again, and the principle of the Act of 1849 has been re-adopted.

The county council will in future be composed of the reeves and deputy reeves of the municipalities forming a part of the council for municipal purposes.

One strong objection to the system now superseded was that it established a governing body for counties which was not in touch with the councils of the municipalities composing the counties, and which was in fact often more or less in open antagonism to them.

Chapter 40. An Act to amend The Municipal Waterworks Act.

One section (1) of this Act may well be noticed in connection with municipal matters.

It will be remembered that in the recent case of *Hamilton Distillery Co. v. City of Hamilton*, 7 O. W. R. 655, it was held by the Court of Appeal, affirming the judgment of Street, J., 10 O. L. R. 280, that in all cases a water rate imposed by a municipal authority must be an equal rate to all consumers, unless express legislative authority has been given to discriminate.

In the opinion of Mr. Justice Garrow it is said: "One cannot help feeling that there is force in the contention that a municipal council ought to have the power contended for. There are wide variations in the needs and circumstances of the individual water consumers which justice requires shall be taken into consideration by the council, and these varying circumstances could, I think, be fairly met by a wide power of classification, and perhaps, in addition, a power to deal specially with special cases. But such considerations must now, I think, since the decisions of the Supreme Court, be addressed to the legislature."



Section 1 of the present statute amends the Municipal Waterworks Act by giving the corporation the power to discriminate and to fix different rates for different classes of consumers.

Chapter 45. An Act to regulate the Width of Sleigh Runners.

The important question as to the proper width between sleigh runners was hotly debated both in the Municipal Committee and in the House.

By an Act of 1905 (5 Edw. VII. c. 13, s. 29), a distance of four feet between runners was required. This year an attempt was successfully made in committee to reduce this to three feet ten inches, but in the House, strange to say, the whole legislation was thrown out, the Act of 1905 was repealed, and every man may now have his sleigh runners as far apart as he chooses.

Chapter 46. An Act to regulate the Speed and Operation of Motor Vehicles on Highways.

Speaking in the House of Commons on the 1st June, 1905, the President of the Local Government Board is reported to have said:

“The motor question presented many difficulties, and would present more in the future. Vast capital was embarked in the manufacture of cars, and the development of the industry shewed that it would be crushed out of existence by a limitation to fourteen miles an hour. Such was his view. On the other hand, he realized that public opinion had been greatly stirred by the danger of motor cars when recklessly or negligently driven, and the accidents that occurred. In addition, there was the intolerable nuisance of dust to dwellers by the roadside. Difficulties had to be met without unduly checking the use of motor cars.”

The present statute, repealing former Acts on the subject, is an attempt to preserve the *via media*; it is a compromise between views such as those of the legislator who was admittedly waiting with his shotgun “to blow the head off any of the empty-pated drivers of these devilish machines” if they

came along his way, and the views of those who were opposed to any stringent legislation on the subject.

The provisions of the statute are, to a large extent, taken from the Imperial Act of 1903; it is certainly a drastic measure with severe penalties attached to it.

Some of the principal new provisions may be noted. No search-light may be carried; no intoxicated person may drive a motor vehicle; where an accident happens owing to the presence of any motor vehicle on any public highway, the person in charge of such vehicle must return, and upon request give in writing his name and address, the name and address of the owner, and the number of the permit of the vehicle.

Peace officers may arrest without warrant on reasonable grounds of suspicion, as in criminal cases, where they believe an offence against ss. 3, 8, 11 of the Act has been committed, and "every one is justified in arresting without warrant any person whom he finds committing any offence against these sections; the peace officer or other person making such arrest may detain any motor vehicle in respect to which such offence has been committed.

The number of the permit or license must now be placed on the front as well as on the back of the vehicle. The numbers must not be less than five inches in height.

Motor bicycles must carry a permit number on the back, three inches in height.

The penalties for the violation of the most important clauses, including that as to numbers, are heavy, and for third offences magistrates and justices of the peace have power to imprison.

Chapter 58. "An Act respecting County Houses of Refuge."

This is another of the Acts amending the Municipal Act. It provides that where inmates of such houses are found to be possessed of property out of which the cost of their maintenance can be paid, the County Judge, on application to him,

may direct that this property may be applied to that end, and may give the treasurer of the county power to manage and appropriate, etc., such property so as to make it available.

The occupants of these charitable institutions are not usually regarded as persons of means, but it was stated that among the inmates of one such place in Ontario it had been found that there were several with paid-up insurance policies, a few who owned some stocks, and one man who owned a house and lot. It is most reasonable that the counties should not bear all the burden of maintenance in such cases.

An excellent provision in this Act is that contained in s. 2, which requires the Inspector of Prisons and Public Charities of Ontario to visit and inspect every county house of refuge at least once a year. There has been no such inspection heretofore. General experience has shewn the very great importance of it in all cases of charitable institutions.

Chapter 61. "An Act to amend the Act respecting Lunatic Asylums and the Custody of Insane Persons."

This is a humane attempt to regulate for the better, and none too soon, the care of the insane prior to commitment to asylums. The evils of confining these unfortunate persons to a gaol pending inquiry as to their sanity has long been deprecated, and has often been brought to the notice of other governments. The present statute repeals several clauses of R. S. O. c. 317, and substitutes others in their place.

Section 14 allows the apprehension, without warrant, of any person apparently insane and conducting himself in a manner which in a sane person would be disorderly, and his detention "in some safe and comfortable place" until the question of his sanity is determined.

Section 15, while providing for the safe keeping of a person alleged to be insane, who has been brought up before a justice of the peace, directs that "in no case shall such alleged insane person be committed as a disorderly person to any prison, gaol, or lock-up for criminals, unless he be violent

and dangerous, and there is no other suitable place for his confinement, nor shall he be confined in the same room with a person charged with or convicted of a crime."

An important feature of the new Act is the power given to the Provincial Secretary to appoint one or more medical practitioners in each territorial division to examine all cases of alleged insanity.

This may prevent the alleged common practice of having indigent persons committed to provincial institutions as lunatics. "It is thought that if examinations are made by physicians holding authority from the province, there will be less likelihood of unwarranted commitment to the insane asylums than when the decisions are made by physicians who may be anxious to get rid of undesirable or indigent people in their locality."

Provision is made, where the person is not an indigent one, that the expenses incurred in determining his insanity and conveying him to an asylum, and the expenses of proper clothing for such person, may be recovered from his estate or from the persons liable for his maintenance.

An important change in the practice on applications for a declaration of lunacy and the appointment of a committee is made by s. 4 of the present Act, and should be noticed by solicitors.

In future five clear days' notice of any application to the High Court for the appointment of a committee of any lunatic detained in any public asylum must be given to the Inspector of Prisons and Public Charities, and with such notice must be served a copy of the petition and the affidavits to be used in support thereof; this has not previously been necessary or usual on such applications.

It will be remembered that in other cases there must be "at least six clear days" between service of notice of an application for a declaration of lunacy and the day for hearing. (R. 1261, 348. (a)).

It would have been well, in order to avoid confusion, to have had the same length of notice in both cases.

Chapters 147-150. These statutes at the end of the volume are a blot upon the otherwise excellent work of the session. "Desinit in piscem mulier formosa superne."

It is much to be regretted that a legislative short cut should be given to persons desiring to enter the legal profession without having had the careful and skilled instruction which it is now conceded by those best capable of forming an opinion is essential in such cases.

And why should a man be made a veterinary surgeon by Act of Parliament?

Toronto.

N. W. HOYLES.

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## RECENT CASES FROM THE TIMES REPORTS.\*

**Appeal.]**—In *Victorian Railways Commissioners v. Brown*, 22 T. L. R. 644, the Judicial Committee apply to Australian cases the rule already laid down for those from Canada, namely, that very special grounds must be shewn to induce the Committee to grant leave to appeal from the Court of ultimate resort in the Colony if the applicant, having the option of going to the Judicial Committee or to that Court, himself chose the latter. Greater latitude will be allowed if the applicant was respondent in the Colonial Court of last resort.

**Arbitration.]**—An award was silent as to costs, and the arbitrator made an affidavit that the omission was due to a mistake on his part as to the Act under which the award came, he thinking that the costs had been provided for by statute. It was held (*In re Baxters and Midland R. W. Co.*, 22 T. L. R. 616), that the award could be referred back to have the costs dealt with.

**Auctioneer.]**—It is decided in *Wheatley v. Smithers*, 22 T. L. R. 591, that auctioneers do not carry on a trade, so as to bring them within the rule that one member of a trading partnership may without the knowledge or direct authority of his partner render the firm and the members of it liable upon negotiable instruments. A trade must have to do with buying and selling, and the term "trade" is not nearly so wide as the term "business."

**Certiorari.]**—The *King v. Woodhouse*, 22 T. L. R. 603, deals with a number of questions under the Licensing Act, but its main interest is in the point (considered particularly by Vaughan Williams, L.J., in a very instructive judgment) that certiorari lies in every case where there is a judicial act, even though not by a Court strictly so called, and with no cause

\* Including the cases in No. 29, Vol. 22, week ending July 3, 1906.

depending. The question of the power to award costs in certiorari applications was also considered, and it was held that the Court had jurisdiction to award them.

**Company.]—**While the general principle is that if no benefit will result to the petitioner and those represented by him a winding-up order should not be made, the interesting case of *In re Crigglestone Coal Co.*, 22 T. L. R. 585, shews that the Court ought to be slow in coming to the conclusion that there will not be benefit, and ought to make the order if there is reasonable probability or even possibility of the petitioner obtaining some benefit. In this case an order was made on an unsecured creditor's petition, though all the assets were covered by a debenture charge and were insufficient to satisfy it, and there was danger of the winding-up order causing the forfeiture of valuable leases held by the company, the reason for making the order being that the petitioner was entitled to have the debenture holders' claims scrutinized by an official—the liquidator—independent of debenture holders, several of whom were also directors in the company. Mr. Justice Buckley in an instructive judgment points out that given the insolvency and the debt, the winding-up order should *prima facie* be granted *ex debito justitiæ*, but that the petitioning creditor being merely the representative of a class, the conservation of the true interests of that class may justify the Court in refusing an order in a particular case. (See, for an example, *In re Strathy Wire Fence Co.*, 8 O. L. R. 186). His judgment was affirmed by the Court of Appeal.—*Shepherd v. Bray*, 22 T. L. R. 625, is an important decision under the Directors Liability Act. The prospectus in question contained a statement that certain contracts mentioned in it were the only ones entered into by the company. There was in fact another contract, the knowledge of which would probably have had a deterrent effect on intending subscribers. It was held that the Court might draw the inference that applicants, if they had known the truth, would not have applied, and that there was liability. It

was also held that a director so made liable was entitled to contribution from the estate of a deceased co-director who if alive would also have been liable, the plaintiffs' costs of the action to enforce liability being part of the sum in respect of which contribution was ordered.—*Newton v. Birmingham Small Arms Co.*, 22 T. L. R. 664, is a case as to auditors which is of considerable interest, though it depends on special legislation. The point shortly stated is that a resolution requiring auditors not to give to the shareholders information as to a secret reserve fund which the directors had been authorized to set aside was invalid as being in direct conflict with the statutory provisions as to auditors' duties.—There is not, it is held in *In re English and Colonial Produce Co.*, 22 T. L. R. 669, any implied liability upon a company to pay for services of which it takes the benefit, rendered before its formation. The solicitors therefore who took the necessary proceedings for the formation of the company were held not entitled to their costs as against it, though they were allowed the registration disbursements; of course the individuals who instructed the solicitors to take the incorporation proceedings would be liable to them for the costs.

**Costs.]**—The rule as to tendering to a formal party to a petition a nominal fee for its perusal and thus to avoid liability for costs of that party's unnecessary appearance, does not, it is held in *Lowe v. Moore*, 22 T. L. R. 640, apply to a trustee of a fund which is the subject matter of a petition, for it is the trustee's duty to appear upon the application.

**Criminal Law.]**—The short point in *Rex v. Murray*, 22 T. L. R. 596, is that an indictment for breaking into the house of the prosecutor and stealing his property therefrom is not supported when the articles stolen are found to be really the separate property of the prosecutor's wife.—In *Rex v. Bond*, 22 T. L. R. 633, a prosecution for feloniously using instruments with intent to procure a miscarriage, it was held, by



five Judges against two, that evidence that the prisoner had on a previous occasion used instruments for a like unlawful purpose upon another girl, was admissible. There is a useful discussion of the limits of admissibility of evidence of other acts.

**Defamation.]**—The Court of Appeal in *Thomas v. Bradbury Agnew and Co.*, 22 T. L. R. 656, deal at considerable length with the question of “fair comment,” and hold that that is not an absolute term, but a relative one, and that in deciding the question the motives of the commentator and the mode of making the comments have to be considered. Just as to the defence of privilege, so as to the defence of fair comment, malice is a complete reply.

**Discovery.]**—In *Nelson and Sons v. The Nelson Line*, 22 T. L. R. 630, it was held that a report made before action to underwriters in reference to an alleged defect in the refrigerating machinery of a ship, was not subject to production in an action conducted by the underwriters in the name, and to the extent of one-fourth for the benefit, of the owners of goods damaged owing to the alleged defect.

**Distribution of Estates.]**—In *In re Gist*, 22 T. L. R. 638, an order had been made in lunacy proceedings for advances to the lunatic’s sister, such advances to be treated as part of her share in the event of the lunatic predeceasing her. She died before the lunatic, leaving children, who survived him. It was held that the order did not affect their rights, and that they were entitled to the full share their mother would have been entitled to under the Statute of Distributions.

**Hiring Contract.]**—*Thomas Tilling (Limited) v. James*, 22 T. L. R. 599, is a case rather novel in its facts, but in principle probably applicable in the construction of many agreements. The defendant hired from the plaintiffs two horses “by the year” from a certain date, at a charge of

a certain sum "per annum," the payments to be made "quarterly;" and there was a provision that "after the expiration of the first year the hiring can be terminated by either party giving one quarter's written notice from a quarter day." It was held that the defendant was not bound to keep the horses for at least fifteen months, but only for twelve months, but that if he wished he had the right to keep them longer, in that case being bound to give them up on a quarter day with three months' previous notice.

**Landlord and Tenant.]**—The lease of a theatre in question in *Lennox v. Curzon*, 22 T. L. R. 611, provided for a suspension of rent if the theatre were "closed by order of any superior authority." It was held that this provision applied where the theatre had been so damaged by the falling wall of an adjacent building that an order for its repair had been made by a magistrate, and it was closed to enable the repairs to be made.—The judgment of the Court of Appeal in *Cavalier v. Pope*, 21 T. L. R. 747, noted 25 C. L. T. 535, holding that the wife of a tenant of a house, injured because of the defective condition of the kitchen floor, which the landlord had agreed to repair, had no right of action against the landlord, has been affirmed by the House of Lords: 22 T. L. R. 648. "A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; . . . the tenant's remedy is upon his contract if any." This statement of the law by Chief Justice Erle in *Robbins v. Jones*, 15 C. B. N. S. 221, is adopted as being "beyond question." The agreement to repair does not put the premises under the landlord's control so as to impose liability.—*A. A. Strick and Co. v. City Offices Co.*, 22 T. L. R. 667, raises a question of a good deal of practical interest. The plaintiffs were lessees of a set of offices in a large building with the right to use the passages in common with other tenants. It was held that this did not give them an absolute right to use the whole of the passages and to prevent the lessors from altering them,

but entitled them only to a reasonably convenient way over the passages. A proposed reduction of a passage from 10 feet in width to 6 feet in width was held under the circumstances not to be reasonable, and therefore not permissible.

**Limitation of Actions.]**—Accepting the accuracy of the statement in *In re River Steamer Co.*, L. R. 6 Ch. 822, that in order to take a case out of the Statute of Limitations there must be either an acknowledgment from which an absolute promise to pay can be inferred, or secondly an unconditional promise to pay the specific debt, or thirdly a conditional promise to pay the debt and evidence that the condition has been performed, the Judicial Committee in *Maniram v. Seth Ruchand*, 22 T. L. R. 619, held that the filing by a debtor, in an application by him for probate of his creditor's will, of a statement containing the allegation that he had had for some years open and current accounts with the deceased, was sufficient to justify the inferring of a promise that upon the accounts being settled they would be paid, and was therefore a conditional acknowledgment.

**Liquidated Damages or Penalty.]**—In *Commissioner of Works v. Hills*, 22 T. L. R. 589, the Judicial Committee put the principle as to liquidated damages or penalty thus: The criterion of whether a sum—be it called penalty or damages—is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation. In the contract in question—for construction of a railway—there was a provision for “forfeiture” of a proportion of the price by way of “liquidated damages” in the event of non-completion by a day fixed, and applying the above principle the Judicial Committee came to the conclusion that the sum could not be treated as a genuine pre-estimate of loss, the

chief reason being that it might vary very much in amount as a result of events not directly connected with the fulfilment of the contract.

**Patent.]**—In *Badische Anilin und Soda Fabrik v. Hickson*, 22 T. L. R. 641, the House of Lords, affirming the Court of Appeal, decided that there is not an infringement in England of an English patent when a trader in England enters into a contract with another trader in England to deliver to the latter's agents abroad goods manufactured abroad, but covered by the patent. A sale unless accompanied by actual delivery within the realm is not a vending within the meaning of the letters patent, and therefore not an infringement.

**Statutes.]**—In the New South Wales lunacy case of *McLaughlin v. Westgarth*, 22 T. L. R. 594, Lord Halsbury, in delivering the judgment of the Judicial Committee, makes some general observations of value as to the construction of statutes. The action was brought against the committee of a lunatic for damages for causing the lunatic to be placed in an asylum. The statute under which the proceedings had been taken contained, it is to be inferred from the report, a clause protecting certain persons from liability in respect of proceedings under it, and it was argued that from the special protection thus given it was clear the committee was not intended to be protected. Lord Halsbury refers to the modern tendency to minuteness in statutes and to the "misfortune" that persons who think they may come within the enactment are allowed *ex abundanti cautela* to obtain a specific exception, thus giving the opportunity for the *expressio unius* argument. However in the case dealt with he had no difficulty in holding that the committee, who had acted in good faith, was protected.

**Trade Name.]**—*Apollinaris Company v. Duckworth and Co.*, 22 T. L. R. 638, is an example of the modern tendency to restrict an attempt to monopolize a special name. The

plaintiffs failed in an attempt to prevent the defendants from selling as "Apollinaris salts," salts not made from, or in any way represented as having been made from, "Apollinaris water," but represented as having the same constituent ingredients as that water.

**Wages.]**—It is held in *In re Klein*, 22 T. L. R. 664, under the provision of the Bankruptcy Act giving priority for "wages or salary of any clerk or servant," that a commercial traveller was entitled to payment in full of commission earned by him, his contract of employment providing for payment to him of a fixed sum per week and in addition a fixed commission on all goods sold by him. The same principle would apply under the Ontario Assignments Act, and under the Dominion Winding-up Act.

**Will.]**—The judgment in *In re Stamford*, 22 T. L. R. 81, noted ante p. 21, as to gifts of plate in two houses, the plate usually in one house being at the time of the testator's death temporarily in the other, has been affirmed by the Court of Appeal: 22 T. L. R. 632.

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## THE LATEST ONTARIO DECISIONS.\*

**Appeal to Supreme Court of Canada.]**—An extension of time for serving notice of appeal to the Supreme Court of Canada from a unanimous judgment of the Court of Appeal (7 O. W. R. 511, noted ante 449) was refused by Garrow, J.A., in *London and Western Trusts Co. v. Lake Erie and Detroit River R. W. Co.*, 8 O. W. R. 31, there being no special circumstances, in his opinion, and the application being made after the expiration of the 20 days within which the notice should have been given, and it not being made to appear that there was during that period any bona fide intention to appeal.

**Assessment and Taxes.]**—In *Goodwin v. City of Ottawa*, 8 O. W. R. 77, the judgment of Teetzel, J., 7 O. W. R. 204 (noted ante 213), was affirmed by a Divisional Court.—It was held by Mabee, J., in *Rideau Club v. City of Ottawa*, 8 O. W. R. 106, that s. 10 of the Assessment Act, 4 Edw. VII. c. 23, includes a "members' club" as well as a proprietary club, and that the expression "carrying on the business of what is known as a club" does not restrict its application to clubs intended to make a gain or profit.

**Bankruptcy and Insolvency.]**—The chattel mortgage attacked in *Allan v. McLean*, 8 O. W. R. 223, was given by the debtor Levagood to the defendant at the solicitation of Levagood's bank at which his account was overdrawn, and had been for some time. Three days afterwards Levagood assigned, and it appeared that the manager of the bank was aware of his insolvency at the time the mortgage was given, though the defendant was not. It appearing also that the application for the loan was made by the bank manager to the defendant, and that the latter agreed to make it, to oblige

\* Short notes of the most important cases in Volume VIII. of the Ontario Weekly Reporter, Nos. 2, 3, 4, 5, pp. 17 to 256, inclusive.

the bank and without any inquiry as to Levagood's title to the property, except to ask if there were any liens against it, Clute, J., was of opinion that the case was within the principle of *Burns v. Wilson*, 28 S. C. R. 207, and that the transaction could not stand.

**Company.]**—The validity of a sale by the directors of the defendant company to one of themselves, of all the assets of the company, without the sanction of the shareholders, was in issue in *Ellis v. Norwich Broom and Brush Co.*, 8 O. W. R. 25. It appearing reasonably clear that, if the sale should be set aside, the shareholders would themselves take steps to effect a similar sale to the same person, Anglin, J., on the authority of *Bainbridge v. Smith*, 41 Ch. D. 462, and *Pender v. Lushington*, 6 Ch. D. 70, 79-80, directed that a meeting of the shareholders be called to ratify or express their disapproval of such sale, reserving judgment meanwhile.

**Contract.]**—Having regard to all the terms of the agreement involved in *Finlay v. Ritchie*, 8 O. W. R. 176, under which the plaintiff deposited the certificates for certain shares indorsed in blank with the bank of Nova Scotia, to be delivered to the defendant upon payment of \$60 per share, the defendant, upon such deposit, to pay the plaintiff \$500, and to have the "right" to pay further sums on dates mentioned until all were paid, and particularly having regard to a clause by which, on the defendant's default for 5 days, all sums paid by him should be absolutely forfeited to the plaintiff, and all interest of the defendant under the agreement should thereupon cease, the Court of Appeal held that the construction put upon this agreement by the trial Judge and a Divisional Court, that it gave to the defendant the right to acquire the shares on making certain payments, without obliging him to make the payments, was the correct one.—In *McLeod v. Lawson*, *McLeod v. Crawford*, 8 O. W. R. 213, the Court of Appeal varied the judgment of Mabee, J., 7 O. W. R. 519 (noted ante 342), so as to declare that the defendant Lawson was entitled to the right (but not an exclusive right) to pro-

ceed with his mining operations upon the location in question in accordance with the terms of the agreement until the 31st August, 1905, the plaintiffs and the defendants Thomas Crawford and John McLeod being entitled to one-fourth of all the ore or mineral mined or taken up to that date, or one-fourth of the value thereof, as they might elect. and the plaintiffs and such defendants being entitled to all mined or taken since that date, subject to the allowance to the defendant Lawson of the actual expenses of operations since that date, and a fair allowance for his care and trouble in connection therewith. It was held that it was not the intention that a purchaser from a registered owner of leasehold lands under s. 21 of the Land Titles Act, should be obliged to take the lands subject to unregistered estates, rights, interests, or equities of which he had no notice.

**Copyright.]**—In *Life Publishing Co. v. Rose Publishing Co.*, 8 O. W. R. 28, the judgment of Teetzel, J., 7 O. W. R. 337 (noted ante 278), was affirmed by a Divisional Court.

**Costs.]**—After the argument of appeals from the judgment in *Re Cartwright and Town of Napanee*, 6 O. W. R. 773, 11 O. L. R. 69 (noted ante 30), and in *Re Knight and Town of Napanee*, and while the cases were standing for judgment, the town corporation, the respondents, procured the passing of an Act confirming the by-law attacked, but leaving the costs in the discretion of the Court. The Court of Appeal (8 O. W. R. 65) considered that there was want of compliance with the conditions that the conditions imposed by the Municipal Act as precedent to the passage of a valid by-law; that the appellants (applicants to quash the by-law) were quite within their rights in objecting; and that their motives in so doing were beside the question; and awarded them their costs.—In an administration matter, *Re Greer, Greer v. Greer*, 8 O. W. R. 69, the Master's certificate failed to shew any unusual proceedings or difficulties, but it was stated that the executors' accounts were intricate and badly kept, and gave rise to difficult questions. Magee,



J., decided that this was not sufficient to warrant an order, allowing taxed costs in lieu of the usual commission.— Although an agreement of submission to arbitration confers no power as to costs upon the arbitrator, the official arbitrator, under the Municipal Arbitration Act, R. S. O. 1897 c. 227, may, by virtue of s. 2, s.-s. 6, award costs, and, except for good reason, the sub-section should be applied retrospectively: the Court of Appeal in *Re Walton and City of Toronto*, 8 O. W. R. 154. —A Judge in Chambers, it was held by Anglin, J., in *Liddiard v. Toronto R. W. Co.*, 8 O. W. R. 222, has no jurisdiction to dispose of the costs of postponements of the trial of the action, nor has the trial Judge except at the trial.

**Criminal Law.]**—The Court of Appeal in *Rex v. Daun*, 8 O. W. R. 173, decided, on the authority of *Rex v. Lacelle*, 11 O. L. R. 74, 6 O. W. R. 911, that a Judge upon the summary trial before him without a jury of an accused upon a charge of seduction under s. 182 of the Criminal Code, had power to allow the prosecuting attorney to prefer an indictment for an offence committed on the 25th March, 1905, and to have the defendant elect to be tried on that charge, he having previously elected to be tried on the charge that the offence had been committed in October, 1905. The circumstances that the defendant, when first accused by the complainant's mother of being responsible for her condition, did not deny it; that on the following Sunday he told the complainant's father and mother that he always intended marrying her, and fixed a date for the wedding; that he talked with the complainant and her brother, of the intended marriage; that the defendant, while working at the same place as the complainant's brother and before the committal of the offence, told the latter that he thought enough of the complainant to make her his wife, and, subsequently, asked the brother how he would like him for a brother in law; and that the defendant and the complainant had had their photographs taken together; were held to be sufficient corroboration of the complainant, to satisfy s.-s. c of s. 684 of the Criminal Code.

**Crown.]**—There was a cumulative mass of evidence adduced for the plaintiff in *Attorney-General for Ontario v. Hargrave*, 8 O. W. R. 127, which, taken in conjunction with the unsatisfactory evidence of Hanes, the maker of the affidavit of discovery on which the Crown grants of mining leases sought to be cancelled were based, and the inconsistency of the evidence of witnesses called for the defendants both inherently and with proved facts, which, added to the practical impossibility of such discoveries having been made in the manner and at the time alleged, there being about a foot of snow on the ground, led Boyd, C., to the conclusion that such affidavit was not a true disclosure of the real facts of the discovery as respects the material facts of locality, date, and the nature and particulars of the find, and that, therefore, the “issue of the leases thereon by the subordinate officers, pending inquiries made and explanations sought by the Commissioner and another branch of the office, was improvident,” and that the grants should be vacated. The *ex post facto* evidence presented and urged as a reason for accepting Hanes as the actual discoverer was held to be not an argument for the Court, but a consideration for the Crown. The protection afforded by purchasers by the Land Titles Act was held not to apply, the root of title being struck at in the grant to the first holders and those in the same interest with them, and no purchaser for value having intervened, but the defendants were declared intitled to compensation for their improvements.

**Discovery.]**—A Divisional Court in *Chambers v. Jaffray*, 8 O. W. R. 26, upheld the ruling of Mulock, C.J., 7 O. W. R. 371 (noted ante 280), save on a minor question, as to which the order was varied to provide that the defendant should not be required to answer as to the person or persons under whose instructions the alleged libel was written, except such as were parties to the action.

**Drainage.]**—The Court of Appeal in *McOuat v. United Counties of Stormont, Dundas, and Glengarry*, 8 O. W. R.

40, decided that *Raleigh v. Williams*, [1893] A. C. 540, is no authority for the proposition that the plaintiffs would have a right of action if they failed, through the defendants' fault, to obtain all the benefit they would have had from the work of improving the channel of the Nation river if it had been properly done. It was found on the evidence that, since the work of removing the dam, shoals, and obstructions in question, all lower down than the plaintiffs' lands, was done under the supervision of an experienced and capable engineer, the superintendence of a competent committee of the defendants' council, and under the interested and vigilant eyes of the plaintiffs and others, and, though the work was done in 1885, the injury complained of was sustained only in 1899 and 1900, the plaintiffs charge that the work resulted in the greater obstruction of the channel which its purpose was to open, was not maintainable. The evidence rather indicated that improved drainage and cultivation had brought greater quantities of water with increased rapidity from a more extended watershed. Also it was held not established that the deposit of the material excavated had the effect of injuring the plaintiffs. Nor could it, considering that such material was deposited in the deep places of the river at least one foot below the bottom grade of the cut by direction of a capable engineer selected by the defendants. Besides, it was a question whether, under the contract, the contractor could have been required to deposit such material on the high and more distant banks of the stream, and these banks comprised the lands of private persons, rendering such deposit of material impossible.

**Evidence.]**—It was held by the Court of Appeal in *Re Dalton and City of Toronto*, 8 O. W. R. 154, that, upon an arbitration between a landlord and tenant upon the termination of the lease as to the value of "permanent improvements" to be paid for by the landlord, evidence aside from the lease itself was admissible to explain the meaning of the term "permanent improvements."

**False Arrest.]**—The plaintiffs in *Thomas v. Canadian Pacific R. W. Co.*, *Bush v. Canadian Pacific R. W. Co.*, 8 O. W. R. 93. were arrested by one Jardine, who was a watchman in the service of the defendants, and also a constable, appointed under s. 241 of the Railway Act, 1903. It was held by a Divisional Court that, in the absence of express authority, Jardine was acting without the scope of his employment as watchman in making the arrest away from the defendants' premises; that, since the arrest was made after the happening complained of, and not to prevent a theft or recover stolen property, it was something that the defendants, under the Railway Act, had no authority to do, and it ought not to be inferred that the defendants had conferred on him authority to do that which they could not themselves lawfully do; and that, if the arrest were made in Jardine's capacity as constable, he must be regarded as an officer of the law and not of the company, and the company, not having actively interfered or attempted to control his action, would not be liable to the plaintiffs therefor, simply because of procuring his appointment under the Act.

**Fire Insurance.]**—It was attempted in *Imperial Bank of Canada v. Royal Ins. Co.*, 8 O. W. R. 143, to satisfy a condition in a contract of fire insurance which was the same as the statutory condition (R. S. O. c. 203, s. 168, No. 8) by proving that the subsequent insurance had been effected by one who as a sub-agent of the defendants had procured the contract in question, but Boyd, C., decided that constructive notice of the subsequent insurance could not be fixed upon the company in this way.

**Highway.]**—*Hobin v. City of Ottawa*, 8 O. W. R. 101, was an action for damages for injuries resulting from negligence consisting in the non-repair of a sidewalk. The plaintiff, waiting for a car, stepped back to let some children pass, when her foot and leg went down a catch basin in the sidewalk, whose iron lid, 40 or 50 pounds in weight, was either not in position or tripped when she stepped on it. Mabee. J.



**Landlord and Tenant.]**—The cause of the dispute in *Cronkhite v. Imperial Bank of Canada*, 8 O. W. R. 18, was a vault door, attached by the defendants to the plaintiff's freehold, not merely by its own weight, but also by staples or pivots on which it hung, fixed in the masonry of a vault, constructed thereon by the lessor, and, as completing such vault, it was an "improvement of the inheritance." Anglin, J., was of opinion that, while the defendants, during the term of their original lease, made in 1890, might have had the right to remove it, such right, in the absence of any agreement providing therefor, and of circumstances from which such an understanding might be deduced, had been lost by their having surrendered that term without having done so, and entered into new leases, which could not, in spite of a reference in the last to an earlier one as an extension of the original, be considered to create merely excrescences upon or enlargements of the original term. Provisoes in these later leases that the defendants might "remove their fixtures" were held to be restricted in their operation to fixtures placed upon the premises by the defendants subsequent to the respective dates of these demises, and to other fixtures, if any, then upon the premises which the parties might agree should be deemed tenants' fixtures.—It was held by the Court of Appeal in *Re Dalton and City of Toronto*, 8 O. W. R. 154, that a tenant entitled to compensation for permanent improvements, in case of non-renewal of his lease, cannot recover for the result of work done in performance of agreements contained in prior leases by or for the tenants, and that such improvements when made become simply a part of the freehold. The term "permanent improvements" in this connection should be confined to improvements made by, and in a sense owned by, the tenant. Work done after the date of the last lease by a sub-lessee whose lease has expired before the end of the claimant's term, would enure to the benefit of the claimant, since in losing his renewal he lost the benefit of that improvement, exactly as he lost the benefit of the improvements made by himself. A



by-law, and that they would incur a penalty of \$50 by voting oftener, whereas such a person was entitled, having regard to s. 141 of R. S. O. 1897 c. 245, and ss. 338 to 374 of the first mentioned Act, to a vote in each ward in which he owned property, and had instructed the deputy-returning officers to refuse such votes, many of which were refused; and that over 100 persons voted who had not votes, some of whom, at least, were very energetic supporters of the by-law. It was held that s. 204 was not a bar to the consideration of this latter matter.

**Master and Servant.]**—In *Keiller v. John Inglis Co.*, 8 O. W. R. 170, the judgment of a Divisional Court, 6 O. W. R. 334 (noted 25 C. L. T. 503), was affirmed by the Court of Appeal.—In *Shea v. John Inglis Co.*, 8 O. W. R. 208, the Court of Appeal varied the order of a Divisional Court, 11 O. L. R. 124, 6 O. W. R. 962 (noted ante 118), by reducing the amount of the plaintiffs' judgment to \$1,100, it appearing that the jury had intended to assess the infant plaintiff's damages at \$1,100 and to award his father, the adult plaintiff, \$400 as a reimbursement for a supposed liability for medical expenses. There was no such liability shewn, and, besides, the defendants were probably bound to furnish the infant plaintiff, who was their apprentice, with medical attendance. There was no evidence of loss of services on the part of the father.

**Municipal Corporations.]**—The evidence in *Toronto R. W. Co. v. City of Toronto*, 8 O. W. R. 78, in the opinion of Meredith, C.J., did not shew that the proceedings of the defendants' Board of Control and committees of council looking to the expropriation for park purposes of certain lands of the plaintiffs intended to be used by them for a "car barn" were taken in bad faith or dictated by anything else than the public interest. The opinion was strongly expressed that, if it were a fact that the council, having under consideration the providing of a park in a particular section of the city, was induced to reject a site which it had under consideration and to choose another, because, upon that other,





**Negligence.]**—In *Heath v. Hamilton Street R. W. Co.*, 8 O. W. R. 32, the judgment of Mabee, J., 7 O. W. R. 459 (noted ante 349), was affirmed by a Divisional Court.—The negligence charged in *Gloster v. Toronto Electric Light Co.*, 8 O. W. R. 57, was the proximity of the defendants' wires to the west side of the Glen Road Bridge (which constituted a highway connecting the city of Toronto and the township of York) for an unreasonable length of time after the repairing and widening of the bridge. The infant plaintiff, a boy between 8 and 9 years of age, reached through a lattice work iron railing 4 feet 1 inch in height, with lozenge shaped openings  $16\frac{1}{4}$  inches wide, and touched the defendants' wire, whose insulation was imperfect, either by accident or with the design of reaching it with a metal toy, when his hand and head resting against the iron work were burned, and for this injury the action was brought. The Court of Appeal allowed an appeal from the judgment of Teetzel, J., on the findings of a jury, in favour of plaintiffs, holding that "the use of the bridge by the public as a highway, or for any lawful purpose incidental to such use, was not impeded by the existence of the wire in its then situation, and no deviation was possible by night or by day, in the ordinary course of such user, which could have resulted in the wire being touched by any one."

**Parliamentary Elections.]**—In *Re Port Arthur and Rainy River Provincial Election*, *Preston v. Kennedy*, 8 O. W. R. 46, the Court of Appeal held, Meredith, J.A., dissenting. except as to the scrutiny, that agency was not proved by the mere possession of a printed scrutineer's appointment paper signed by the respondent, but received from one not himself an agent, without evidence to shew how such paper came into the possession of him from whom it was received. Quære, whether such authority, in the case of corrupt acts by an agent, could subject the respondent to the same consequences as if such agent were a general agent. The irregularities shewn were held not to be so extensive as to deprive the respondent of the benefit of s. 214 of R. S. O. 1897 c.

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9. Matters decided in respect of the scrutiny were that an agent authorized to take entries and make locations, but not to sell or receive purchase money, under the Free Grants and Homesteads Act, is not disqualified as a voter by s. 4 of the Ontario Election Act, R. S. O. 1897 c. 9; that the proper lists for the returning officer to refer to, for the purpose of giving certificates under s. 94, were the lists in the poll books, for the subdivisions, delivered to him by the clerk of the peace or the clerk of the municipality; that a person not duly appointed an agent at a polling booth is not entitled to vote on a transfer certificate under s. 94 (1) and (4) of the Act; that the votes, except under ss. 94 and 108, of persons voting at polling places other than those at which they were entitled to vote, although on the list as entitled to vote elsewhere, should not have been received, and could not be allowed to stand; that votes on certificates signed in blank by the returning officer could not be allowed; and that the vote of one White whose name was not on the list of the poll booth where he tried to vote, and who did not demand or receive a tendered ballot in the manner required by s. 108, could not be allowed.

**Private Way.]**—A grant of the “use of a good and sufficient roadway not less than 10 feet in width leading to the rear” of a property conveyed, having a frontage of 22 feet by a depth of 90 feet, contemporaneously with a grant to another party of the adjoining property on the east to a depth of 80 feet, with a right of way in similar terms, was held by Clute, J., in *Brocklebank v. Colwill*, 8 O. W. R. 231, having regard to the location, and to the user immediately after, as well as the position of a door opening in the side of the first mentioned parcel at the rear of the second mentioned, to be complied with by giving a right of way over the 10 feet at the rear of the 80 foot lot to the easterly side of the 90 foot lot, instead of extending all the way across the end thereof. The plaintiff was held entitled to such a way as would enable loaded vehicles 25 feet in length to approach the premises with a full load and turn to get out, even though in one

place more than 10 feet wide. The plaintiff's right was held not abandoned by the building up of the doorway in the east wall opening on the 10 feet in rear of the 80 foot lot; but he was held not entitled to use the right of way in question for premises at the rear of his 90 feet subsequently acquired.

**Public Schools.]**—A motion to quash a township by-law altering the boundaries of school sections, was refused by Mabee, J., in *Re Almonte Board of Education and Township of Ramsay*, 8 O. W. R. 147, on the sole ground that s.-s. 4 of s. 29 of 6 Edw. VII. c. 53 (O.) has deprived the High Court of jurisdiction to entertain such an application. The matter should be determined upon a summary application to the Judge of the County or District Court of the county or district in which such school section or some part thereof is situated.

**Release.]**—In *Ontario Bank v. O'Reilly*, 8 O. W. R. 187, a letter in which the plaintiffs stated that, having no evidence that Frank O'Reilly was a member of a partnership known as the Ottawa Cold Storage and Freezing Co., they would not attempt to hold him liable as a partner in such concern in respect of certain notes, was held, in the circumstances of the case shewn in evidence, not to be such a release of one of several joint debtors as would release the others. The letter shewing, as it did, the intention to continue the liability of the other partners, was a sufficient reservation of the plaintiffs' rights against them.

**Sale of Goods.]**—The plaintiffs in *Flynn v. Kelly, Douglas, & Co.*, 8 O. W. R. 120, an action for the price of a car of canned fruits and vegetables, were held by Anglin, J., not entitled to succeed because the burden was on them to prove that the transcript of the telegraph message produced by them was a true copy of the order which the defendants handed to the telegraph company, and this had not been done. Assuming that the message handed by the defendants to the company for transmission was different, as they alleged, from

that produced by the plaintiff, while the company were their agents to transmit the message, on the authority of *Henkel v. Pope*, L. R. 6 Ex. 71, this authority was limited to the transmission of messages in the terms in which senders delivered them. With respect to an omission to send part of the order, the plaintiffs' excuse was that there was not room in the car, and that there was a custom of the trade, and the telegraphic orders received justified shipment only by carloads, was held valid, but in the circumstances the delay from the 29th August to the 7th October was so unreasonable that it might have justified the defendants in returning the other goods, had they taken delivery of them.

**Specific Performance.]**—The action of *Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co.*, 8 O. W. R. 254, for specific performance, was dismissed by Teetzel, J., because the conveyance tendered by the plaintiffs for execution included land in respect of which there was no pretence of any agreement giving the plaintiffs any right or interest therein. It was not decided whether a letter of the plaintiffs' vice-president offering to acquire certain lands, and its acceptance by the comptroller of the defendants, formed an agreement binding upon the defendants.

**Street Railways.]**—In *City of Toronto v. Toronto R. W. Co.*, 8 O. W. R. 179, the judgment of Street, J., 6 O. W. R. 871, 11 O. L. R. 103 (noted ante 43), was affirmed by the Court of Appeal, except on the point as to whether the defendants could be required by the plaintiffs to establish and lay down new lines and extend their tracks and car service on and into territory which, though now part of the city, was not within its limits at the date of the agreement, on which point, the Supreme Court having decided the question in the negative, 26 C. L. T. Occ. N. 454, reversing a previous judgment of the Court of Appeal, the appeal was allowed.

**Timber.]**—In *McWilliams v. Dickson Co. of Peterborough*, 8 O. W. R. 211, the Court of Appeal affirmed the

judgment of Street, J., 6 O. W. R. 706, (noted 25 C. L. T. 707).

**Vendor and Purchaser.]**—Specific performance was sought in *De Rosiers v. De Calles*, 8 O. W. R. 91, of an agreement for the sale for \$5,000 of “all the property belonging to the said A. D. De Calles, situate on the north side of Daly avenue in the said city of Ottawa, being street No. 171 Daly avenue.” The defendant owned lot 16 on the south side of Daly avenue (171) and lot 16 on the south side of Besserer street, which abutted the other lot. The whole property was worth at least \$6,000. The plaintiff asserted that the agreement covered the whole lot, and the defendant that it only covered the Daly street lot. The agreement was prepared at the instance of the plaintiff. It was alleged, but not satisfactorily established that the plaintiff had stated that the property he was offering was 200 feet in depth (the length of both lots). It was probable that the defendant had stated the size of the lots without intending to mislead. In the circumstances, believing both parties were acting bona fide, Mabee, J., refused specific performance, holding that the contract was not free from mistake, and to enforce it would be hard and unconscionable——In *Owen v. Mercier*, 8 O. W. R. 151, the plaintiff, the vendor, after he had executed the deed and before he had received any of the purchase money, became aware of the use to which the property was to be put, and refused to go on with the sale unless he had some assurance that the land would not be used for such illegal purpose as was contemplated. Meanwhile the deed, which had been sent to the registry office, was returned to have a correction made in the description. whereupon the plaintiff inserted a clause providing that the land should be forfeited and returned to him in case a house of ill fame should be maintained thereon. This the purchaser did not notice (as he said) until some months after completion, when he applied to the local Master of Titles to have this clause expunged, and the Master directed an action to be brought.

This action in which the vendor claimed a forfeiture under such clause was then brought. Boyd, C., directed that the deed should be cancelled, its registration vacated, and the purchase money repaid to the defendant with the value of any permanent improvements made on the property.—The Court of Appeal in *Walker-Parker Co. v. Thompson*, 8 O. W. R. 197, affirmed the order of a Divisional Court, 7 O. W. R. 125 (noted ante 136).

**Warehouse Receipts.]**—The dealings and transactions by which the plaintiffs in *Ontario Bank v. O'Reilly*, 8 O. W. R. 187, acquired the warehouse receipts whose validity was in question were conducted in good faith, and, it appearing that, upon the discount of certain notes from time to time, the warehouse receipts were taken as collateral, and the proceeds of the notes discounted placed to the credit of the makers in their current account, the Court of Appeal held that there was in spite of the fact that such account was on most occasions overdrawn, an actual advance at the time of the acquisition of each of such receipts sufficient to take the case out of the decision in *Halsted v. Bank of Hamilton*, 27 O. R. 435, 24 A. R. 132, 28 S. C. R. 235, for the proceeds were placed freely at the disposal of the bank's customers. If Frank O'Reilly were a member of both the firm giving the receipts and that to whom they were given, they would not by reason of that circumstance be invalidated by s.-s. (d) of s. 2 of the Bank Act. A shortage in the goods warehoused being claimed, it was held that the onus was on the owners or keepers of the warehouse to shew that such goods were removed by the plaintiffs, and this onus was not satisfied.

**Water and Watercourses.]**—In *C. Beck Manufacturing Co. v. Ontario Lumber Co.*, 8 O. W. R. 35, the Court of Appeal affirmed the order of a Divisional Court (10 O. L. R. 193, 6 O. W. R. 54). Moss, C.J.O., referring to the provisions of the Rivers and Streams Act, R. S. O. 1897 c. 142, said: "These provisions confer exclusive jurisdiction

to fix the tolls upon the different tribunals mentioned in s. 13, and render it incumbent upon any person seeking payment for the use of constructions or improvements to produce as a condition precedent to recovery an order or judgment of one of the tribunals fixing the tolls."

**Will.]**—The use of the words "her dower of one-third of my estate" by the testator in *Re Mannel*, 8 O. W. R. 70, was held by Mabee, J., to indicate that the word "dower" was not used in its technical sense, and that the widow was entitled, under a clause in the will by implication making a gift to her described by such words, to one-third absolutely of the proceeds of the testator's real and personal property, after payment of his debts and funeral and testamentary expenses.—The words "on the terms, charges, payments, and conditions hereinbefore mentioned to be imposed upon my son Denis Keleher," attached to a gift over upon the death of the son Denis, "without lawful issue of his body," in a will not governed by the Wills Act, were held by Meredith, C.J., in *Re Keleher*, 8 O. W. R. 225, not sufficient to restrict the reference to the death of Denis to his death in the testator's lifetime.—Matters determined by Meredith, C.J., in *Re Church*, 8 O. W. R. 228, were: (1) that, under a gift to nephews and nieces, providing that should any of them die before the testator, their shares were to be divided equally among their children, the children of deceased nephews and nieces who had died before the will was made were not entitled to the legacies which their respective parents would have been entitled to had they been then living and survived the testator; (2) that a gift of legacies as above, and a gift of legacies to persons described as "widow daughter of Thomas Church" and "widow daughter of Harriett Raymond," and by name, the persons so described being also a nephew and nieces of the testator, were cumulative; (3) that notwithstanding the use of the words "absolutely" and "full sum" applied to the secondly mentioned legacies, all such legacies should abate pro rata, if the assets were



insufficient; (4) that all those to whom legacies were given, except Joseph Church, who was excepted from the nephews and nieces, and given \$1 "only," and including nephews, nieces, children of deceased nephews and nieces, and children of Joseph Church by his first wife, should all share equally in the residue; and (5) that Joseph Church was not himself entitled to share in the residue, the language shewing that he was not to participate to a greater extent than \$1.

**Writ of Summons.]**—The indorsement of the claim upon the writ of summons in *Green v. George*, 8 O. W. R. 247, was held by Britton, J., not to be sufficient as a special indorsement, for the reason that it included a charge for interest. The claim was upon an account stated, and it was not alleged that interest was demanded, or that the defendant was informed that he would be charged with interest, or that he promised to pay interest, nor was anything shown from which an implied promise to pay interest might be deduced.

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## CASES FROM WESTERN CANADA.\*

**Appeal.]**—In *Munroe v. Morrison* (YT.), 4 W. L. R. 31, after an application to Craig, J., in Chambers (2 W. L. R. 367, noted ante 49), had been refused, a substantive motion was made to the full Court for an extension of the time for appealing under Rule 512. The Court were of opinion that the application should have been made by way of appeal, and that the appeal in the first instance should have been made from a Judge in Chambers to a single Judge. On the merits it was urged that the delay was due to the defendant Hebb having been advised by his solicitor that it was not necessary for him to launch an appeal, for the reason that, as a co-partner of the defendant McDonald, he would have the benefit of an appeal about to be launched by the latter, but the Court held that the mistake of a solicitor in regard to the law is not such a special circumstance as would warrant the extension desired after such long delay.

**Bankruptcy and Insolvency.]**—The transaction impeached in *Newton v. Lilly* (Man.), 3 W. L. R. 537, consisted in a sale by the debtors, A. M. Mouat & Co., of their stock-in-trade to the defendant Lilly, the latter assuming the liability of the former to Gault Bros. & Co., Limited, who, in consideration thereof, released them from liability. Mouat & Co. assigned, and the action was brought within the 60 days mentioned in s. 41 of the Assignments Act. It did not appear that Gault Bros. & Co. were aware of the insolvency of Mouat & Co., if they were insolvent, which was doubtful, and the transaction was entered into in good faith. The full Court held that the transaction did not come within ss. 38 and 39 of the Act, but rather within the saving clause, s. 41, as being in effect a payment of money to a creditor, so far, at least, as Gault Bros.

\* Short notes of the most important cases in Volume III. of the *Western Law Reporter*, No. 7. pp. 517 to 580, inclusive, and in Volume IV., No. 1. pp. 1 to 36, inclusive.

& Co. and Mouat & Co. were concerned, and it was not attacked as a sale by Mouat & Co. to Lilly. Section 45 was held not to apply, the same being limited to transfers of considerations other than money.—In *Howe v. Reeve* (B. C.), 3 W. L. R. 555, a receipt had been given to the plaintiff by the insolvents, as follows:—"Vancouver, B.C., April 3rd, 1906. Received from George Howe \$650 on agreement that scow of lumber now ready be sent to his order, and that this loan shall be first claim on same." Another receipt was given in similar terms. Hunter, C.J., held that these documents did not come within s. 7 of the Bills of Sale Act, but were rather warrants or orders for the delivery of goods within the meaning of s. 3; and, in any event, that such orders had been superseded by the acceptance by the Pacific Coast Lumber Co., consignees of the lumber, of an order directing them to pay the proceeds to the plaintiff, which relieved the insolvents; and that no payment had been made within s. 40 of the Creditors Trust Deeds Act.

**Constitutional Law.]**—The main question in *Re Prince Albert City Provincial Election, Strachan v. Lamont* (N. W. T.), 3 W. L. R. 571, was whether the Court had jurisdiction to entertain a petition against the return of a member of the Legislative Assembly of Saskatchewan. Prendergast, J., in an interesting judgment of some length, after pointing out that it is an essential principle of the common law of Parliament that that body as a whole is the guardian and arbiter of its prerogatives and privileges, and having regard to ss. 14 and 16 of the Saskatchewan Act, and the fact that the former section expressly continues in force the Legislative Assembly Ordinance and the Election Ordinance, held that the Controverted Elections Ordinance was not continued in force, and that, as a consequence, the Court had not the jurisdiction in question.

**Costs.]**—The costs of obtaining security for costs were allowed to the defendants by Wetmore, J., on a motion by the

plaintiff for a review of the taxation of the defendants' costs in *Griffin v. Ruller* (N. W. T.), 4 W. L. R. 12, because their counterclaim arose out of the same matter as the plaintiff's claim, and the facts were also set up as a defence, and such costs exceeded the amount to which the plaintiff was found entitled for both claim and costs.

**Criminal Law.]**—The objection which Wetmore, J., held to be fatal to the conviction in *Rex v. Earley* (N. W. T.), 3 W. L. R. 567, was that, the summons being issued on the 9th January, the defendant was called upon to answer for an offence committed by her prior to the issuing of such summons, whereas the conviction, on an information amended to agree therewith, was that the defendant between the 1st January and the 12th January was a keeper of a house of ill-fame, so that she might have been convicted for an offence committed after the information was laid.—It was objected to the notice of appeal in *Rex v. Russell* (N. W. T.), 4 W. L. R. 16, that the offence was not stated as in the conviction, no date being mentioned as that on which it was committed, but Newlands, J., considered that there could be no doubt as to what conviction was alluded to in the notice, and, on the authority of *The Queen v. Justices of Oxfordshire*, 4 A. & E. 177, overruled this objection. The conviction was quashed owing to the unsatisfactory nature of the evidence.

**Executors and Administrators.]**—It was decided by Wetmore, J., in *Re Easton* (N. W. T.), 4 W. L. R. 23, that the administrator having, from time to time, relying upon the statements of the deceased, his father, who had come to the country at his request, and taken up as a homestead a pre-emption of the son, and who repeatedly said that what he had would be the son's "when he was through with it," meaning that he would leave the son all his property, done a large amount of work with his teams and farm implements for and on the homestead of the deceased, and the deceased having died intestate, was entitled to recover for such services upon a quantum meruit, and that his claim was not

barred by the Statute of Limitations, because the right of action did not accrue until the father's death in 1903. In any event the son had the right to retain the amount as a debt due him from the estate, even if his right of action were barred by the statute. The portion of the claim of Maggie Easton for services rendered in waiting upon the wife of the deceased during an illness was disallowed, because it appeared that she went there from a sense of duty and in a neighbourly way, as other neighbours did, but her claim for services for five months after the death of deceased's wife, for which she swore deceased promised to pay, was allowed. Apart from his jurisdiction as a Judge sitting in Probate, the Judge decided that there was jurisdiction to adjudicate upon these claims under clause 2 of Rule 597 of the Judicature Ordinance as enacted by s. 9 of c. 8 of the Ordinances of 1903.

**False Arrest and Imprisonment.]**—The full Court in *Sinclair v. Ruddell* (Man.), 3 W. L. R. 532, an action for false arrest and imprisonment, in dismissing an appeal by the defendants from the judgment upon the findings of a jury in favour of the plaintiff, decided that, though the trial Judge had told the jury that there was a total absence of reasonable and probable cause, having later told them in effect that this was simply a matter of opinion and that it was for them to find the facts upon which the question depended, his charge was not objectionable in this respect; that neither was it objectionable because he had refused to put questions which had been put in other cases and were proper enough—"The Judge is not bound or restricted to any particular mode of direction, or to put any particular form of question." It was also held that evidence of witnesses as to their opinion of the bad character of the plaintiff was properly rejected; and that, in an action for false imprisonment, the plaintiff is not bound to allege or prove malice as in a case of malicious prosecution; and that, therefore, the absence of evidence of malice

only affected the quantum of damages, which was not in question.

**Husband and Wife.]**—It was held by Wetmore, J., in *Barrett v. Barrett* (N. W. T.), 4 W. L. R. 7, that, since s. 2 of the Imperial Act 36 V. c. 12, passed subsequent to the 15th July, 1870, was not in force in the Territories, and under the common law a contract by which a father surrendered the custody of his children was against the policy of the law, the plaintiff relying entirely upon such a contract could not succeed in an action against her husband, to obtain the custody of their infant daughter.

**Illegal Contract.]**—The circumstances that the Steam Boilers Ordinance provides that before a certificate of qualification as an engineer can be obtained, the candidate must pass an examination as to his fitness to take charge of a steam boiler and produce a certificate of good conduct and sobriety, and that the Ordinance imposed on any one not so qualified who should operate a steam boiler a penalty of not less than \$5 and not more than \$50, were considered by Newlands, J., in *Hardy v. Worchomoka* (N. W. T.), 3 W. L. R. 579, to shew the intention to prohibit all not qualified from operating steam boilers, and he held, therefore, that the plaintiff could not, for the time he was without a certificate, recover for his services as engineer in charge of the defendants' steam threshing machine.

**Judgment Debtor.]**—Several points of practice were involved in *Fraser v. Kirkpatrick* (N. W. T.), 4 W. L. R. 1. Scott, J., decided that where it is intended to use the depositions of a party on his examination for discovery in aid of execution in support of a motion, it is not necessary that a copy thereof be served with the notice of motion, such depositions being on file in the clerk's office; that, while such depositions may be used in proceedings by the judgment creditor to obtain payment of his judgment debt otherwise than by execution, by reason of the provisions of Rule 380, they

cannot be used in a proceeding to punish a judgment debtor for non-payment; and that, where it is sought to commit a person for disobedience of an order requiring him not to do an act, it is sufficient to shew that such order has been brought to his notice, although where such order requires him to do an act it must be personally served and the original shewn to the person against whom it is directed.

**Justice of the Peace.]**—The conviction in *Rex v. Gray* (N. W. T.), 3 W. L. R. 564, was made by a single justice and purported to be under s. 94 of the Indian Act, as amended by 51 V. c. 22, s. 4. Scott, J., quashed the conviction, holding that a conviction for such an offence can only be made by a Judge, police magistrate, stipendiary magistrate, or two justices of the peace, or an Indian agent.

**Limitation of Actions.]**—It was decided by the full Court in *Wilson v. Graham* (Man.), 3 W. L. R. 517, reversing the decision of Dubuc, C.J., that an action by one who had agreed to purchase land, for damages against the vendor for breach of covenant against incumbrances, was not barred by s. 24 of the Real Property Limitation Act, that section having no application to such a claim.—It appeared that, while the cause of action in *Plano Manufacturing Co. v. Peterson* (N. W. T.), 3 W. L. R. 565, did not accrue within 6 years before the commencement of the action, the defendant did not come into the North-West Territories until within 6 years from its commencement, and it was contended by the defendant that s. 1 of c. 31 of the Consolidated Ordinances constituted the whole law with respect to the limitation of actions of this nature, in effect repealing the English statutes, Scott, J., refused to give effect to this contention, on the authority of *United States Savings and Loan Co. v. Rutledge* (Y. T.), 2 W. L. R. 471.

**Mechanics' Liens.]**—An appeal by the defendants in *Day v. Crown Grain Co. and Cleveland* (Man.), 3 W. L. R. 545, from the judgment of Richards, J. (2 W. L. R. 142, noted 25

C. L. T. 636), was allowed by the full Court, on the grounds that the plaintiff treated the contract as completed on the 20th April, 1904, and only returned to test the machinery, which would not, as would not the removing of such defects, if found, revive the right to file a lien, and that the other work done by the plaintiff was either not such as was contemplated by the contract, or not such as was a performance of part of the work.

**Municipal Corporations.]**—The poll taken on the local option by-law the validity of which was in question in *Re Swan River Local Option By-law* (Man.), 3 W. L. R. 546, shewed 302 votes in its favour, 195 against it, and 18 rejected ballots. The question was whether the 18 electors who had cast the rejected ballots had voted, within the meaning of s. 63 of the Liquor License Act, because, if they were to be considered as having voted, the by-law did not receive the assent of three-fifths of the electors who had voted, as required by the section mentioned. Richards, J., decided this question in the negative, upholding the by-law.—The claim of the plaintiff in *Baskerville v. Rural Municipality of Franklin* (Man.), 3 W. L. R. 547, was founded upon the neglect of the defendants to keep certain drains constructed by the provincial government, in repair, and the improper construction of other drains. With respect to what was called the "Island Drain," Mathers, J., held that the plaintiff was entitled to recover only nominal damages, because the capacity of this drain was so small in comparison with the Jordan, whose flow it was intended to relieve, that, even if it were effective, a very large quantity of water would still go upon the plaintiff's lands. Failure to maintain a certain dam across the Jordan for the purpose of raising the waters of the creek so as to force some through a ditch known as the "Jordan cut-off," was held not to entitle the plaintiff to damages, because it did not appear that when the dam was in existence it was effective for the purpose stated. Besides, had the defendants maintained it, they would



have subjected themselves to claims from owners of lands below it, who had complained that in ordinary times by reason of the dam the waters of the creek were prevented reaching them. It was held that the plaintiff could not complain of another ditch, since it was constructed under his supervision as an officer (roadmaster) of the defendants, at his request and for his benefit. The defendants were held not liable for flooding caused by acceleration of the flow of water caused by the construction by them of ditches alongside the roads which emptied into tributaries of the Jordan.

**Negligence.]**—In *Stonor v. Lamb* (Y. T.), 4 W. L. R. 26, the full Court dismissed the defendants' appeal from the verdict and judgment for the plaintiff at the trial, there being no fault found with the Judge's charge, and, in the opinion of the Court, the verdict not being unreasonable or perverse. The defendants were carrying on blasting operations, and were about to explode a charge at a point about 40 feet from a highway, when the plaintiff, a teamster bringing freight up the creeks, was approaching in his waggon. After lighting a short fuse, they sent two men out on to the road to give the alarm, and these came upon the road waving their arms and shouting "fire," whereupon the plaintiff stopped his horses for a few moments and started on again. One of the two men said "you are taking great chances in going." The plaintiff at no time spoke or gave indication that he was aware of what was going on, and proceeded on his journey, when the explosion took place, and he was struck by a lump of frozen earth, causing the injuries for which he sued. It was held that there was evidence of negligence proper for the jury, and that their verdict could not be interfered with.

**Particulars.]**—*Savage v. Canadian Pacific R. W. Co.* (Man.), 3 W. L. R. 522, is an unsatisfactory case, a "full Court" of two Judges being divided in opinion upon an appeal from an order of a Judge affirming an order of the Referee refusing particulars of the defence. Mathers, J., who was in favour of affirming the orders below, laid down

the rule, recently several times asserted in Ontario, that particulars will not be ordered after the close of the pleadings, unless in special circumstances. The action was brought by the widow of a conductor in the defendants' service, who was killed in an accident on their railway, to recover damages for his death. The defendants pleaded, *inter alia*, negligence and contributory negligence of the deceased, and of these pleas particulars were sought after the pleadings had been closed. Mathers, J., said that the only special circumstance was the fact that the person charged with the negligence was killed as a result of the accident, and therefore the plaintiff had no means of ascertaining what the negligence charged consisted of; and, as she was in the same position when pleading, that was not a special circumstance on which she could rely.

**Pleading.]**—Scott, J., in *Plano Manufacturing Co. v. Peterson* (N. W. T.), 3 W. L. R. 565, allowed the plaintiffs to amend by setting up in reply to a defence of the Statute of Limitations, the fact that the defendant had only come within the jurisdiction within 6 years, the defendant having admitted this fact, and the case coming within Rule 178, the real question in controversy being whether the plaintiffs were precluded by the Statute of Limitations from bringing the action.

**Railway.]**—*Wallman v. Canadian Pacific R. W. Co.* (Man.), 3 W. L. R. 526, was an action for the death of the plaintiff's husband, a section foreman on the defendants' railway, who was killed by a yard engine while engaged in his duty of examining the tracks in the defendants' Winnipeg yards. This duty was of an absorbing character and required the deceased to examine the tracks closely to see that they were in perfect line and gauge, and perfectly spiked, and to be between the tracks. The deceased was seen by another section man just after the engine, on which no look-out was kept and whose bell was not rung or whistle blown, struck him. The full Court held that the facts were sufficient to

support the findings of the jury affirming negligence on the part of the defendants, and negating want of reasonable care on the part of the deceased. The Court also considered that, had there been negligence on the part of the deceased, the defendants, by the exercise of reasonable care, there being a common law duty imposed on them in the circumstances to keep a look-out and give proper warning of the engine's approach, might still have avoided the accident.

**Statutes.]**—It was held by Hunter, C.J., in *Emerson v. Skinner* (B. C.), 3 W. L. R. 558, that the Timber Manufacturing Act, 1906, is not retrospective so as to authorize the seizure under s. 4 thereof of timber cut before the passing of the Act.

**Summary Judgment.]**—The plaintiffs, who applied for judgment under Rule 229, on admissions in the defendants' pleading, were held by Wetmore, J., in *Ross v. McBride* (N. W. T.), 3 W. L. R. 561, bound to accept such pleading as a whole, and, if they accepted judgment, not entitled to proceed with the action to recover the amount not admitted. A declaration, asked by the plaintiffs, that they were entitled to a lien on the lands of the defendants under an agreement providing therefor, was refused as to certain specified lands, because the same had, before the commencement of the action, been sold and transferred to persons who were not parties to the proceedings, and as to the defendants' other lands because there was no evidence that the defendants were interested in any other lands.

**Vendor and Purchaser.]**—Though the printed part of the agreement in question in *Wilson v. Graham* (Man.), 3 W. L. R. 517, was consistent with the contention of the defendant that the plaintiff, who had bought a quarter section of land subject to a mortgage to secure \$1,000, must have paid that sum as a condition precedent to his right to call upon the defendant to fulfil his covenants, or to bring an action

for damages for the breach thereof, the full Court considered that the written portion, inasmuch as it provided that the defendant should give a deed clear of all incumbrances save and except such mortgage, made it clear that it was not the intention of the parties that the mortgage should be paid off before the defendant should convey; and held that the plaintiff was entitled to damages for breach of the covenant against incumbrances.

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## DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.\*

**Appeal.]**—That no appeal lies to the Supreme Court of Prince Edward Island from a judgment of the City Court of Charlottetown, is the point decided by the full Court in *Wheatley v. Long* (P.E.I.), 1 E. L. R. 132. An Act of the legislature of Prince Edward Island of 1903 consolidating and amending the various Acts relating to the city of Charlottetown, enacts that there shall be in Charlottetown a court of record, to be called “The City Court,” over which Court one Judge shall preside, and further that such Court shall, so far as the same shall be applicable thereto, and so far as regards persons, both debtors and creditors, residing or doing business within the boundaries of Charlottetown, be vested with the same jurisdiction, powers, and authorities, up to but not beyond \$80, as the County Courts possess. By the County Courts Act an appeal is given in express words, but not so in the Act constituting the City Court, nor does that Act contain any reference to an appeal, nor to procedure in appeal. The Court held that the words “jurisdiction, powers, and authorities” have reference to the capacity of the Court in deciding cases before it, whereas the right of appeal is a privilege that appertains not to the Court, but to the suitors before it, and unless that privilege is unequivocally given, it does not exist.

**Canada Temperance Act.]**—“When a statute prescribing the punishment for an offence or a crime is repealed after such offence or crime has been committed, but before final judgment of conviction, though after a verdict of guilty, no punishment can be imposed, because the act must be punishable when judgment is demanded, and authority to render judgment must still reside in the Court. But when sentence

*Short notes of the most important cases in Volume I. of the Eastern Law Reporter, Nos. 3 and 4. pp. 117 to 200, inclusive.*

has been pronounced, and nothing remains but to fix the day when it shall be executed, the case is not affected by the repeal of the law, because the Court fixing the day of execution does not exercise judicial power, but only acts ministerially." In *re Lynch* (P.E.I.), 1 E. L. R. 134. The defendant was on the 6th September, 1905, convicted for an offence against the Canada Temperance Act; the operation of the Act was suspended by order in council on the 7th April, 1906; and on the 24th April, 1906, a commitment was issued upon the conviction and the defendant lodged in gaol. Hodgson, M.R., upon the defendant being brought before him on habeas corpus, expressed the gravest doubt whether the magistrate had power to delay the issue of the commitment; but that point was not argued; and, assuming the power to delay, the issue of the commitment was held to be merely a ministerial act, and as such performable after the repeal of the statute. —A great deal of ingenious if technical reasoning was displayed in the contentions overruled by Graham, E.J., in *Rex v. Woodlock* (N.S.), 1 E. L. R. 160. The prisoner had been convicted of a third offence against the Canada Temperance Act, and was in durance vile. Upon a motion for his discharge under the Nova Scotia Liberty of the Subject Act, it was contended, first, that there was not in the warrant of commitment a sufficient recital of an adjudication that the offence for which the prisoner was tried was a third offence. There was a recital of the adjudication and conviction by the magistrate of the present offence; then there were recitals of valid adjudications of a first and second offence respectively; and the warrant proceeded, "and it was thereby adjudged that the (defendant) for the first above recited offence, the same being a third offence, should be imprisoned," etc. This was held to be a sufficient recital of an adjudication that the present offence was a third offence. But, if there was any doubt about it, the conviction returned being according to the statutory form and perfectly good, effect could not be given to the supposed defect in the warrant, in view of the curative sections applicable to the case. It was

further contended that one of the certificates of the former convictions was invalid proof, in that it may have been the fact, from all that appeared on the face of the certificate, as the date of the information was not mentioned in it or otherwise proved, that the first conviction was for an offence committed more than three months before the information was laid, and therefore the offence may have been barred by s. 106. It was held that the magistrate would be justified in inferring that the certificate was *prima facie* evidence of an offence not barred by the statute, that is, that the information must have been (as it could have been) laid at a date which would in law cover an offence charged to have been committed between the 22nd May and the 22nd August, although the conviction did not take place till the 8th September.

**Company.]**—In *In re Tonquoy Gold Mining Co. (N.S.)*, 1 E. L. R. 142, the holder of certain “preferred shares or debentures” was held, in a proceeding for the winding-up of the company, to be a secured creditor and not merely a preferred shareholder, upon a consideration of the terms of a resolution authorizing the issue of the shares or debentures, the terms of the instruments issued pursuant thereto, and of a trust deed or mortgage to trustees to secure payment.

**Costs.]**—In disposing of the costs of an action for the construction of a will, *Parker v. Black (N.S.)*, 1 E. L. R. 128, noted post under “Will,” Mr. Justice Graham said: “Four counsel could have represented and argued all the contentions involved, and, following the usual rule, there ought not to be an order for costs out of the fund of unsuccessful parties, or of unsuccessful contentions by way of claim or resistance raised by parties otherwise in part successful, but only at most costs of successful parties or of successful contentions. I utter this as a warning to those on the road to the Court above. But there are cases where the point in dispute has been caused by the peculiar words used by the testator, and even unsuccessful parties have been allowed costs

out of the fund, and I intend to allow them here, although it is not the usual rule. The taxing master will have to discriminate in taxing these bills."—The broad question whether an appeal by one defendant enures to the benefit of another, recently suggested by the Yukon case of *Munroe v. Morrison*, 2 W. L. R. 367, 4 W. L. R. 31, was touched upon in *Fairweather v. Lloyd* (N.B.), 1 E. L. R. 154, but the decision turned upon a narrower point. There were two defendants, Lloyd and Robertson. Before the hearing Lloyd ceased to have any interest in the subject matter of the litigation, but his name was not struck out, and at the hearing the bill was dismissed with costs. This decree was reversed upon the plaintiff's appeal to the Supreme Court of New Brunswick, but was restored by the Judicial Committee of the Privy Council upon the appeal of the defendant Robertson only. The defendant Lloyd then sought to have his costs of suit taxed against the plaintiff under the original decree. It was contended that the Supreme Court having reversed the original decree, and Lloyd not having appealed against the judgment of the Supreme Court, it was conclusive as against him. The decision of Barker, J., was based upon the language used in the order in council expressing the judgment of the Judicial Committee—"that the said decree of the said Supreme Court, dated the 21st day of October, 1902, be and the same is hereby restored." "I am unable to conclude," he said, "that when the Judicial Committee recommended that the original decree be restored they intended to vary it, leaving it operative in favour of Robertson and against Lloyd. . . . In my opinion, the defendant Lloyd is in precisely the same position as to costs of his suit as if there never had been any appeal from the original decree."

**Criminal Law.]**—There was a considerable difference of opinion among the Judges who heard the various motions for discharge of the defendant from custody under a conviction for selling liquor to an Indian (*Rex v. Johnston* (N.S.), 1 E. L. R. 163), but the defendant was ultimately successful upon a ground characterized by Russell, J., as coming "down



to us from the evil days of excessive formalism and technicality, 'the times of ignorance that God winked at,' viz., that the defendant was not personally present when, upon his appeal from his conviction, judgment was given in his favour reducing the term of imprisonment and the amount of the fine awarded by the conviction!

**Deed.]**—In the conveyance of land from father to son in question in *Ogilvie v. Grant* (N.S.), 1 E. L. R. 117, the description was general if not vague: "The following tracts of land situate, lying, and being at Musquodoboit aforesaid, that is to say, one full moiety or half of the farm lot on which the (grantor) now resides, with one full half of the buildings thereon, and also one full half or moiety of the whole of the personal estate of the (grantor) which he now owns or possesses, together with one full half or moiety of all the woods, ways, waters, watercourses," etc. The grantor resided on what was known as the Story lots, and also owned a lot about two miles away from his residence, connected with the Story lots by a private way. The question was whether a half interest in the last named lot passed by the grantee. It was held by Longley, J., that parol evidence was admissible to enable the Court to determine the meaning of the general expressions used, and upon the evidence adduced that it was the intention of the grantor to convey an interest in the land two miles distant from his residence.

**License.]**—*Town of Dartmouth v. Dartmouth Rolling Mills Co.* (N.S.), 1 E. L. R. 194, was an action to restrain the defendants from cutting and obstructing sewers on their property, placed there by the plaintiffs under a revocable license given by the defendants' predecessors in title. Russell, J., held that the plaintiffs were not entitled to set up powers of expropriation not originally acted upon, and, the license having been revoked, that the Court could not interfere; and the action was dismissed.

**Parliamentary Elections.]**—A neat point under the Dominion Controverted Elections Act was raised in *The Hali-*

fax Election (N.S.), 1 E. L. R. 122. The petition was presented on the 13th December, 1904. Preliminary objections were filed, and were not finally disposed of till the 3rd October, 1905. On the 20th May, 1905, the petitioner made a motion to have a day fixed for the trial or to have the time for the commencement of the trial enlarged. The Dominion Parliament being then in session, the Court adjudged that the presence of the respondent was necessary at the trial, and enlarged the time for the commencement of the trial for 6 months from that date. On the 14th November, 1905, a similar application was made, and the Court on that date enlarged the time for 8 months. Within the 8 months the petitioner again applied to set the petition down for trial, and was met with a counter-application by the respondent to dismiss the petition, on the ground that the two enlarging orders were invalid, because at the time they were made the petition had not been set down for trial. This objection was overruled by the full bench of the Supreme Court of Nova Scotia in a carefully prepared judgment delivered by Graham, E.J., in which a number of Canadian cases are considered. The motion to dismiss the petition was also supported on the ground that it was not properly intitled. The title was: "Election of a member for the House of Commons for the electoral district of the county of Halifax," etc. For the county of Halifax two members are returned, and it was contended that the title should be "Election of members" or "Election of two members," etc. The very objection was given effect to, when taken as a preliminary objection, in *In re Queens County Dominion Election, Burke v. McLean* (P.E.I.), 25 Occ. N. 46, but that case was not apparently before the Nova Scotia Court. The Court doubted whether there was even an irregularity in the title, but considered that, if there were, it had been waived by many proceedings taken and by laches.—In *The Shelburne Election* (N.S.), 1 E. L. R. 179, a similar point to that firstly mentioned in the preceding case was raised. The petition was presented on the 12th December, 1904. Preliminary objections were

filed on the 5th March, 1905, and judgment was given on the 16th May, 1905, allowing the preliminary objection as to defective service. Security for an appeal to the Supreme Court of Canada was given on the 17th May. On the 20th May an application was made by the petitioner to enlarge the time for the commencement of the trial, upon which an order was made purporting to enlarge the time for 6 months. On the 4th November, 1905, the Supreme Court of Canada allowed the appeal, thus restoring the petition. On the 20th November the time for commencement of the trial was enlarged for 8 months. The petitioner now moved to set the case down for trial at a particular time and place under R. S. C. c. 9, s. 13, and the respondent moved to dismiss the petition, on the ground that there was not by the orders mentioned a valid enlargement of the time for the commencement of the trial provided for by s. 32, and the 6 months' period had run. The contention that the case must be set down for trial at a fixed date before there can be any order enlarging the time for the commencement of the trial was negatived for the reasons above given in the Halifax case. But the respondent attacked the order of the 20th May upon another ground, as to which there was a difference of opinion among the five Judges who heard the motions in the Supreme Court of Nova Scotia. The contention was that when the order of the 20th May was granted, the petition was dismissed, and there was no power to make any order. The majority of the Court held, following the *St. James Case*, *Brunet v. Bergeron*, 33 S. C. R. 137, that for the period during which the petition stood dismissed the six months' limitation was not running against the petitioner, and the six months had therefore not expired when the order of the 20th November was made. The minority relied on a later decision of the Supreme Court of Canada, *Dominion Cotton Mills v. Trecothick Marsh Commissioners*, 37 S. C. R. 79.

**Preference.]**—*McLeod v. Wightman* (P.E.I.), 1 E. L. R. 146, is a tolerably plain case of a trader on the eve of insol-

vency preferring the indorser of commercial paper for his accommodation. The bill was filed in the Rolls Court of Prince Edward Island to have a mortgage of land, a bill of sale of the insolvent's stock-in-trade as a general merchant, and a warrant of attorney to confess judgment, declared null and void as against the plaintiff, the assignee for the benefit of creditors generally of the insolvent. The mortgage and bill of sale were given on the 28th January, 1905, and were made payable two days after their execution. The warrant of attorney was dated the 1st February. On the 7th February the assignment was executed. By the provincial statute 61 V. c. 4, every conveyance, assignment, etc., except any bona fide sale in the ordinary course of trade or calling to innocent purchasers or parties, made by a person at a time when he is in insolvent circumstances, to a creditor, with intent to give such creditor an unjust preference, shall as against the creditors prejudiced, if the debtor within 60 days after the transaction makes an assignment for the benefit of creditors, be presumed *prima facie* to have been made with the intent aforesaid, and utterly void, whether the same be made voluntarily or under pressure. It was suggested that the transaction might be a bona fide sale within the exception. But Fitzgerald, V.-C., said that to construe the general words excepting a bona fide sale in the ordinary course of business to an innocent purchaser, as covering and permitting a conveyance to secure a past indebtedness, would be directly contrary to the Act, which only permits the giving of a security for a present advance of money or of goods. The fact of insolvency at the time was undisputed, and the proof offered by the defendant to rebut the presumption of intent to prefer, in the opinion of the Court, utterly failed. The insolvent's one purpose was to give the defendant a preferential security, to be recorded when necessary to hinder other creditors coming down on him seeking or enforcing payment. The question whether the defendant was, in relation to the warrant of attorney, a creditor of the insolvent, within the meaning of the statute, occasioned some difficulty.

In s. 2, referring to warrants of attorney, etc., the word "creditor" is not declared to include a surety, as is declared in s. 3, referring to conveyances, assignments, etc. The defendant was indorser upon the insolvent's notes, one of which was due, the others maturing. The Court found that the defendant had assumed the debt to the bank which held the notes, and become a creditor of the insolvent at the time of the impeached transactions. It was held also that there was collusion between the defendant and the insolvent in the giving of the warrant of attorney, and the judgment entered thereon was set aside.

**Seamen's Act.]**—"The point of substance raised in *Rex v. Willneff* (N.S.), 1 E. L. R. 168, an application for the discharge from imprisonment of a fisherman convicted under s. 91 of the Seamen's Act, R. S. C. c. 74, of refusing without reasonable cause to join his ship, was that the statute did not apply to a fisherman engaged on a fishing vessel under an agreement for profit sharing. Graham, E.J., was of the opinion that the definition of "Canadian home trade ship" included a fishing vessel of over 80 tons' burthen (as the one in question was shewn to be); that the definition of "seamen" was sufficient to cover the fishermen engaged on board of such a vessel; and that the agreement to share profits was an agreement for the payment of wages, as held in *Swinehammer v. Sawler*, 27 N. S. Reps. 448. .

**Will.]**—*Parker v. Black* (N.S.), 1 E. L. R. 128, was an action for the construction of a will. The testator bequeathed the income of a fund to his daughter, and directed that if she should die leaving no husband or issue (which was the actual event) the fund should be equally divided "among her brothers and sisters or their legal representatives." Graham, E.J., held that "legal representatives" meant executors or administrators, and that the provision was applicable only to those representatives of brothers and sisters who died after the testator and during the lifetime of the daughter.

## EDITORIAL REVIEW.

**The Late Walter Barwick.**

The appalling railway disaster at Salisbury on the 1st July last, with its dire loss of life, had among its victims three highly esteemed citizens of Toronto. The very largely attended public funeral on the 19th July of Mr. Walter Barwick, K.C., testified to the regard in which he was held by the Bench, the Bar, and his fellow-citizens generally. One Judge travelled from Winnipeg solely for the purpose of being present, and that was only one instance of many shewing the extreme affection in which Walter Barwick was held by his friends. Affection is the right word, for his own devotion to his friends was conspicuous, and was warmly reciprocated. Mr. Barwick was born in 1851, matriculated in Toronto University in 1869, graduated in 1873, was called to the Bar in 1877, and took silk in 1899. He was an active Bencher of the Law Society of Upper Canada, and will be greatly missed in that capacity as in others. At the head of a great legal firm he occupied a prominent position, and had many important corporation and private clients. He lived a busy, strenuous life; his appearances in Court were rare; but his success as an advocate in the cases in which he did appear, was marked. His sphere was the consulting room, and to the affairs of his clients he devoted himself with whole-hearted energy. Much of the work that he did was unremunerated, and perhaps he did that kind of work with even a little more zest than the other kind. The widow and the orphan and the afflicted never appealed to him in vain; his money, his time, his services, were freely at their disposal. He can be ill-spared; the legal profession and the country need such men as Walter Barwick.

**The Manitoba Bench.**

The Manitoba legislature at its last session created a Court of Appeal by an Act which came into force by proclamation on the 21st July last. On the same day the

Dominion government appointed the Judges. The new Court consists of four Judges, and the first occupants of the offices are: Chief Justice, H. 'M. Howell, K.C., appointed from the Bar; puisne Judges, A. E. Richards and W. E. Perdue, promoted from the King's Bench, and F. H. Phippen, K.C., from the Bar. The Court of King's Bench is henceforth to have three Judges, instead of four. Mr. Chief Justice Dubuc remains at the head, and the puisnes are Mr. Justice Mathers and Mr. Justice D. A. Macdonald, the latter being taken from the Bar. The present Chief Justice of the King's Bench retains the title of Chief Justice of Manitoba, but upon his death or retirement the Chief Justice of the Court of Appeal will have the title. Long life to the new Court and the new Judges !

#### **The Lord's Day Act.**

The new Lord's Day Act passed by the Dominion Parliament at the recent session was much debated in its passage through the two houses, and has been discussed with some acrimony in the public press. The difficulty of satisfying all sections of the community is obvious. The first section contains definitions of terms used in the Act. The second section is the principal prohibitory one, and is as follows:—

2. It shall not be lawful for any person on the Lord's Day, except as provided herein or in any Provincial Act or law, now or hereinafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with his calling, or for gain to do, or employ any other person to do, on that day any work, business or labour.

The third section contains the usual exception of "any work of necessity or mercy," with a long list of classes of work which the words quoted shall be deemed to include. Perhaps the most notable are the following:—

(p) Any unavoidable work after 6 o'clock in the afternoon of the Lord's Day, in the preparation of the regular Monday morning edition of a daily newspaper.

(q) The conveying his Majesty's mail and work incidental thereto.

(r) The delivery of milk for domestic use and the work of domestic servants and of watchmen.

(s) The operation by any Canadian electric street railway company, whose line is interprovincial or international, of its cars, for passenger traffic, on the Lord's Day in any line or branch now regularly operated.

(t) Work done by any person in the public service of his Majesty while acting therein under any regulation or direction of any department thereof.

(u) Any unavoidable work by fishermen after 6 o'clock in the afternoon of the Lord's Day in the taking of fish.

(v) All operations concerned with the making of maple sugar and maple syrup in the maple grove.

The others include matters connected with worship, sickness, transportation, &c.,

Section 4 is as follows:—

4. Except in cases of emergency, it shall not be lawful for any person to require any employee, engaged in any work described in paragraph (c) of section 3 of this Act, or in the work of any industrial process, or in connection with transportation, to do on the Lord's Day the usual work of his calling, unless such employee is allowed during the next six days of such week, 24 consecutive hours without labour.

(2) This section shall not apply to any employee engaged in the work of any industrial process in which the regular day's labour of such employee is not of more than eight hours' duration.

Then follow provisions as to Sunday games, Sunday newspapers, penalties for breaking the law, &c.



The last three clauses are as follows:—

14. Nothing herein shall prevent the operation on the Lord's Day for passenger traffic by any railway company incorporated or subject to the legislative authority of the Parliament of Canada, of its railways, where such operation is not otherwise prohibited. Nothing herein shall be construed to repeal or in any way affect any provision or any Act relating in any way to observance of the Lord's Day in force in any province of Canada when this Act comes into force, and where any person violates any of the provisions of this Act, and such offence is also a violation of any other Act, the offender may be proceeded against either under the provisions of this Act or under the provisions of any other Act applicable to the offence charged.

15. No action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed, or after the expiration of 60 days from the time of the commission of the alleged offence.

16. This Act shall come into force on the 1st day of March, 1907.

#### **Parliament and Mr. Justice Grantham.**

An extraordinary debate took place in the Imperial House of Commons on the 6th July upon a motion of Mr. MacNeill impugning the conduct of Mr. Justice Grantham, in the trial of the Yarmouth election petition. The debate ended in the motion being withdrawn. The Attorney-General pointed out the distinction between conduct which would justify removal from the Bench and observation and an attitude which the House could not regard with approval. He dispelled the notion that there could be any middle course open to the House if it went the length of censuring a Judge. It would be impossible to place upon the Bench with the cloud of such a censure hanging upon him. On the other hand, the Attorney-General pointed

a catena of high authorities to shew that the extreme penalty of removal from the Bench cannot be inflicted except for some defect of moral quality in the Judge. The learned Judge, though admitted to be an honest and innocent Tory partisan, and exonerated from any suspicion of moral turpitude, hardly comes off with credit. The Thunderer concludes its article on the debate with these very plain words: "While on the main question Mr. Justice Grantham was yesterday completely exonerated, the House was hardly less unanimous in holding that his conduct was injudicious and calculated to provoke charges which are really unmerited. But we feel very strongly that it is highly desirable, especially in political cases, that the House should not be tempted, after seeking a more judicial tribunal than can be found within its walls, to review the proceedings of that tribunal, and so to combine all the disadvantages of both methods of trying election petitions. Mr. Justice Grantham is, of course, the best judge of the line he ought to take in view of yesterday's debate. But he is senior puisne Judge; he has been on the Bench for more than 20 years, or 5 years longer than is necessary to secure his pension; and he will enter on his 72nd year in October. Taking these things into account, together with the impairment of his authority which must follow from this debate, although his uprightness is entirely vindicated, it would seem reasonable and natural were he to retire to well-earned repose before the close of the long vacation."

#### **The Quest for Error and the Doing of Justice.**

The following from "The Outlook," by Charles F. Amidon, Judge of the District Court of the United States District of North Dakota, is full of interest.

In 1887 a committee of the American Bar Association reported to that body, after a careful investigation of the subject, that new trials were granted in forty-six per cent. of all causes that were brought under review in appellate courts in this country. It was further found that in sixty per cent.

of these cases the appeal turned upon questions of pleading and practice. I myself have recently looked into this subject with respect to seven representative States of the Union, for the period extending from 1895 to 1900, and find that the conditions reported to the Bar Association have not improved, but, on the contrary, have in some respects grown worse. This morning's Chicago paper contains an account of a personal injury case that has been to the Supreme Court of Illinois four times, and had just been tried again and started on its weary journey for another review.

These facts point unmistakably to the capital vice of American law—viz., its instability of administration, the frequent retrials of the same controversy. For the purpose of comparison, and of seeing whether this condition is a necessary evil, I have examined the law reports of England for the period extending from 1890 to 1900, and I find that of all the causes that were brought under review on appeal in that country, new trials were granted in less than three and one-half per cent. Here is a country having the same body of substantive law that we have, having substantially the same practice that we have, and yet the result in the one case is new trials in forty-six per cent. of all causes brought under review, and in the other in less than three and one-half per cent.

What is the cause of this difference? I know that there are several minor causes to which attention might be directed, but the fundamental defect of our legal administration is the doctrine that, where error is found, prejudice will be presumed. That is the difference between the English and American administration of the law. In England there is no such thing at the present time as a bill of exceptions. A copy of the pleadings and of the written instruments that have appeared in the trial of the case is furnished to the appellate court, together with a transcript of the evidence, or more frequently a transcript of the brief notes of the presiding Judge, and then the question is not, Is there error

in the proceedings of the trial court? but the question is, Is the judgment just? And if it is, it is let alone. This doctrine, that where error is found prejudice will be presumed, removes the cause at once from the region of reality and fact into the thin air of presumption and metaphysics. The record is there—why presume prejudice? Why not look at the record and see whether prejudice in fact occurred? That is, whether the error is of such character as to produce a wrong judgment. After litigants have once been led over the weary course of justice, there ought to be, at the end, peace for both, and permanent fruition for one.

#### **A Scientific Teacher of Law.**

Dr. Christopher Columbus Langdell, who died last month, had been out of active service for several years, as Dane Professor of Law Emeritus at Harvard University. Few men of our time have had a more definite influence on the educational methods or done more constructive work in the educational field than this eminent lawyer. Graduating from Harvard in 1848, and from the Law School in 1853, he practised law for a number of years in the city of New York, and rapidly secured recognition as a man of unusual force, penetration, and soundness of intellect. In 1870 he accepted the Dane professorship in the Harvard Law School, and became as successful in his new vocation as he had been in his profession. With Professor Theodore W. Dwight, of the Columbia Law School, he ranked among the first teachers of law in the country. The two men differed, however, very widely in their methods. Professor Langdell, following the general trend of university work, applied the laboratory method to the study of the law by the introduction of what has become known as the "case" system. Law had been taught in the schools largely by text-books and lectures. Professor Langdell became convinced that the most thorough way of mastering legal principles was by studying the cases in which they are involved and the decisions in which their various aspects are stated. He substituted for the text-books then in use

collections of cases carefully prepared in the different fields of jurisprudence. There was at first a good deal of opposition to this radical change of method, but several of the leading law schools of the country adopted it later, and it is now the method used in nearly all the foremost law schools. It still has its critics, who call attention to the fact that since the system has been established at Harvard that university has not made any great contributions to legal literature, as it did in the days of Story, Parsons, Greenleaf, and other eminent legal writers, and that it has lost a certain literary quality which went with the study of law in the earlier time. The system is in harmony with the university methods now prevalent, which begin with the study of facts and reach the governing principle or law later by the inductive method. Its advantages are the concrete form in which the principles of law are presented, the close attention and thorough work required of the student, and the habit of patient investigation and of clear thinking induced by the method. (*The Outlook*.).

**M. A. P. on the Lord Chief Justice of England.**

Lord Alverstone, who succeeded the late Lord St. Helier as a member of the Ecclesiastical Discipline Commission, is a devoted Churchman. He looks exactly like a Bishop, says M. A. P., and does, as a matter of fact, sing in the choir at St. Mary Abbot's, Kensington. It used to be said, wickedly, when the present Bishop of Peterborough, Dr. Carr Glyn, was Vicar of Kensington, that when the then Sir Richard Webster's top notes were uplifted he would glance apprehensively up to the roof as if in terror lest the woodwork should be dislodged! His Lordship's brother commissioner, Sir Edward Clarke, can also sing a song; and there is a story that at some festive gathering at which they were both present, a mutual friend received successive confidences—from Sir Edward Clarke: "Ah, Webster, rare good fellow if he only didn't think he could sing;" and from Sir Richard Webster: "I have always had the highest regard for my friend Clarke, but that voice of his—really some one ought to tell him."

If Lord Alverstone does not exactly scintillate on the Bench, like Mr. Justice Darling, he has been the cause of wit in others, and never more notably than when, in one of the early electric light cases, he succeeded in changing the opinion of Lord Justice Cotton in regard to the thread-like filament now so familiar a sight within the bulb. This exploit of Dick Webster's was commemorated by a certain witty registrar of the Chancery Division in the following lines:—

'Twas no mean workman that devised  
A speech of such electric force;  
Successfully he carbonized  
The thread of his discourse.  
Logic and fact so close were packed,  
That Webster to his purpose bent  
Even a cotton filament.

Lord Alverstone has the distinction of having made the longest speech of any living lawyer. This was when he appeared as counsel for this country before the Venezuela Arbitration Commission, and his address occupied sixteen consecutive days.

#### **The American Bar Association.**

The 29th annual meeting of the association will be held at St. Paul, Minnesota, on Wednesday, Thursday, and Friday, the 29th, 30th, and 31st August, 1906. All the meetings will be held in the Capitol. A large volume containing the transactions of the 28th annual meeting has just been issued. Many of the formal papers and less formal discussions are full of interest.

#### **Recent American Decisions.**

*Bills and Notes.*—One whose indorsement was secured upon a note by the trick of inducing him to sign his name to a paper placed upon the note in such a way that the ink penetrated through to the note, is held, in *Yakima Valley Bank v. McAllister* (Wash.), 1 L. R. A. (N. S.) 1075, not to be liable.

The rule making certainty as to payment a condition of negotiability was applied in *Jeseph v. Catron* (N. M.), 1

L. R. A. (N. S.) 1120, by denying the negotiability of a note payable upon the confirmation by Congress of a certain land grant.

*Forgery.*—Uttering a letter with a forged signature for the purpose of falsely representing the bearer to be a friend of the writer, and giving him standing with persons to whom it may be presented, is held in *People v. Abeel* (N. Y.), 1 L. R. A. (N. S.) 730, to be forgery under the New York statute.

*Gift.*—A gift inter vivos is held, in *Harris Banking Co. v. Miller* (Mo.), 1 L. R. A. (N. S.) 790, not to be established by depositing a fund in a bank with the statement that it was intended for the donee, and the delivery to the latter of a certificate of deposit with an indorsement indicating that it was his.

*Landlord and Tenant.*—The right of a tenant to remove trade fixtures placed on the premises is held, in *Wadman v. Burke* (Cal.), 1 L. R. A. (N.S.) 1192, to be lost by entering into a new lease containing no recognition of his title to the fixtures, and binding him to surrender the premises in as good state and condition as reasonable use and wear would permit.

*Limitation of Actions.*—The Statute of Limitations is held, in *Cook v. Carpenter* (Pa.), 1 L. R. A. (N. S.) 900, not to begin to run against an unpaid subscription until demand is made for payment, where, by the terms of the contract, it is not payable until called for.

A legacy reciting that it was in consideration of the legatee's care for the testator's invalid mother is held, in *McNeal v. Pierce* (Ohio), 1 L. R. A. (N. S.) 1117, not to be an acknowledgment of a legal obligation which would remove the bar of the Statute of Limitations.

A holder of a demand certificate of deposit issued by a bank is held, in *Elliott v. Capital City State Bank* (Iowa),

1 L. R. A. (N.S.) 1130, to be under no obligation to demand payment within the period of the Statute of Limitations.

*Master and Servant.*—A barnman of a street railway company, charged with the duty of substituting a perfect car for one which has become disabled, is held, in *Chicago Union T. Co. v. Sawusch* (Ill.), 1 L. R. A. (N. S.) 670, not to be a fellow servant of the conductors on the road.

Railway employees engaged in operating a steam shovel in a gravel pit are held, in *Jemming v. Great Northern R. Co.* (Minn.), 1 L. R. A. (N. S.) 696, not to be engaged in operating a railway, within the statutes abrogating the fellow servant rule.

The assignment of servants of the same master to separate departments of the same general enterprise is held, in *Atchison & E. Bridge Co. v. Miller* (Kan.), 1 L. R. A. (N.S.) 682, not to affect their relation as fellow servants, unless the departments are so far disconnected that each may be regarded as a separate undertaking.

*Municipal Corporations.*—The distinction between private and public functions of a municipality is considered in *Dickinson v. Boston* (Mass.), 1 L. R. A. (N.S.) 664, which denies municipal liability for negligence of the city superintendent of the lamp department in respect to an unsafe lamp-post.

*Name.*—A limitation upon the right of one to use his own name in his own business is declared in *Morton v. Morton* (Cal.), 1 L. R. A. (N. S.) 660, holding that one who had established a business under a particular name, which he placed on the hats of his agents to inform customers that they were his representatives, could enjoin another of the same name, engaged in the same business, from using such name as a hat label in substantially the same way as the former, so as to deceive the public.

*Parent and Child.*—An action for the death of a minor child is held, in *Swift & Co. v. Johnson* (C. C.A. 8th C.), 1



L. R. A. (N. S.) 1161, to be for the sole benefit of the father, although he has deserted the family, to whose support the deceased was, at the time of his death, contributing.

*Railway.*—Injuries caused by gross negligence are held, in *Chicago, R. I. & P. R. Co. v. Hamler* (Ill.), 1 L. R. A. (N. S.) 674, to be included in a release, by a sleeping car porter, of the railway company from liability for negligent injury.

What is a reasonable time to keep a station platform lighted prior to the arrival of a train is held, in *Abbot v. Oregon R. & N. Co.* (Or.), 1 L. R. A. (N. S.) 851, to present a question for the jury.

The approval by the state commission of a freight rate based upon limited valuation of the property is held, in *Everett v. Norfolk & S. R. Co.* (N. C.), 1 L. R. A. (N. S.) 985, not to absolve the carrier from liability for full value of the property if lost through its negligence.

A railway company is held, in *Rodgers v. Choctaw, O. & G. R. Co.* (Ark.), 1 L. R. A. (N. S.) 1145, to be liable to a passenger thrown to the ground by the starting of a freight train with a jerk while he was on the platform, to which, with the knowledge of the conductor, he had gone for a necessary purpose, the conductor having neither warned him of the danger, nor taken any measures to prevent the starting of the train.

*Theatre.*—A right of action for trespass for failure to provide the seat called for by a theatre ticket is denied in *Horney v. Nixon* (Pa.), 1 L. R. A. (N. S.) 1184, upon the ground that the owner of the theatre is under no implied obligation to serve the public, and that the only remedy is assumpsit for breach of the contract.

A condition upon a theatre ticket that it will not be honoured if sold on the sidewalk is held, in *Collister v. Hayman* (N. Y.), 1 L. R. A. (N. S.) 1188, not to be against public policy.

## BOOK NOTICE.

**Wilcox's Foibles of the Bench:**—By Henry S. Wilcox, of the Chicago Bar. Chicago: Legal Literature Co. (\$1, cloth.)

Mr. Wilcox has, we understand, retired from active practice as "a trial lawyer," and is devoting his leisure to the making of books. Already published are, "A Strange Flaw," a novel of American life, and "Trials of a Stump Speaker," besides the little volume before us. These are to be followed by "Foibles of the Bar," "Frailties of the Jury," and "Fallacies of the Law." "Foibles of the Bench" is not bad reading for a summer day; there is much truth in the shrewd and caustic remarks of the veteran lawyer; but the absence of literary finish and the presence of unwelcome provincialisms partly spoil the enjoyment of the reader.

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# THE CANADIAN LAW TIMES.

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SEPTEMBER, 1906.

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## COMMENCEMENT OF WINDING-UP PROCEEDINGS.

**I**N Canada the winding-up begins with the service of the notice of presentation of the petition: R. S. C. c. 129, s. 7. In England it commences at the time of the presentation of the petition: Companies Act, 1862, s. 84.

The practice here is thus different from that in England. There a petition is presented to the Court (i.e., presented at the Registrar's office and filed there: Rule 26, 1903); and then notice is given by advertisement and service on the company. Consequently the presentation and filing of the petition fixes the date for the commencement of the winding-up. But with us it begins with the service of the notice.

Another dissimilarity is to be noticed. In England the petition is first filed, then advertised, and, after that, the affidavit in support is sworn and filed within four days after the petition is presented. Our practice is that the application is by way of an ordinary petition, which, in the absence of any statutory direction, must be supported by an affidavit duly filed before the petition is served. This seems to follow from s. 93 of the Winding-up Act, which applies the forms and procedures of the Court in other cases to applications under that Act.

By that practice, the affidavit in support must be filed before the service of the petition: Con. Rule 524. But it is irregular to file the petition before it is heard: *Re Western Insurance Co.* (1873), 6 P. R. 86; and the proper practice appears to be to file it on the day of hearing, and before the order upon it issues: *H. & L.* p. 1177.

The presentation of the petition in Canada is (notwithstanding the wording of s. 13—evidently copied from s. 85 of the English Companies Act of 1862) the formal application to Court by counsel, and is made on the day for which notice is given (see form 70), and the petition itself must conform to the Rules as to indorsement: Con. Rules, 134, 135, 136, 937.

Priority in time, in Ontario, thus dates from the service of the petition, properly indorsed, and not from the date of its filing: *Fuches v. Hamilton Tribune Co.* (1884), 10 P. R. 409. The case of *Re Estates Limited* (1904), 8 O. L. R. 564, evidently treats the date of the filing of the petition as the test of priority. But it does not appear from the report whether or not the point was argued, and the case cannot be regarded as decisive, or even as contrary to the decision in the *Fuches* case just cited. Service of the petition and notice must be properly effected. It may be served upon the president or other head officer, or upon the cashier, treasurer, or secretary, clerk, or agent of the corporation, or of any branch or agency thereof in Ontario: Con. Rule 159. An agent for a corporation whose chief place of business is without Ontario, is defined by the same Rule as a "person who, within Ontario, carries on any of the business of, or any business for," any such corporation.

But it has been held that simply having an agent in England is not sufficient; the company must have a residence of its own, a branch office, in England to give the Courts there jurisdiction: *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219; *Mercantile Bank of Australia*, [1892] 2 Ch. 204. It is also to be noted that the amending Act of 1889 (52 V. c. 32, s. 6 (D.)), confines the jurisdiction of any provincial Court to companies where the head office of the company is situated in that province. The provincial Courts have no extra-territorial jurisdiction, and, unless foreign companies are doing business in Ontario so as to be locally within the jurisdiction, the Dominion Winding-up Act confers no powers on the provincial Courts other than those

exercisable under Ontario statutes or rules. Whether, therefore, s. 6 of the amending Act (52 V. c. 32 (D.)) is to be read as applying to all companies by virtue of s. 2, or only to those named in s. 3, the provincial Courts would seem to be confined to initiating winding-up proceedings as to foreign companies (i.e., extra-territorial, and, therefore, foreign *sub modo*) to ancillary winding-up: *Allen v. Hanson* (1890), 18 S. C. R. 667; *North Australian Co. v. Goldsborough Co.* (1889), 61 L. T. 717; or to winding-up limited to the assets of persons within their jurisdiction.

A creditor having a claim of over \$200 may petition; but if the claim is bona fide disputed the Court will not pronounce the order. A shareholder holding shares to the amount of \$500 at least may apply: R. S. C. c. 129, s. 8, as amended by 62 & 63 V. c. 43, s. 4, and 52 V. c. 32, s. 5. By the latter section power is given to the company itself or to any shareholder to obtain a winding-up order where the powers of the company are, or ought to be, extinct, where the shareholders at a special meeting called for that purpose have passed a resolution requiring the company to be wound up, or where the company is insolvent within the meaning of the Winding-up Act. Doubts have been expressed whether the amending Act has reference only to the companies referred to in its third section.

But by s. 2 the amending Act is to be read with and construed as forming part of the Winding-up Act. Taking that literally, then s. 3 of the amending Act and s. 3 of the Winding-up Act would be read in conjunction as giving jurisdiction as to the companies referred to in both of those sections, and the right of application for an order as vested in those described in s. 8 of the principal Act (as amended), and in s. 5 of the amending Act of 1889.

Section 8 of the Winding-up Act allows an application to be made after four days' notice thereof. A practice has sprung up of disregarding this, provided the company appears and waives the required notice. This is clearly improper. As pointed out by Meredith, C.J., in *Re Grundy Stove Co.* (1904), 7 O. L. R. 252, the making of a winding-up order has

an important effect upon the rights of shareholders and others not parties to the proceedings: see ss. 15, 16, 17, 46, 47, 54, 57; see also *Re London and Westminster Wine Co.*, 12 W. R. 44, and *Re Joint Stock Co.*, 13 Beav. 434. Creditors and contributories may, before the making of an order, apply to restrain further proceedings: s. 13. They are also entitled to appear upon the petition and are entitled to their costs of so doing: *Re Lake Manufacturing Co.* (1893), 9 Man. L. R. 342; *Re Lake Winnipeg Co.* (1891), 7 Man. L. R. 255; *Re Alpha Oil Co.* (1887), 12 P. R. 298; *Re Bradford Navigation Co.* (1870), L. R. 5 Ch. 600; *Re Humber Iron Works Co.* (1866), L. R. 2 Eq. 15; *Re Spence's Co.* (1869), L. R. 9 Eq. 9; *Re Emerson* (1866), L. R. 2 Eq. 231; *Re Union Fire Insurance Co.* (1886), 13 A. R. at pp. 291-292. They may ask for more than one liquidator (s. 20), or nominate a provisional liquidator (s. 26), or require the arrest of a contributory, director, officer, or employee (s. 52).

The four days' notice is therefore valuable to the shareholders and to creditors, and the power of the Court to shorten or abridge the time is not to be found in the Act (*Re Eldorado Co.* (1886), 6 C. L. T. 542), and even if it exists ought not to be used to their prejudice: *semble*, per Meredith, C.J., *Re Abbott-Mitchell Co.* (1901), 2 O. L. R. 143; see also *Re National Whole Meal Co.*, [1891] 2 Ch. 151. The only plausible argument in favour of the power to shorten the time is that s. 93 applies the procedure of the Court in other cases to proceedings under the Act, and it appears to be answered by *McLean v. Pinkerton* (1882), 7 A. R. 490. The Court is not seised of the matter until the petition is presented, and, by the statute, its presentation is to be preceded by four days' notice, and the winding-up can only begin upon a service authorized by the Act.

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## THE THREE SCOTTISH VERDICTS.

In a recent essay I spoke of the verdict of "not proven," and expressed my liking for it, and also for a majority verdict of a jury of fifteen in criminal cases, instead of the mechanical yes or no of twelve.

Lord Moncreiff has quite an interesting article upon "not proven" in the June "Blackwood," which reached me at the end of the month. The writer, Lord Moncreiff, was born, brought up, and has lived in Scots law as an advocate and judge. He has a knowledge of the subject, and has formed opinions which he expresses clearly. He shews that the verdict was in old Scottish days "clean," or "foul;" that the verdict was given upon the indictment, which set forth the charge in great detail. A practice, he does not say, but which I believe, was the result of the old French intimacy. The jury's finding was limited to the question whether the allegations were proved or not, and, consequently, the reply said they were proved or not proved by the evidence adduced. But in 1728 a jury reverted (or, perhaps, copied from England) in order to mark its disagreement with the Judge's charge, to the words not guilty, thereby marking their belief in the innocence of the accused.

Since that time there have been, in Scotland, the three verdicts, "guilty," "not proven," "not guilty;" "not proven" being used to express the failure of evidence to convict; not guilty, the jury's belief in the innocence of the accused. Lord Moncreiff says that he does not remember a single case in which he believed the prisoner innocent where there was a verdict of not proven, while in many cases in which he thought the prisoner guilty the accused escaped through that verdict. Had his Lordship been more familiar with a practice where a unanimous yes or no is the alternative, he would have found many a case in which the Judge's charge amounted to not proven, and some disagreements and some unexpected

acquittals. Lord Moncreiff strongly believes that the verdict should be simply yes or no, but admits that his countrymen are in favour of not proven. Coming from that part of the nation which produces juries, I think I understand the prejudice against saying not guilty; the juries feel the prisoner is guilty, though the evidence is insufficient. Let Lord Moncreiff strike out the interloping not guilty, and have simply "guilty" and "not proven;" no one could complain then.

As a matter of fact, under our procedure with a true bill found by a grand jury, not guilty simply amounts to not proven, and when the Judge is satisfied the prisoner has been unjustly accused, he discharges him with the stereotyped speech that he leaves the dock without a stain on his character, or words conveying the meaning of the Scotch verdict of not guilty. I advise readers to peruse the whole article and Lord Moncreiff's note of three leading trials. In the last, in the face of a strong charge for acquittal by a most eminent Judge, the jury unanimously found not proven.

I wish to add a note on the great case of Madelaine Smith, in which any of the three verdicts might have been returned upon the evidence, and the jury chose the middle course. My old-time professor of chemistry, Dr. Stevenson Macadam, had a strong view in favour of the prisoner. The deceased had the marked red and white complexion often characteristic of arsenic eaters. He was supposed to have used the poison, and would have known the taste at once, but the point seems not to have been dwelt on. Upon the evidence the deceased must have swallowed between 100 and 200 grains of arsenic; 88 were found in the stomach. The prisoner had purchased an ounce, 480 grains. The professor told us that the preparation she had purchased was difficult to dissolve, and had the quantity been given in a cup of coffee it would have sunk like grounds and have been gritty like sand. Poor misguided Madelaine Smith! What a tragedy! I have read the trial over again in the new edition. I feel that the death of her lover, dastard as he was,



her letters, and the publicity and degradation, was too great a strain. She ran away Thursday, and ever afterwards her demeanour amused spectator, not of an actor in the dread told against her in Scotland. Reading the

I feel that the mystery would have been more searching examination of the servants. There shew traces of having been made up late cups, milk, and sugar have been disarranged, spoiled. And had nothing been touched, they have fallen through. But it is easy to criticise an idea was evidently that nearly half an ounce could have been given in a cup of coffee into one while she drank another. Such a Macadam held to be impossible.

GEO. M. RAE.

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## RECENT CASES FROM THE TIMES REPORTS.\*

**Bills of Exchange.]**—Bank of Montreal v. Exhibit and Trading Co., 22 T. L. R. 722, was an action on a promissory note made in England, payable to the order of "The Goderich Organ Company," and sent unstamped to that company at Goderich. The company was a limited liability company, its proper title being "The Goderich Organ Company, Limited." The note was received by it, and was indorsed to the plaintiffs in the proper company name, the word "Limited" being first added (presumably by the indorsing officer, though this was not proved) to the name in the body of the note. It was held that this addition was not an "apparent alteration" within the meaning of the Bills of Exchange Act, and that the note was good according to its original tenor, but that the indorsement being in that view inconsistent, the plaintiffs had no title. It was also held that the failure to stamp was fatal.

**Building Scheme.]**—The judgment in Whitehouse v. Hugh, 22 T. L. R. 89, noted ante p. 97, as to the non-binding effect of a representation by plan that a space would be used as a road, has been affirmed by the Court of Appeal: 22 T. L. R. 679. There was express power to the vendors to alter the building scheme, and dedication in fact was not made out.

**Chose in Action.]**—With some hesitation on the part of some of the members of the Court, the House of Lords (22 T. L. R. 729) have affirmed the judgment in Weinberg v. Ogdens Limited, 22 T. L. R. 58, noted ante p. 16, the result being that an assignment of the goodwill of a business "and also all the book and other debts, securities, credits, effects, contracts, and engagements," was held to pass a claim for damages for breach of contract.

\* Including the cases in No. 33, Vol. 22, week ending July 31, 1906.

pany.]—While the case was in the hands of the  
Manufacturing Co. of T. L. R. Co. the following provisions  
sections of the Companies Act 1862, 1867, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543,

Conflict of Laws.]—The will in question in *Re Bove*, T. L. R. 711, was made by a British subject, and according to English law, domiciled in France, but he was domiciled according to French law, which does not require any domicile but one acquired by law. It was held that the will, both as to construction and administration, was governed by English law.

**Contract.]**—The judgment in *Gray v. The Oxford*, 21 T. L. R. 664, noted 25 C. L. T. 498, that a provision for cancellation of an engagement in the event of the performance being found contrary to law, applied when the performance turned out to be of such nature that it could not be given without a license, has been affirmed by the Court of Appeal: 22 T. L. R. 684.

**Copyright.]**—*Davis v. Benjamin*, 22 T. L. R. 702, emphasizes the very wide protection afforded by the Imperial Literary Copyright Act, 5 & 6 V. c. 42. While drawings published individually as such have, in order to be protected, to be registered under the Fine Arts Copyright Act, which does not extend to the colonies (*Graves v. Gorrie*, 3 O. L. R. 697), drawings if published in a book, or catalogue, or (as the case in hand decides) on a mere sheet of paper, become, ipso facto, entitled to the protection of the Literary Copyright Act, and the proprietor of the copyright upon making due registration may bring his action to prevent any reproduction. The Literary Copyright Act extends to the colonies, and in the recent case of *Life Publishing Co. v. Rose Publishing Co.*, 8 O. W. R. 28, a similar view was taken, and drawings published in a magazine were held to be protected.

**Criminal Law.]**—The conviction in question in *Bex v. Girod*, 22 T. L. R. 720, upon an indictment charging the prisoners with stealing certain articles and receiving them well knowing them to have been stolen, was quashed because of the admission of evidence of their possession of other property alleged to have been stolen within the preceding twelve months, without proof that this property had been stolen. See the Criminal Code, s. 716.

**Damages.]**—In *Clark v. London General Omnibus Co.*, 22 T. L. R. 691, the Court of Appeal, reversing the judgment below, 21 T. L. R. 505, noted 25 C. L. T. 382, held that under Lord Campbell's Act a father cannot recover from defendants whose negligence has caused the death of his unmarried daughter, her funeral expenses paid by him. The

tion is put on the ground that the statute gives to certain persons a right to damages which the deceased if he had survived would have himself been entitled to recover; therefore funeral expenses. A large number of authorities are referred to, and it is of interest to note that the judgment of Justice Gwynne in *Monaghan v. Horn*, 7 S. C. R. 458, is specially commended.

**Discovery.]**—In *National Association of Operative Plasterers v. Smithies*, 22 T. L. R. 678, an action for damages against a trade union and the trustees thereof for conspiracy to persuade workmen not to fulfil their contracts, an order for discovery by the defendants was held to be proper, the right to object on the ground of possible incrimination being, it was pointed out, not of avail as against the order generally, only for the protection of specific and properly identified documents.

**Estoppel.]**—On the facts fully set out in the report of *Sanitary Steam Laundry Co. v. Barclay and Co.*, 22 T. L. R. 737, it was held that the defence of estoppel by negligence had not been made out. The son of the chairman of the board of a company, who had been appointed secretary of the company, obtained from the defendants, the bankers of the company, sums of money on cheques purporting to be signed by the company to which he had forged a director's signature. He had to the knowledge of his father committed these forgery some years before. He was allowed to have the custody of the cheque book and bank book, and the directors did not require these to be produced for their inspection. It was held that enough was not shewn to prevent the company from holding the bankers liable for the amounts paid on the forged cheques; to have that result something tending to show that the bankers would have to be shewn.

**Fraudulent Preference.]**—While an agreement to give a preference if and when required does not necessarily involve a fraudulent preference, there is in such a case an onus cast on

the creditor who gets the security to shew that the giving of it was not postponed in order to avoid publicity and interference with the debtor's credit. In *In re Jackson and Bassford, Limited*, 22 T. L. R. 708, it was held that a director of a company who had guaranteed the payment of an overdraft and who, shortly before winding-up proceedings, had obtained a debenture charge for the amount of his liability, had not satisfied this onus, and the charge was held to be a preference and invalid.

**Landlord and Tenant.]**—In view of the now common practice of renting space and supplying power, the case of *Bentley Brothers v. A. Metcalfe and Co.*, 22 T. L. R. 676, is of much interest. The defendants leased to the plaintiffs a room in a factory and agreed to supply power from an engine, which was under their control, to work a machine of the plaintiffs in that room. Owing to a defect in the engine it went too fast, and overdrove the machine, which broke and killed a workman, to whose widow the plaintiffs had to pay compensation. The Court of Appeal held that the contract to supply power was one of purchase and sale; that there was an obligation to supply power reasonably fit for the purpose for which it was required; that this obligation had not (as a conclusion of fact) been fulfilled; and that the defendants were therefore liable to make good to the plaintiffs the loss which they had suffered.—In *Lewis v. Baker*, 22 T. L. R. 680, the Court of Appeal, affirming the judgment below, 21 T. L. R. 539, noted 25 C. L. T. 383, held that an agreement to let premises, until determined, at a “yearly rent,” payable in quarterly instalments “in every year,” with power to either party “to determine the tenancy by giving to the other three calendar months’ notice in writing,” created a yearly tenancy determinable on three calendar months’ notice, terminating at the end of a year of the tenancy.—*Grunnell v. Welch*, 21 T. L. R. 554, noted 25 C. L. T. 438, has also been affirmed by the Court of Appeal, 22 T. L. R. 688, the short point being that a distress by a bailiff who broke into a house

was illegal and void ab initio, and no bar to a subsequent valid distress.

**Life Insurance.**]—The judgment in *Horncastle v. Equitable Life Assurance Society*, 22 T. L. R. 534, noted ante p. 493, that representations by an agent as to the expected value of an endowment policy were inconsistent with the provisions of the policy itself and not admissible in evidence, has been affirmed by the Court of Appeal: 22 T. L. R. 735.

**Light.**]—*Ankerson v. Connelly*, 22 T. L. R. 743, deals with the question of the right to light where buildings enjoying an easement of light are pulled down and buildings of a different kind are erected in their place, the result in the case in hand being that the easement was held to have been lost.

**Liquidated Damages.**]—*Heinrich Diestel v. D. M. Stevenson and Co.*, 22 T. L. R. 673, affords another opportunity of applying to a concrete case the now fairly well settled principles as to penalty and liquidated damages. The defendants agreed to sell to the plaintiff and the plaintiff agreed to buy from the defendants a large quantity of coal of two grades at prices fixed for each grade, to be shipped in instalments; "penalty for non-execution of this contract by either party one shilling per ton on the portion unexecuted and the amount of proved loss, if any, on freight actually arranged." With a good deal of hesitation Kennedy, J., came to the conclusion that the parties to the contract had intended by this clause to assess the possible damages, and he held therefore that for non-delivery of an instalment of coal the plaintiff's damages were limited to one shilling a ton.

**Master and Servant.**]—The important case of *Devonald v. Rosser and Sons*, 21 T. L. R. 595, noted 25 C. L. T. 439, has reached another stage, the Court of Appeal having now affirmed the judgment below: 22 T. L. R. 682. The dispute in the case was as to the right of the defendants to shut down their works when they were unable to get orders at remunerative prices, and thus to throw their workmen out of

employment, and it was held that no such right could be exercised to the prejudice of workmen having contracts for employment and entitled therefore to proper notice.

**Partner.]**—In *Trimble v. Goldberg*, 22 T. L. R. 717, the Judicial Committee refused to make two partners share with a third the profits of a venture of their own, this venture not being within the scope of the partnership business, or an undertaking in rivalry with it, or entered into because of information obtained by these two partners by virtue of their position as such. Even if the venture had been one forbidden by the articles, a share in the profits would not have been the right of the partner left out. He could have obtained a dissolution of the partnership and perhaps damages on proof of loss to the partnership by reason of the attention paid to the outside venture.

**Patent.]**—The judgment in *Badische Anilin und Soda Fabrik v. Isler*, 22 T. L. R. 326, noted ante p. 273, that under the special agreements in question the purchaser of the patented article from a licensee did not infringe by selling it again, has been affirmed by the Court of Appeal: 22 T. L. R. 710.—The judgment in *Northern Press Co. v. Hoe*, 22 T. L. R. 453, noted ante p. 400, holding that the machine in question was a mere combination of old machines and without patentable novelty, has also been affirmed by the Court of Appeal: 22 T. L. R. 723.—So too has been affirmed the judgment in *North Eastern Marine Engineering Co. v. Leeds Forge Co.*, 22 T. L. R. 178, noted ante p. 206, holding that a person liable to be proceeded against for alleged infringement of a patent, is not ipso facto entitled to bring an action for a declaration of the patent's invalidity: 22 T. L. R. 724.

**Principal and Agent.]** — *Nitedals Taendstikfabrik v. Bruster*, 22 T. L. R. 724, decides an interesting point as to agents' commissions. The agent was employed to sell the plaintiffs' matches on commission, and was not to sell any



matches. In breach of this agreement he did sell matches, and he also sold the plaintiffs' matches in some cases at a price higher than that placed by them upon and retained the excess. This excess he was ordered to the plaintiffs, and he was not allowed any commission in respect of these dishonest transactions. He was also ordered to pay to the plaintiffs the profits made by him on other matches. But he was held entitled to his commission on those sales in which he had acted honestly, the transactions being treated as severable, and a systematic course of fraudulent dealing not being made out.

**Delivery of Goods.]**—The judgment in *Weiner v. Smith*, 21 T. L. R. 478, noted 25 C. L. T. 386, has been affirmed by the Court of Appeal: 22 T. L. R. 699. The case deals with the delivery of goods "on consignment" and is on somewhat the same line as *Langley v. Kahnert*, 7 O. L. R. 356, 9 O. L. R. 36, 36 S. C. R. 397.

**Security for Costs.]**—In *Greener v. Kahn & Co.*, 22 T. L. R. 699, an insolvent trustee for the benefit of creditors, suing in his representative capacity to recover a debt due to the estate, was ordered to give security for costs. It was pointed out by the Court that such a result would not obtain in the case of a trustee in bankruptcy or a liquidator, each of whom has statutory duties to perform, or in the case of an executor.

**Trade Name.]**—The "*Appollinaris Salts*" case, *Appollinaris Co. v. Duckworth and Co.*, 22 T. L. R. 638, noted 25 C. L. T. 572, has been affirmed by the Court of Appeal: 22 T. L. R. 744.

**Usury.]**—In *Samuel v. Newbold*, 22 T. L. R. 703, the majority of Lords discuss with much care the construction of the Moneylenders' Act, and, affirming the Court of Appeal, come to the conclusion that a transaction may be held to be "harsh and unconscionable" merely because of the exorbitant rate of interest charged, and relief granted on that ground alone.

**Way.]**—*Milner's Safe Co. v. Great Northern R. W. Co.*, 22 T. L. R. 706, is useful as a reminder that a right of way, or other easement, has its limitations, and cannot be indefinitely increased to the detriment of others. A private passage ran behind a number of houses, and was used by the occupiers of these houses as a means of ingress and egress. A railway company bought two of the houses and built a station. It was held that this passage could not, to the annoyance and exclusion of the occupiers of the remaining houses, be used by large numbers of persons who desired to enter the station, this being an unreasonable and burdensome change in the original mode of enjoyment. In the absence of express grant, the extent of a right of way has to be decided as a matter of inference from the user.

**Will.]**—If a will duly executed has been in the testator's possession when last seen, and is not forthcoming after his death, there is, it is stated in *Drake v. Sykes*, 22 T. L. R. 741, a presumption that he has destroyed it *animo revocandi*, and this presumption is rebuttable only by clear evidence to the contrary. A letter by the testator stating that he has cancelled the will is not evidence of that fact, though it is evidence as to the state of mind and intention of the testator.

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## CASES FROM WESTERN CANADA.\*

**Broker.]**—The circumstances in *Donald v. Edwards & Co.* (N. W. T.), 4 W. L. R. 128, were such that New-J., found the transaction out of which the plaintiff's arose to be a mere gambling transaction in the price of , and, it appearing that the plaintiff had given notice anating the contract between himself and the defendants, e a deposit by the plaintiff with the defendants to cover argins was appropriated to satisfy a loss sustained by it was held that he was entitled to recover the amount ch deposit.

**Company.]**—A joint stock company incorporated under ws of the United Kingdom and licensed in 1889 under c. 49, was held by Macaulay, J., in *McDonald v. Klou-Government Concession* (Y. T.), 4 W. L. R. 151, dis- shing *Clazy v. Thornburn*, 2 W. L. R. 534, on the d that the action in this case was not on a contract but n account between the company and their manager, ed, notwithstanding the provisions of c. 59 of the Yukon ances, to maintain their action, and, although the plain- ho was acting manager of the defendant company, had in accounting to the company to charge certain sums for wages, which it was found on the evidence he was ed to charge the company with, he was held entitled to er the amount of such payments, in spite of the decision y v. Mills, 7 H. & N. 913, on the ground that the mis- entation of which he was guilty had not resulted in ge to the defendants so as to amount to an estoppel.

**Constitutional Law.]**—That the Animal Contagious Dis- Act, 1903, is intra vires of the Dominion Parliament, is

Short notes of the most important cases in Volume IV. of *The Law Reporter*, No. 2, pp. 87 to 220, inclusive.

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the point decided by Morrison, J., in *Brooks v. Moore* (B. C.), 4 W. L. R. 110.

**Contract.]**—In *Rogers v. Braun* (Man.), 4 W. L. R. 40, the plaintiff claimed, under an agreement with the defendant, 25 per cent, of the price at which it had been agreed that certain lands should be sold, in such agreement called a “commission,” but really representing a substantial interest of the plaintiff in such lands. It was agreed that, on the plaintiff “producing” a purchaser at the price and on the terms mentioned and the defendant refusing to make a sale, the plaintiff should be entitled to the amount claimed. The plaintiff, on the 13th March, through his agent, received an offer, at the price and on the terms stipulated, with notice that it would be withdrawn at 10 o’clock a. m. on the 16th, unless accepted, all of which he immediately communicated to the defendant. The plaintiff acted throughout with promptness and punctuality, but, owing to the leisurely fashion in which the defendant acted, his acceptance was not communicated to the purchaser until the offer was withdrawn at the hour named. Although the name of the purchaser was not disclosed except to the sub-agent, Mathers, J., held, that the plaintiff had complied with the requirements of the agreement.—In *Ross v. Parks* (Man.), 4 W. L. R. 212, the plaintiff, the vendor of a restaurant business and the chattels used therein, sued for a balance of purchase money. The defendant counterclaimed for the value of certain articles removed by the plaintiff, and the price of certain articles purchased to replace other articles also said to have been removed by the plaintiff. The plaintiff admitted taking some things but not all. Perdue, J., applied the maxim *omnia præsumentur contra spoliatorem*, on the authority of *Armory v. Delamirie*, 1 Stra. 505, and *Mortimer v. Craddock*, 12 L. J. C. P. 166, to raise the inference that the plaintiff had taken all the missing articles, and deprived him of costs, his actions having made it necessary to put in a defence.

**Criminal Law.]**—No judgment having been entered upon motion to quash the indictment in *Rex v. Hannay* (B. C.), 2 W. L. R. 96, although Martin, J., had delivered an opinion stating in which he stated that the motion ought to be dismissed (2 W. L. R. 543), the case came on before Duff, J., at the spring assizes, who held that there had been no adjudication upon the question raised, and traversed the case to the next assizes so that the matter might be decided by Martin, J.

**Evidence.]**—The objection was taken in *St. John v. Friel* (N.B.), 4 W.L.R. 126, that certain evidence taken under a subpoena was not receivable, as it had not been proved that the plaintiff and other witnesses were beyond the jurisdiction of the Court, as required by Rule 280. Newlands, J., overruled this objection, on the ground that the order for taking the evidence provided that "either party be at liberty to examine and give such depositions in evidence at the trial of the action, saving all just exceptions."

**Quebec Court.]**—A counterclaim, set up by the defendants in *Bow, McLachlan, & Co. v. The "Camoston"* (B. C.), 4 W. L. R. 113, in answer to the plaintiffs' claim for a sum of money due on the vessel named, built by them in Scotland, was dismissed by the defendants, for repairs to the vessel on her way out, which were necessary by the defective workmanship and materials supplied by the plaintiffs, was struck out by Morrison, J., a local Judge, on the ground that such counterclaim was not within the subject of Admiralty jurisdiction.

**Gambling Transactions.]**—Upon the trial of *Hickey v. Levey* (Man.), 4 W. L. R. 46, the defendant swore that the transaction out of which the claim sued on arose, was a gambling one. The evidence of a stock broker at Halifax taken on commission, and he swore that the shares in question had been actually purchased, but refused to say from whom. Richards, J., found in favour of the defendant, concluding that suspicion was cast upon the broker's evidence

by such refusal, apart from the fact that the defendant had no opportunity to verify his statement.

**Highway.]**—The defendants in *Iverson v. City of Winnipeg* (Man.), 4 W. L. R. 53, were held by Richards, J., to have been so negligent as to entitle the plaintiff to recover for injuries sustained by her by breaking through a wooden sidewalk on a public highway which was kept in repair by replacing defective planks with planks taken from other sidewalks that were removed to be replaced with granolithic walks, and which was inspected by a man in charge of 12 miles of sidewalk, walking over it every two weeks, and reporting defects, a method which owing to the liability of the stringers to rot, and the planks to rot on the under side, without the tops shewing any rot or defect, was “rather one by which breaks could be remedied after they had occurred, than one by which the frequently recurring danger of breaks could be prevented.” A notice which did not state the date or nature of the injury or how it occurred, was held to be sufficient under s. 669 (b) of the Municipal Act.

**Landlord and Tenant.]**—The plaintiff in *Dundas v. Osment* (N. W. T.), 4 W. L. R. 116, having failed to remove certain tenant's fixtures by the 28th February, 1903, when his term under a lease of the premises in which such fixtures were situated was put an end to by a month's notice pursuant to a provision in such lease, and, indeed, having been finally evicted without removing same, though given an opportunity by the sheriff to do so, was held by Newlands, J., not entitled to claim the value thereof from the defendant, his landlord. The defendant, on the other hand, was held entitled to claim double the annual value of the premises for the time the plaintiff retained possession after the expiration of the time mentioned in such notice, on the ground that the plaintiff's possession was not under a fair claim of right, it having been decided in a previous action that the plaintiff's contention that the provision for the termination of such lease was void under the Liquor License Ordinance, on grounds of public

was untenable. It was also held unnecessary to the effect of the notice in question that the month specified terminate at the end of a month of the term.

[*See* *el.*]—"I was asked by your attendant Williams to set your leg which I said was still dislocated and reduction. This was after you had laid (sic) in bed a week with your leg dislocated, which I consider a dis-credit to any practitioner." These words used in reference to a medical man's professional conduct, were held by the court, C.J., in *Williams v. Morris* (B. C.), 4 W. L. R. 99, to be *prima facie* libellous. It was no defence that there was merely a correct statement of the facts accompanied by a comment, the rule as to comment having application only to comments about acts or matters of public interest.

[*See* *Master and Servant.*]—The word "solely" in s. 2 (c) of the Workmen's Compensation Act was held by the court, J., in *Hill v. Granby Consolidated Mining, Smelting, and Power Co.* (B. C.), 4 W. L. R. 104, to exclude injuries attributable to the negligence or other wrongful act of the employer from the exception contained in that subsection, and the words "serious neglect" to refer to conduct which a prudent man would apprehend serious danger to persons or property, the test being the apprehended not actual consequences.—The plaintiff's claim for wages in *Wright v. Tunnicliffe* (N. W. T.), 4 W. L. R. 120, was allowed by the court, J. The circumstances were that the plaintiff came from England to this country with her infant daughter, on the strength of a letter from the defendant requesting her to come with her daughter as soon as possible, as girls could not get here, and on her arrival was put to work. She received no wages for 15 months, and the defendant contended that she was not to be paid for her work, but was merely to be kept on board and lodging. A claim by the plaintiff for her daughter's services was disallowed because, assuming that a child may claim the wages of a child under 16 years of age

(Eversley on Domestic Relations, 2nd. ed., p. 531), there was no evidence to shew when the daughter reached the age of 16 years, after which the parent could not recover.—The plaintiff in *Johnston v. Mead* (Y. T.), 4 W. L. R. 192, having received an offer by wire from the defendant through an agent of the plaintiff authorized to negotiate arrangements for the season, in the words following, "Prospector has vacancy wheel house; would you accept either mate-pilot or captain, two-fifty month?" which he accepted by wire, on presenting himself to his employers proposed to accept \$250 for one month only and demanded \$300 for each month thereafter, which they refused to pay. The full Court dismissed the plaintiff's action for damages for breach of contract of hiring, holding that it was not conceivable that when the plaintiff accepted the offer he intended to be hired only for one month.—Judgment was given in favour of the plaintiff by *Perdue, J.*, in *Williams v. Hammond* (Man.), 4 W. L. R. 208, an action for wrongful dismissal, because he considered that incompetency on the part of the plaintiff was not made out, since the defendant had given the plaintiff no opportunity to shew his ability as manager of his factory, which was the main employment, and never permitted the plaintiff to design and make up a fur garment, pronouncing him incompetent on an imperfect test afforded by the making of certain patterns. A remark by the plaintiff, in answer to a statement by the defendant when paying the plaintiff, that it was "another case of paying a man who was not worth it," that the defendant would have to prove the plaintiff incompetent before a judge and jury, being a single isolated instance, was not regarded as sufficient to justify a dismissal, considering the capacity in which the plaintiff was employed and the provocation.

**Mechanics' Liens.]**—The plaintiffs in *John Arbuthnot & Co. v. Winnipeg Manufacturing Co.* (Man.), 4 W. L. R. 48, were unable to shew in respect of which of three houses belonging to different owners, for which they had supplied ma-



the general balance claimed by them was owing, and upon the evidence of the contractors to shew that the fees had been paid in full for materials supplied to the other than that in respect of which a lien was claimed. Ds, J., considering this evidence reliable, and having to the fact that the time for filing liens against the houses had expired, held that they were not entitled to. Furthermore the plaintiffs had taken a note from the contractors not as collateral, but in settlement, and discounted had so deprived themselves of the right to file a lien.

**Woods and Minerals.]**—An appeal by the defendants in *Woods v. Jensen and McLaren v. Elliott* (Y.T.), 4 W.L.R. from the judgment of Craig, J., 3 W. L. R. 199 (noted 14), was allowed in part by the full Court, who, while in accord with the trial Judge's views as to the rule which to obtain as to the deposit of tailings in a stream to the benefit of an owner lower down, thought that his judgment requiring the defendants to retain everything having a perceptible particle, did not effect the purpose he had in view, and gave such judgment to provide that the defendants should retain "all tailings, which may be described as gravel, stones, and coarse sand," but that "material which floats easily away at a slow rate of speed, such as silt and fine sand, cannot be retained by any reasonable dam which could be constructed, should be allowed to flow in the stream to the benefit below." The trial Judge having stated that "it would be possible for any one, no matter how long this case lasted, to take account would be taken," to ascertain, with reasonable certainty, the damage done by the defendants, the Court reduced the damages awarded to \$1 in each case.—The full Court in *Kincaid v. Lamb* (Y. T.), 4 W. L. R. 167, affirming the judgment of Dugas, J., decided that a purchaser of a mining claim put into possession by the vendor under an agreement for sale then in escrow, upon which he had paid the deposit, and who, with the vendor's knowledge, was working and mining the ground, was entitled to maintain an

action against a trespasser, and that where, pending an appeal from the judgment of the Gold Commissioner in favour of his claim to part of such mining claim afterwards reversed, a third party with wilful intent to obtain an unfair advantage entered upon the ground, took out the pay dirt, and deliberately confused it with his own, such third party was not entitled in estimating the damage to be allowed the cost of severance.—Matters decided by the full Court in *Grant v. Treadgold* (Y. T.), 4 W. L. R. 173, were that whatever is needed to carry on the actual work of sinking the shafts in a mining claim, and in the bona fide development of the claim, should be allowed as work done under s. 41 of the regulations; that a reasonable time after the expiry of the year should be allowed to prove up the work in cases not governed by the regulation of the 31st July, 1905; that claims in actual occupation at the time of staking cannot be deemed to be vacant land under the mining regulations; that, where the posts are not marked on the side facing the claim legibly with the name and number of the claim, there is not a bona fide attempt to comply with s. 14, and this irregularity is not covered by s. 15; that a claim originally numbered 5 should not have on being divided on re-location been again numbered 5, but upper and lower half of number 5; and (Dugas, J., dissenting) that, under the present regulations, upon non-performance of the work and non-compliance with the regulations, a claim becomes absolutely forfeited and open to location, the regulation of itself cancelling the location on non-performance of the work.

**Mortgage.**—An important decision was that of Hunter, C. J., in *DeBeck v. Canada Permanent Mortgage Corporation* (B. C.), 4 W. L. R. 91, that where a mortgagee has instituted foreclosure proceedings and obtained an order nisi, so pursuing his forensic remedy, he is bound by the conditions thereof, one of which is that he must re-transfer the property to the mortgagor, within the time allowed, and, as a consequence, a sale without leave of the Court before the lapse of

period allowed for redemption is not effectual to take the mortgagor's right to redeem, and the latter is entitled to redeem at any time before the order nisi is made absolute.

**Municipal Corporations.]**—It was decided by Hunter, C. in *Municipality of District of South Vancouver v. Rae* (1900), 4 W. L. R. 98, that the Municipal Clauses Act does not prohibit the making of a contract between a member of a municipal council and the corporation, and that such a contract might or might not be void, depending on the circumstances, and that a pleading alleging a contract, and that a sum was paid thereunder, which it is sought to recover on the ground of illegality, discloses no cause of action.

**Police Magistrate.]**—In *Rex v. Olsen* (B. C.), 4 W. L. R. 145, it appeared that the seamen on a British ship of Canadian registry, in Canadian waters, had signed articles in the form prescribed by the Imperial Merchants Shipping Act, s. 140, but not in the form prescribed by the Seamen's Act, nor acknowledged with the formalities required thereby. The Judge, J., decided that a magistrate had no jurisdiction to punish such seamen summarily for offences against the provisions of s. 91 of such last mentioned Act, and on the authority of *Bunbury v. Fuller*, 9 Ex. 111, 140, that a conviction made was subject to review by certiorari, since the question of jurisdiction was one collateral to the merits of the case.

**Practice.]**—Upon a motion in *Fey v. Seimor* (Y. T.), 4 W. L. R. 145, to have an affidavit made by the claimant in a writ of habeas corpus proceeding removed from the files for refusal of the claimant to be cross-examined thereon, Craig, J., decided that the fact that a notice of motion was made returnable before a Judge other than the one who heard the motion, was not a fatal irregularity, but could be cured by amendment; nor was the fact that the affidavit of service did not state the hour of service of the subpoena; and, while a failure

to shew the original subpoena would be a good answer to a motion to commit, in the absence of a request to see the original, it was not so in this case. But it was also decided that the proper practice was either to issue a subpoena under Rule 281, on a direction of the Judge that such a subpoena do issue, or to take out an order for the cross-examination under Rule 292, neither of which courses was followed.

**Security for Costs.]**—Security for costs was ordered by Craig, J., in *Gumm v. McDonald* (Y.T.), 4 W. L. R. 149, on the ground that the plaintiff was resident without the territory, although at the time he left he had been examined *de bene esse*, so that his evidence could be used at the trial, and the action was ready for trial, and the trial had been postponed on account of the illness of the defendant. Owing to the defendant's delay in making his application, the security was limited to future costs. Except in case of an admission by the defendant shewing that he has no bona fide defence, the merits cannot be considered on an application for security for costs.

**Statutes.]**—It was decided in *Rex v. Canadian Consolidated Mines Limited* (B.C.), 4 W. L. R. 101, that employment for wages to perform duties in violation of the provisions of Rule 21 of s. 25 of the *Inspection of Metalliferous Mines Act, 1901*, constitutes an inducing or persuading within the meaning of Rule 21B of the amended Act; that the words "preceding section" in the latter Rule apply to the matters referred to in the former; and that it is not necessary for the application of the former Rule that all the machinery mentioned therein be operated in the same mine, the expression "machinery hereinafter mentioned" meaning any of the machinery thereinafter mentioned.

**Trusts.]**—It was decided by Mathers, J., in *North-West Construction Co. v. Valle* (Man.), 4 W. L. R. 37, on the authority of *Brown v. Sweet*, 7 A. R. 725, that in order to charge a purchaser of land with constructive notice of the

nce of a trust estate, known to his solicitor, such solicitor must have actual personal knowledge that his client is to make such purchase. Here such knowledge was communicated to a clerk in the solicitor's office. Though the plaintiff's interest was prior in point of time, and both claims equitable ones arising under an agreement with the corporation of Winnipeg for the purchase of the land in question, the Court considered that the plaintiffs were guilty of negligence in failing to file a caveat in the Land Titles Office, or to notify the city corporation of the trust in their favour, and so could not benefit by the maxim "*Qui prior est tempore potior est jure.*"

**Vendor and Purchaser.]**—In an action by the vendor for specific performance of the land sold, cancellation of the agreement of sale, and forfeiture of the amount paid, where the purchase price was to be paid in instalments, and certain instalments had come in arrear, there being no clause for the acceleration of payments, *Newlands, J.*, decided that the plaintiff was bound to accept the amount due according to the terms of the agreement, and could not require payment of the whole of the purchase money or in the alternative cancellation of the agreement: *Read v. Richardson (N. W. T.)*, 4 W. L. R. 123.

**Water and Watercourses.]** — *Duff, J.*, in *Esquimalt and Nanaimo Harbour Works Co. v. City of Victoria (B.C.)*, 4 W. L. R. 59, decided that the English law as to riparian rights is the law in British Columbia; that the plaintiffs under their Act of Incorporation and the amending Act of 1892, and by certain provisions by such enactments authorized, acquired in certain streams the riparian rights incident to the ownership of the lands purchased by them, and, not only so, but that they had power to acquire for the purpose of their undertakings rights in the waters of such streams, which, as separated from the ownership of land, are unknown at common law, and to acquire the waters of such streams out and out;

that certain lands purchased by the plaintiffs must be considered as acquired pursuant to the powers enabling them to acquire lands for the purposes of their undertaking; that the power to grant a water privilege or a record authorizing the diversion of water prior to the Act 1897 applied only to unappropriated waters which these waters could not be considered to be, and that, save only to the extent to which the reservations in the Crown grants might support it, no water record granted under the laws that existed at the time of the passing of the company's amending Act of 1892, could authorize the interference with the rights of the company under that Act, and that the Water Privileges Act of 1892 and the Water Clauses Consolidation Act of 1897 do not authorize any grants interfering with the plaintiffs' rights.

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## DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.\*

**Appeal under Collection Act.]** — In *McLure v. Parker* (1 E. L. R. 270), the majority of the full Court held, on a motion for prohibition, that a County Court Judge had no jurisdiction to hear an appeal from the decision of an officer under the Nova Scotia Collection Act, where the time for appeal was not given until after the expiry of ten days from the decision appealed from, and the appeal was brought on for hearing within thirty days, notwithstanding an order of the County Court Judge, made after the expiry of the ten days, purporting to extend the time for giving notice of appeal. The Court proceeded upon a construction of the provisions of the Collection Act governing the right of appeal, and the following cases: *Glengarry Election Case*, 14 S. C. R. 453; *In re Dominion Cotton Mills, The* (subsequent case), 37 S. C. R. 79; *Barker v. Palmer*, 8 Q. B. D. 101. Prohibition was granted, Russell, J., dissenting.

**Attachment.]**—Under a writ of attachment against the defendant in *Bank of Montreal v. Wallace* (N.S.), 1 E. L. R. 270, as an absent or absconding debtor, it was sought to attach his interest in certain coal mining leases standing in the name of the defendant and another in the Mines Office. On an application to set aside the writ and the judgment in the action, it was held by Graham, E.J., that in view of the provisions of the Mines Act as to registry of an attachment, it was unnecessary to attach the lease like other chattels. The property covered by the leases was situate in Inverclyde County, but the duplicate lease, the registry, and the defendant's domicile were all in the county of Halifax, and it was considered that the sheriff of Halifax was the proper officer to execute the writ, the interests attached not being

Short notes of the most important cases in Volume I. of the *Law Reporter*, No. 5, pp. 201 to 316, inclusive.

real estate situate in a particular county. Some objections to the proceedings were discussed and overruled, and it was also held, upon the evidence, that the defendants had an attachable beneficial interest.—Upon an application to set aside a writ of attachment against the property of a corporation, in *Clish v. Baltimore Nova Scotia* (N.S.), 1 E. L. R. 235, the question for the court was whether the defendants had any property, real or personal, within the province, which would warrant the issue of the writ. The rule laid down by the Court was that to support the writ it is not necessary to shew that the defendants had the possession of property by a valid and unquestioned title; it is sufficient if prima facie an interest in property is shown, and the fact that a writ of attachment is upheld against the defendants shewing at a later stage that they had no property. In 1901 the defendants acquired certain areas which they mortgaged to trustees for bond. In May, 1905, the venture not being a success, they asked the trustees that they would surrender the property. The trustees accepting, a written transfer was made in October, 1905, but this was not registered in the land office until November, and the writ of attachment issued in October. In these circumstances it was held that the defendants had an interest upon which the writ might attach.

**Company.]—***Stavert v. Lovett* (N.S.), 1 E. L. R. 236, an action brought by the liquidator of a company against directors for paying dividends out of capital, making advances to insolvent customers, and otherwise acting negligently as directors. Upon a motion for summary dismissal of the action, the objection was taken that the action was brought by the liquidator without the approval of the Court. But an order had been made at the commencement of the winding-up declaring that the liquidator was authorized by the Winding-up Act and amending Acts to do by the liquidator without the previous intervention or sanction of the Court or any Judge. This order



s. 13 of the amending Act of 1889, and was held by Russell, J., to be fully warranted by that section. It was also held that there was no notice to creditors, contributors and shareholders. Such notice was dispensed with by the same order, but only in cases where the liquidator required or found it necessary to make application for the approval of the Court before taking any step. "I am not," said Russell, J., "that the notice referred to in connection with the institution of litigation is not simply a non-precedent to the approval of the Court, such as would require the parties so notified to shew cause why the approval of the Court should not be given, and if this is the rationale of the matter it explains why the only notice dispensed with by the order is the notice of an application for approval. If that is what the statute means, the approval being dispensed with, the notice goes with it." The action, no doubt, should have been brought in the name of the company, but an amendment was allowed, following *Kent v. Communauté des Sœurs de Charité*, [1903] A. C. at p. 227.

**Criminal Law.]**—Some points of importance in regard to the jurisdiction of police and stipendiary magistrates for cities and towns were decided by the full Court upon habeas corpus in *Rex v. McLeod* (N.S.), 1 E. L. R. 202. The decision of the late Mr. Justice Ritchie in *Rex v. Bowers*, 6 Crim. Cas. 264, was approved, and it was held that the stipendiary magistrate for Halifax had the power under s. 786 of the Criminal Code, as amended in 1900, to try, with the consent of the accused, any of the offences defined by ss. 430 and 540, which cover all indictable offences other than those excepted by these sections, the offence (theft) for which the defendant was convicted not being included among the exceptions. Section 786 provides for the case where the stipendiary magistrate proposes in the first instance to try the case summarily, while s. 789, in its original form in the Code, applied where he did not so propose in the first instance, but discovered after entering on the prelimin-

any inquiry that the case was a proper one for a summary trial by consent; he had accordingly the power to proceed with the trial, with the consent of the accused, without entering upon any preliminary examination of the facts. The proceedings before the magistrate were not prescribed by the statute, but it was held by the Court, that they were sufficiently in accordance with the requirements of the statute to be considered as conforming in form only. The charge having been read to the accused precisely in the terms of the information, and he pleaded guilty to the charge, he could not be allowed afterwards to say that he was unaware of the nature and consequences of the particulars of the charge.

**Damages.]**—In *Bartlett v. Nova Scotia Steel and Coal Co.* (1894) 1 E. L. R. 226, Mr. Justice Russell, on appeal from the referee's report, gave an exposition of the milder mode of assessment of damages for trespass: "The rule, which is to have been a comparatively modern discovery of Lord Parke, is that if the property has been taken in good faith and ignorantly without any negligence, damages should be assessed as if it would have been a fair price if the wrongdoer had sold it while it was yet a portion of the land. This is Lord Blackburn's statement of the rule in *Livingstone v. Impey* (1842) 10 Cl. & F. 25, 40, and it differs from the statement of the rule made by Bacon, V.-C., in *Impey v. Merthyr Collieries Co.*, L. R. 15 Eq. 46. Lord Blackburn's statement of the rule, which is that damages for trespass of coal should be assessed as if the coal had been sold at a fair price, differs altogether from its intrinsic value. The latter is worth nothing at all. The former depends on the value which would be put upon it by purchasers, and it seems to me that this is manifestly the correct measure of the damages payable to the owner. The assessment of the damages for trespass of coal must be . . . a matter of conjecture and opinion, and not of law or work."

ed.]—*Bartlett v. Nova Scotia Steel Co. (N.S.)*, 1 E. 293, though reported at great length, is not a satisfactory decision. The action was for trespass to land and seizure of minerals, and the question involved was one of trespass. The action was tried by a jury, and a verdict was given for the plaintiff, which was set aside for misdirection in the absence of evidence to support it, a new trial being directed. The case has already been twice tried and has been much discussed by the Courts: see 35 N. S. Reps. 376, 37 N. S. Reps. 527, 5 S. C. R. 527.

**Municipal Corporations.]**—The main point decided by the Supreme Court upon an application in *In re Mack (N.S.)*, 24 N. S. R. 222, for leave to file an information in the nature of a *quo warranto*, is that the payer of a poll tax as such is not a ratepayer, and is therefore ineligible as a town councillor. An objection was raised that proceedings against a councillor could be taken only under the Municipal Control and Elections Act, R. S. N. S. 1900 c. 72, s. 66; but it was held that the ground of the application was not that the councillor was not duly elected or returned, but that he was acting as a town councillor in violation of R. S. N. S. 1900 c. 26 (3), which enacts that no person shall be qualified to be elected as councillor unless he is a ratepayer of the town. In *Queen v. Kirk*, 24 N. S. Reps. 70, was in this connection considered, and it was held that *quo warranto* was the appropriate remedy. The respondent relied also upon the fact that he had actually paid the rates upon a house rented by him in which he lived with his father, the property having been by mistake assessed in his father's name. But, it was held, this did not make him a ratepayer within the meaning of the statute. "I was inclined to think," said Russell, in delivering the principal judgment, "that possibly some construction might be made of the fact that our statute contains no indications that the term 'ratepayer' is equivalent to the expression 'liable to be rated.' . . . It may be a nice

question to determine the precise moment at which liable to be rated becomes a ratepayer. . . . B. . . .  
 tentation such as I at one time thought might be for  
 the form would require us to consider a man a rate  
 fore he had even got his name on the assessment  
 that, I think, cannot ever have been the intention  
 statute, however arguable it may be from the form  
 Upon demurrer to a bill filed by a ratepayer, on  
 himself and all other ratepayers except the individu  
 dants, against the corporation of a city and certain  
 common councillors, for an account of moneys alleged  
 been illegally expended, and to compel restoration to  
 treasury, it was held by Hodgson, M.R., that the d  
 volving upon the city council and corporation were  
 trusts, and that the action should have been brought  
 name of the Attorney-General: *Tanton v. City*  
*lottetown (P.E.I.)*, 1 E. L. R. 282.

**Parliamentary Elections.]**—In the matter of *T*  
*fax Election, Hetherington v. Roche, Hetherington*  
*ney (N.S.)*, 1 E. L. R. 255, a curious point arose  
 controverted election petition came on for trial. . . .  
 had been made extending until the 14th July, 1906,  
 for trial of the petition. The full Court on the 2  
 1906, made an order fixing as the day of trial the 1  
 three days after the expiration of the extended time  
 making any order for its enlargement. The petition  
 ever, before the 14th July, applied to one of the J  
 signed to try the petition for a further extension of t  
 an order was made by the Judge extending the tim  
 order was founded on an affidavit setting forth the  
 of the order of the full Court of the 25th May, and  
 petitioner desired an enlargement of the time. W  
 petition came on for trial before Townshend and Rus  
 on the 17th July, it was objected that they had no jur  
 to proceed with the trial, and they both so held, ref  
*Paint v. Gillies*, 26 N. S. Reps. 526. They agreed

of the 25th May was a nullity because it attempted to set the date of trial at a time when no trial could legally be held. Townshend, J., was of opinion that the order subsequently made by the single Judge could not make valid what was inoperative when it was made; and Russell, J., there never had been an exercise of the judicial discretion of the Court or Judge founded upon the conclusion that the requirements of justice rendered necessary an enlargement of time for the commencement of the trial.

**reference.]**—The judgment in *McLeod v. Wightman* (1 E. L. R. 146, noted ante 611, was affirmed by the Full Court: 1 E. L. R. 260.

**promissory Note.]**—*Rockwell v. Wood* (N. S.), 1 E. L. R. 7, was an action upon a joint and several promissory note made by the defendant and another, and the defence was that the defendant was merely a surety for his co-maker, and that the plaintiff had accepted from P. another note made by him and one R. in satisfaction of the note sued on. It appeared that the plaintiff had agreed to accept a note signed by his brother-in-law in lieu of that sued on, but that P. had, instead, sent to the plaintiff the note made by himself and R. on a request that the old note should be returned either to himself or the defendant. The plaintiff “sat tight”—signified acceptance, but did not return either the old note or the new one. There was some evidence of a conversation as to a compromise, in the course of which the plaintiff had agreed to use the note signed by R., but he did not in fact do so. The case was tried before a Judge who found for the plaintiff. A motion for a new trial on the ground of misdirection was refused, and the learned Judge, E.J., who delivered the principal judgment, saying: “The learned Judge properly told the jury that if any act of the plaintiff indicated that he had accepted the note in lieu of the other, it would be a defence. In respect to the conversation involving a compromise, I cannot say that the learned Judge commenting on the facts put the matter



under which the depositions could be looked at, and showed that an agreement had been signed. On the application the objection was that the agreement was such a one as the Act called for, and this was considered by Russell, J., to be well taken. "A statute," he said "which imprisons a man for the mere breach of a contract must be strictly interpreted; the agreement in such a case as this, in order to be attended with the consequences of imprisonment for breach, must be in the form in the schedule, or as near thereto as circumstances will permit." I think that the circumstances would have permitted this agreement to be nearly in conformity with the schedule than it is. The first of provisions contained in the schedule is omitted entirely, and this is among the things required by s. 25 in absolute terms. \* \* \* The objection is also taken that the Act requires absolutely a statement of 'the number and designation of the crew, specifying how many are engaged as sailors.' The term 'sailor' is not defined in the Act: \* \* \* technically, it applies only to 'men before the mast.' I cannot learn from these articles how many of the 17 men named there were sailors. \* \* \* In these respects the agreement in question is not as nearly as it might have been in conformity with the schedule, and when it is considered for a moment that mere trifles men have been discharged from imprisonment who have actually committed the most serious crimes, I think it would be opposed to the spirit of our laws to detain men in gaol for what, although technically an offence, is in fact the mere breach of an agreement, when there are serious doubts as to the compliance with the requirements of the Act."

## EDITORIAL REVIEW.

**Death of Mr. Justice Sedgewick.**

We record with regret the death of Mr. Justice Sedgewick, a senior puisne Judge of the Supreme Court of Canada, which occurred at Chester, Nova Scotia, on the 4th August. He was not a great jurist, but he was a favourite of the public, a man of the world, urbane, without fads, with a wide knowledge of law, and a great knowledge of human nature. The following brief account of his life is taken from the *Globe*:—

The late Hon. Robert Sedgewick was the third son of the late Rev. Robert Sedgewick, D.D., who was formerly pastor of the Presbyterian church at Musquodoboit. He was born in Aberdeen, Scotland, on the 10th March 1822, when quite a child accompanied his parents to Canada, where he received his education at Dalhousie College, Halifax, and took his B.A. degree in 1867, and his LL.D. degree in 1885. He was under the late Hon. John Sandfield Macdonald, then Attorney-General for Ontario, that he followed him to that province, studied, and he was called to the Bar of Ontario in 1870, and then to that of Nova Scotia in the following year. He commenced practice in Halifax, and became head of the firm of Ross, & Sedgewick, which had an extensive business connection, and he soon took a foremost place in the law. In 1880 he was created a Q.C., was appointed Judge of the Halifax in 1885, and was elected Vice-President of the Nova Scotia Barristers' Society in 1886. He was a governor of the University of Dalhousie College and President of the Nova Scotia Association, and for some years held the lectureship in jurisprudence in its law faculty. At the general election of 1874 he entered the political arena, contesting the Conservative interest for the local legislature, but was defeated. He became Deputy Minister of Justice for Nova Scotia under the late Sir J. S. D. Thompson, on the 25th



and held that office until the 18th February, 1893, he was appointed a puisne Judge of the Supreme Court of Canada. As Deputy Minister of Justice he argued before the Imperial Privy Council the case between the Dominion of British Columbia as to the ownership of precious metals and the railway belt in British Columbia. In 1891 he went on a special mission to Washington in connection with the Alaska Sea question; he codified the laws on the subject of exchange and promissory notes, 1890, and gave a great deal of attention to the drafting of the Criminal Code of Canada, which was passed into law in 1892.

#### **The Late Mr. Justice Street.**

With profound regret and with a keen sense of the loss to the community that we chronicle the death of Mr. Justice Street, of the Ontario High Court of Justice, King's Bench Division, at Dansville, New York, on the 1st August 1893. His death was not altogether unexpected; he had been long and ill since March last, and it was known that his heart was not strong; but hopes of his recovery were entertained day or two before his death, and many of his friends and colleagues expected that he would be able to resume his position on the Bench after a year's rest. All were shocked and grieved at the news of his passing away, and all agreed that his removal caused a serious impairment of the strength of the Bench. He was almost an ideal judge—learned, dignified, fair-headed, experienced in the affairs of life, and thoroughly impartial. He was patient, too, in often trying circumstances; long and complicated accounts and intricate questions of fact which sorely afflicted other Judges seemed to him a delight; but he did not suffer fools gladly, and he lacked the divine gift of sympathy. He was easily one of the dozen best Judges that Osgoode Hall has known since Osgoode Hall has been. He has his memorial in the Reports, Practice Reports, and Ontario Law Reports, pages of which are filled with his clear and convincing judgments. His written opinions are certainly among the

best of his day and generation. They are models of brevity and terseness and expressed in language of which Bowen would not have been ashamed.

The Hon. William Purvis Rochfort Street, London, Ont., on the 13th November, 1841. At the Grammar School there, he graduated LL.B. (hon. list) at the University of Toronto in 1868. He was an examiner in law at that institution for years. Called to the Bar in 1864, he practised in his native city, where he was a member of the firm of Becher & Street. He was Queen's Counsel in 1883, was chairman of the commission sent to ascertain and settle the claims of the Indians of the North-West in 1885, and was raised to the Bench as puisne Judge of the Queen's Bench Division of the Court of Justice of Ontario on the 30th November, 1886. He was for many years a member of the Board of Aldermen of the city of London, and at one time held the office of president of the Huron and Erie Loan and Savings Company. He was a Senator of Toronto University. He was (says Morgan) regarded as one of the best cricketers in Canada, and in 1895 was elected a member of the Toronto Cricket Club. Until his appointment to the Bench he was a Conservative in politics and has been known as a strong advocate of British connections in Canada. A member of the Church of England, he was for many years a prominent figure in the Synods of that denomination.

#### **County Law Library Associations.**

At the annual meeting of delegates from the County Law Library Associations, held at Osgoode Hall on November 1st, 1906, the following motion was unanimously carried:—"Whereas the meeting of the delegates from the County Law Library Associations to which all members of the bar have been invited, has before it matters of great importance to the profession in the province of Ontario, and they are of the opinion that a general meeting of the bar should be called by the committee for the consideration of the same, be it resolved that the committee be authorized to call such a meeting."

tions referred to: Resolved that the committee be re-  
 ted to call a general meeting of the profession, on such  
 ce as they deem proper, for the purpose of bringing be-  
 such a meeting the matters now before this meeting or  
 of them as may be deemed proper, and that this meeting  
 now adjourn until the assembling of the meeting to be  
 d."

ursuant to the above resolution, the committee have  
 Thursday the 27th September, 1906, at 8 o'clock p.m.,  
 ing understood that whatever business is not disposed of  
 evening can be taken up the following day.

e following subjects are suggested for discussion, but  
 be open to members present to introduce any other  
 with the consent of the meeting:—

#### SUBJECTS.

Dominion aid to the County Law Library Associations.  
 Legislation as to conveyancers.

Amendments to Surrogate Court tariff.

Better system of promulgating Rules of Practice.

Distribution of public Acts of the Dominion and On-  
 tario (bound) to the members of the legal profes-  
 sion free.

The formation of a provincial Bar association.

Increasing the tuition fees of the Law School to make  
 it self-sustaining out of such fees, or abolishing the  
 school.

Reducing disbursements in litigation.

Freedom of contract between solicitor and client.

Change in the mode of electing Benchers.

The Christopher Robinson memorial.

Committee	{	W. C. MIKEL, Belleville.
		W. A. McLEAN, Guelph,
		M. HOUSTON, Chatham,
		CHARLES ELLIOTT, Toronto.

**Mr. J. A. Apices Juris.**

*was a Citizen of the 19th century*  
*notice of "Apices Juris,"*  
*J., Deputy Registrar and*  
*Canada:—*

on the author says:  
 one, but it bulks in  
 contents.' Neither is  
 as three hundred and  
 y contains a very large  
 om a geometrical stand  
 n scarcely be termed accu  
 be said to have "posi  
 replete with magnitude;  
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. into three parts. The f  
 h there are ten, touches  
 of legal science. These a  
 igh briefly, and embrace  
 s, Contract, Negligence  
 nal Government, Private  
 Every subject bears the  
 originality of the aut  
 egal Maxims he has exp  
 , whether legal or secular  
 allible principle or inc  
 onvinces the reader, that  
 . stand on their own m  
 no claim to superhuman  
 rity. The essay upon t  
 .haustive manner with t  
 and legislation, and give  
 the old threadbare aph

*Verses and Versions. T*  
*One, a Memorial Sonnet*

phers Robinson; K.C., should be of deep interest to the profession. In fourteen lines only, of rhyme and poetry, the learned author has portrayed the life and character of this man among gentlemen and prince among lawyers, concluding with the following:

'From youth to age he held our homage, then  
Ended at eventide his race well run.'

Part 3 contains a large number of Causeries.

The mechanical features of the book are in keeping with every excellence. It has a full and complete alphabetical index which greatly adds to its usefulness. The work should add great interest and value to the legal profession, and it is also very much to instruct and entertain the public generally."

#### **Recent American Decisions.**

*Alimony.*—The obligation to comply with a provision of a decree of divorce directing the husband to pay the wife a sum annually as alimony, "so long as she may live," survives in *Wilson v. Hinman* (N.Y.), 2 L. R. A. (N.S.) 232, even with his death. With this case is a note marshalling authorities on the question whether alimony terminates on the death of the husband.

*Execution of Promissory Note.*—That the maker of a note understood that it was to carry interest is held, in *Merritt v. [unintelligible]* (Ill.), 2 L. R. A. (N.S.) 217, not to authorize the insertion of an interest clause without the maker's consent to the execution of the note.

*Recovery by Mother.*—The mother of an illegitimate child is held, in *Wald v. Southern R. W. Co.* (S.C.), 2 L. R. A. (N.S.) 218, not to be within the meaning of a statute giving a right of action for the benefit of the parent in case of the negligent killing of an infant. The other cases on right to recover for negligent killing of illegitimate, or to maintain action for benefit of illegitimate for negligent killing of relative, are collected in a note to this case.



passenger's relation to the carrier is held, in *Glenn v. Erie & W. R. Co. (Ind.)*, 2 L. R. A. (N.S.) 872, to have stated, where, upon reaching his destination, he voluntarily loitered in the station house in quest of pleasure. As to this case reviews the other authorities on termination of passenger's relation as such upon reaching destination.

*Contempt of Court.*—Abusing and assaulting a Judge after retired from the court room, upon adjournment subject to be called, because of his disposition of a case immediately hereto, is held in *Ex p. McCown (N.C.)*, 2 L. R. A. 603, to constitute contempt at common law.

*Exhibition.*—The exhibition, by one seeking damages for personal injuries, of the injured portion of his person to the jury is held, in *Houston & T. C. R. Co. v. Anglin (Tex.)*, 2 L. R. A. (N.S.) 386, to waive his right to object to the requiring him to exhibit it for examination by the defendant's witnesses.

*Gift.*—A gift of his accumulated property by a man to his wife at a time when he is earning a good income is held, in *Wes v. Aller (N. J. Err. & App.)*, 2 L. R. A. (N.S.) 285, to be valid at his option, although the act may be imprudent.

*Malicious Prosecution.*—The dismissal of a prosecution by the court of the peace for failure of the prosecutor to introduce evidence against accused is held, in *Graves v. Scott*, 2 L. R. A. (N.S.) 927, to be a sufficient termination of prosecution to sustain a suit for malicious prosecution. The question, when is an action sufficiently at an end to maintain a suit for malicious prosecution therefor, is the subject of a note to this case.

*Marriage.*—The power of the legislature to forbid the marriage of epileptics when the woman is under forty-five years of age is upheld in *Gould v. Gould (Conn.)*, 2 L. R. A.









# THE CANADIAN LAW TIMES.

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OCTOBER, 1906.

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## ATTACKING A CROWN GRANT.

A writ of scire facias was the commencement of an original action when issued to repeal letters patent. It is necessarily founded on some matter of record, issued out of the Court where the record was. It may be "when the King by his letters patent doth give by several letters patent one and the selfsame to several persons," for the first patentee to repeal the subsequent letters patent, or "when the King is deceived by a false suggestion he may by his prerogative by scire facias repeal his own grant," or "when he hath granted any thing which by law he cannot grant in his own right, and for advancement of justice he may have scire facias to repeal his own letters patent," or "where a patent is granted to the wrong person, the King of right is to permit him to have his name for the repeal of it on a scire facias at the instance of the Crown, and to prevent multiplicity of actions, for such writs will lie notwithstanding such void patent:" Foster's *Scire Facias*, pp. 2, 12, 228; *Farmer v. Livingstone*, 8 S. C. 22, per Strong, J.; *Terrell's Letters Patent*, 3rd ed., 7.

It will be seen that the initiative is with the Attorney-General as representing the Crown: see *Osborne v. Morrell*, 13 App. Cas. 227; *Municipality of Saugeen v. The Saugeen Land Company*, 6 Gr. 538: except where the "selfsame" has been granted to several persons. There the first patentee is entitled to a scire facias to repeal the subsequent

grant, but the second patentee is not, though his superior: Chitty's Prerogatives of the Crown, p. 3. Scire Facias, p. 246-7. The case of *Farmer v. Livingstone*, 5 S. C. R. 221, 8 S. C. R. 140, went twice to the Court, the defendant asserting that he was in effect grantee of the Crown. He failed because the Court held he had neither the equivalent of a Crown grant nor the right. In *Fonseca v. Attorney-General of Canada*, 10 S. C. R. 649, 650, Gwynne, J., declared that "a judgment in a writ of scire facias could only be justified upon the evidence being established in evidence as would be necessary to be established if the proceedings were by scire facias." The proceedings in this case were under the R. S. C. 1859, which gave power to declare void patents issued through fraud or in error or improvidence." The 35 V. C. (D.), contained a similar provision. In *Farmer v. Livingstone*, 8 S. C. R. 140, based on the latter statute (p. 153), declared that "the statute merely gives a remedy for the old common law right, and a third person coming under it to set aside a patent must therefore show that he has the same title as was required to maintain a scire facias, the name of the subject, namely, that he had right in the subject of the grant which had been prejudiced and voided by the patent." The Judicature Act, s. 26, s.-s. 8, gives power to "repeal and avoid letters patent issued erroneously through mistake or improvidently or through fraud." There is a substantial difference between this Act and the one invoked in *Fonseca v. Attorney-General of Canada*. In *Farmer v. Livingstone*, supra. Con. Rule 241 (Ontario) provides that the writ of summons now substituted for scire facias "shall be in the same cases and under the same restrictions as may be as writs of scire facias were on the 5th day of December, 1859, issuable from the Court of Chancery in England."

If we recur to Foster, pp. 12, 246, 247, already cited, it will be seen that only the first grantee of the Crown

grantee. *The Queen v. La Force*, 4 Ex. C. R. 14; *Sax-Sennett*, L. R. 8 Ex. 210; *Ex p. Bates*, L. R. 4 Ch. 577. In all other cases it would appear that the Attorney-General has alone the right to attack a Crown grant, and only on the special grounds set forth in the Judicature Act, qualified by Rule 241. It seems clear from *Boulton v. Jeffrey*, 1 E. & A. 111, *Doe D. Henderson v. Westover*, ib. and later cases, that there is no other method of varying or attacking a Crown grant: see also *Foster's Scire Facias*,

In *Boulton v. Jeffrey* the plaintiff and defendant had agreed the issue of the grant before the Minister of the Interior.

The patent afterwards issued was held final. The defendant refused to allow a variation thereof in the way of a variation for the plaintiff, or otherwise, for if equities existing before the patent, and not disclosed on its face, were enforced, the stability of titles would be impaired to the serious injury of the public interests; see also *Farmer v. Livingstone*, 8 S. 157, per Strong, J.

There is further a constitutional principle which assigns to the responsible Minister the duty of deciding between rival claimants to a Crown grant. From that decision there is no appeal to the Court. If any mistake be made, the future Act contemplates not the reformation of the instrument by the Court, or a declaration that it is held in void, but its entire recall: see *Foster's Scire Facias*, pp. 228-9: the estate remains, as before, solely at the grace and favour of the Crown to do what to justice may appertain, as between the rival claimants. The power is to "repeal and revoke" not to vary or usurp the functions of the Minister.

The case of *Osborne v. Morgan*, 13 App. Cas. 227, seems to be of the point that the grant cannot be varied unless by the Crown. The plaintiffs had miners' rights in respect of the land, and they attacked Crown leases admitted to be valid. Lord Watson said that "no decree which they can obtain in this action could operate as *res judicata* between the plaintiffs and the Crown," while a suit by the latter could only



ine whether they belonged to neutrals, enemies, or British subjects. Speaking of the statutes, the Lord Chancellor, *Liverpool Borough Bank v. Turner*, 2 De G. F. & J. 508, "It is the duty of courts of justice to try to get at the intention of the legislature by carefully attending to the scope of the statute to be construed. A disclosure of the actual owners of every British ship is considered to be of the utmost importance, with a view to the commercial privileges which British ships are entitled to, and still more with a view to the proper use and the honour of the British flag. The State can only obtain the desired information by the registration of the names of the true owners, and by the register being considered by the State the only evidence of ownership." See also *Chasteauneuf v. Capeyron*, 7 App. Cas. 1. On this principle it was decided, where a ship purchased with partnership money was registered in the name of one partner, that he became sole owner legally and beneficially, not only as against the firm, but also as against the firm's creditors. *Ex p. Yallop*, 15 Ves. 60. The Lord Chancellor said, p. 61, "It is obvious that if where the title arises by act of the legislature the doctrine of implied trusts in this Court is to be applied, the whole policy of these acts may be defeated." See also *Curtis v. Perry*, 6 Ves. 739; *Ex p. Houghton*, 17 Ves. 1. In *Hughes v. Morris*, 2 De G. M. & G. 349, and in *Mont v. Rankin*, ib. 403, the Court proceeded on the same principle in requiring a new registry on a mere contract for the sale of a ship.

It is the tendency to defeat a statute or otherwise prejudice the public interests, which determines illegality. It is not material that no actual injury is proved: *Bonisteel v. Bonisteel*, 17 A. R. 505; *Egerton v. Brownlow (Earl)*, 4 H. L. 1, at p. 174.

In *McLeod v. Lawson*, 8 O. W. R. 213, the Court of Appeal held that Crown demises are, in the district of the grant, on the same footing as letters patent granting the right in fee. The ordinary demise is conditional; and, subject to forfeiture, the grant in fee is absolute. In the case





## DEDUCTIONS FROM RENT FOR REPAIRS.

(*From the London Law Times.*)

As a general rule it is, of course, unusual in leases for the lessor to covenant to repair during the term, but such covenants are sometimes assumed by lessors, and a question of some nicety arises when the lessor neglects to fulfil his obligation in this respect. The lessee not unnaturally desires to be enabled to do himself what is necessary, and to find his remedy by retainer of rent. It is probable that in practice this solution is accepted without demur, but it is not quite clear how far it would be approved were it to come before the courts. The orthodox text books (other than Woodfall on Landlord and Tenant, and Lely and Agg's Agricultural Holdings Acts) do not seem to touch upon this subject, and the authorities to which we are about to refer are not cited by them. In *Taylor v. Taylor*, 1 Leon. 237, decided in 1590, it is reported to have been held by Justices Gawdy and Clench, that "if a lease for years be made, and the lessor covenants to repair during its term; if now the lessor will not do it, the lessee may himself do it, and pay himself by way of retainer of so much out of the rent."

In the same case, sub nom. *Taylor v. Beale*, is also reported Cro. at p. 522, and there the matter does not seem quite clear. The action is there described as one of debt for rent, and the issue was joined if it had or had not been paid. The defendant gave in evidence, as to part of it, that he had expended a sum of money in repairing the house. The question was, would this evidence maintain the issue? Mr. Justice Gawdy is reported to have thought "that the law giveth liberty to the lessee to expend the rent in reparations. It shall be otherwise at great mischief, for the house may lie upon his head before it be repaired, and therefore the law giveth him to repair it and recoupe the rent." Mr. Justice Fenner held that "it was no evidence, for if the lessor



In Lely and Agg's Agricultural Holdings Acts (1901), p. 474, the statement of the case, which is there cited as *Forster v. Beal*, is as follows: "Perhaps, where a landlord refuses to do repairs, a tenant may at common law do them himself on the landlord's default and deduct the cost from the rent . . . . but the authority is an old one . . . ."

The matter is one, therefore, upon which it is not easy to express much confidence in one's own opinion, but on balance it would seem not unreasonable to suppose that such should be the tenant's privilege. It would be consonant with general convenience and abstract justice, and not the less so when one remembers that the Courts shrink from giving specific performance of an agreement to repair: *Paxton v. Paxton*, 2 Sm. & G. 437. It seems worthy of consideration, as a way of making the rights of the parties more definite, whether it would not be prudent in leases containing a covenant by the lessors to repair, to insert a short clause something on the lines of that framed in Messrs. Lely and Agg's Bill, mentioned above, at p. 474. The draft there suggested provides that "if after the expiration of one month's notice in writing from the tenant the landlord declines or neglects to execute the said repairs, the tenant may himself execute the same, and may, upon the production of the receipted bill, deduct the cost thereof from rent due or to become due." It is one of the features of the department of law by which is governed the relationship of landlord and tenant, that there are involved in it many points of practical and daily interest, not lying off the main route of ordinary experience, but on its midmost track, upon which the rights of the parties are shrouded in doubt directly they are examined.



property for the time being of a company was upheld as given priority over an attaching order obtained by a present creditor of the company against bankers who had in their hands moneys due to the company.

[**Consolidation.**]—*Hughes v. Britannia Permanent Benefiting Society*, 22 T. L. R. 806, deals with a neat point as to consolidation. A mortgage to the defendants of certain property contained a provision that the mortgagor should not be entitled to redeem without paying to the defendants all arrears which might be payable under any other mortgage made by the mortgagor to them. The mortgagor gave a mortgage on another property to the defendants, then a second mortgage on this property to the plaintiffs, and then two other mortgages on two other properties to the defendants, who had notice of the plaintiffs' mortgage before these two mortgages were taken. It was held that the special provision in the first mortgage to the defendants was an expression of "contrary intention" sufficient to prevent the statutory (*Conveyancing Act, 1881*) restriction against consolidation applying; that the case had to be dealt with as if the equitable rules were still in force (as they still are in Ontario), and that the defendants were entitled to consolidate, as against the plaintiffs desiring to redeem the second property, the two mortgages; but that, having notice of the plaintiffs' mortgage, the principle of *Hopkinson v. Rolt*, 9 H. L. C. 514, applied, and that they could not consolidate mortgages three and four to the plaintiffs' prejudice, the stipulation for in further security by way of consolidation not being good against them.

[**Copyright.**]—The agreement in question in *Jude v. Reid*, 22 T. L. R. 749, by which the composer of some musical compositions gave to the defendants the sole and exclusive right of printing and publishing the musical compositions in volume form, a royalty on each volume sold, and the right to the composer to obtain volumes at a certain price



**Domestic Forum.]**—The Judicial Committee in allowing appeal in *Lapointe v. Montreal Police Benefit Society*, 22 T. L. R. 768, found it necessary to state once more what it to be by this time the well understood principle, that in dealings between a society and its members where questions of status and beneficial interest are involved, the procedure must be judicial and above board, and that no man can be condemned without notice of the charge against him, and an opportunity of answering the accusation. For failure to so do an alleged forfeiture for misconduct of a right to a pension as police constable was set aside.

**Expropriation.]**—In *In re Mountford and London Tramways*, 22 T. L. R. 752, a Divisional Court, with no doubt, decides a neat point in the law of expropriation. Tramway company were given the right to lay a tramway on a highway, upon condition that the highway was widened, and they were given power to expropriate land for this purpose. They did expropriate land to widen the highway, and laid their tramway on what had originally been highway. Claimant was held entitled to the value of the land taken, not to damages for interference with his privacy, etc., by reason of the highway being brought nearer to his house, but to damages because of the construction or working of the tramway, for as to that he suffered no more than any person would have suffered upon the original highway.

**Gaming.]**—It was held in *Vogt v. Mortimer*, 22 T. L. R. 769, that a defendant who, under arrangement with the owner of a house, received correspondence there in reference to bets made with him as bookmaker, used the house in such a way as to constitute it a betting house, and that the plaintiff was, therefore, entitled to recover back money sent to the defendant for the purpose of making bets.—*Moulis v. Moulis*, 22 T. L. R. 770, decides that a cheque given for money owed to pay gaming losses in a country where gaming is not illegal is valid, and that payment thereof may be

ed in England against the English maker of the money.

**Indemnity.]**—In *Moel Tryvan Ship Co. v. [?]* 2 T. L. R. 821, an implied right of indemnity arose under rather unusual circumstances. The plaintiffs chartered a ship to the defendants under a charterparty which protected the plaintiffs from any liability in the event of accidents due to the negligence of the defendants. The negligence (as was found) of the defendants was allowed to sign bills of lading not containing any statement as to his negligence. The ship having been lost through the negligence, the holders of the bills of lading sought judgment against the plaintiffs for the value, up to a certain monetary limit, of the goods lost. It was held that the plaintiffs could not hold the defendants responsible for the loss following the bills of lading in the wrong hands, but that they were entitled to indemnity for the amount of their loss.

**Landlord and Tenant.]**—In *Lowe v. Dorchington*, the construction of the Lodgers Goods Protection Act, 1897, ss. 39 to 42 of the Ontario Landlord and Tenant Act, R. S. O. 1897 c. 170, are based, provides that if a landlord, or a bailiff, or other person employed by a landlord with a distress upon a lodger's goods, after having taken the proper steps for their protection, are found to be "guilty of an illegal distress," the lodger may apply to a magistrate for an order for restoration of the goods, or to any court of competent jurisdiction. In *Lowe v. Dorchington* (21 T. L. R. 616) the superior landlord (the bailiff and other persons mentioned) "shall also be liable to an action for damages." The Court (21 T. L. R. 616) held, reversing the decision of the Judge, and also overruling *Page v. Vallis*, that the last clause was not exclusive, and that an action was maintainable against the bailiff as well as the superior landlord. This decision the Court



now affirmed, the Master of the Rolls dissenting how—  
—The judgment in *Dartford Brewery Co. v. Till*, 22 T. L. R. 502, noted ante p. 493, has been reversed by the Court of Appeal, 22 T. L. R. 792, and the regulations of the defendant, as lessee of a public house, against Sunday drinking, and limiting the number of "drinks" to any one person on week days, have been held to be a contravention of his covenant not to do anything whereby the business might be prejudicially affected, etc.

[*Perpetuities.*]—In *Mayor of Worthing v. Heather*, 22 T. L. R. 750, land had been demised to a local authority for 99 years to be used as a park, with a covenant to convey the land to the local authority at any time during the term on payment of a named sum. In the last year of the term the local authority expressed a desire to exercise the right of purchase was given. It was held that though specific performance of the covenant to convey could not be granted, because it was in effect a limitation in fee simple, void as transgressing the rule against perpetuities, yet the contract to convey was not void, and damages for its breach were allowed.

[*Principal and Surety.*]—*National Provincial Bank v. Morgan & Llewellyn*, 22 T. L. R. 797, is decided on the principle that a principal surety is not bound if it is intended that there shall be another surety, and that intended surety does not in fact become a surety. In the case in hand there was a guarantee which on its face was intended to be a joint and several guarantee by four guarantors. Three signed, but the fourth, who was intended to sign, died before his signature could be obtained. It was held that the three who had signed were not liable.

[*Support.*]—*Salt Union Limited v. Brunner Mond & Co.*, 22 T. L. R. 835, is the first stage of an action dealing with important questions as to the pumping of brine from underground areas and the consequent subsidence of the soil, the facts being of a special nature, and the decision of interest chiefly in the district in Cheshire affected.



## THE LATEST ONTARIO DECISIONS.\*

**Company.]**—The decision of MacMahon, J., in *Sovereign Glove, and Robe Co. v. Whiteside*, 8 O. W. R. 279, was where the number of the directors of a company becomes less than the number required by its by-laws to constitute a quorum, the board is incompetent to transact the business of the company and cannot legally appoint directors to fill vacancies, which should be done at a special meeting of the shareholders under s. 52 of the Ontario Companies Act. Section 40 of the Act was intended to make provision for the minimum number of directors who might administer the affairs of a company, and does not limit the right of a company under s. 45 to pass by-laws to increase that number. An assignee for the benefit of creditors of a company cannot be an agent of the company within the meaning of Rule 159, so as to render a service upon him of a kind for the winding-up of the company under the Companies Act, a good service upon the company. It was also held that general instructions from the directors of such a company to act for them and the company, and to carry on the company's business, fell short of authority to him to render a service, or to represent the company in winding-up proceedings. The unaccepted resignation of directors was ineffective to denude them of their character and responsibilities as officers of the company.

**Insurance.]**—Two points were decided by Falconbridge, C.J., in *London and Western Trusts Co. v. Canadian Insurance Co.*, 8 O. W. R. 273,—that it is not material to the question whether an insurer against fire is liable, that the insured had or had not knowledge that the premises insured

Report notes of the most important cases in Volume VIII. of the Ontario Weekly Reporter, Nos. 6, 7, 8, pp. 257 to 302, inclusive.

were being put to a different use than that contemplated at the time the contract of insurance was entered into, and no notice to the insurer of such change, short of that contemplated by statutory conditions Nos. 3 and 2, to continue the liability of the insurer in such a case.

**Highway.]**—The circumstances that an elevation of snow or ice 6 or 7 inches high on the inside of a sidewalk in the city of Ottawa, sloping down to the outside where the sidewalk was bare, had existed for 3 or 4 weeks during a winter without any reason being given for its non-removal, and that the city possessed appliances for the removal of such dangers as this, was considered by Mabee, J., in *City of Ottawa v. The Corporation of the City of Ottawa*, 8 O. W. R. 257, to constitute negligence as entitled the plaintiff to recover for personal injuries sustained by reason of such elevation.

**Husband and Wife.]**—The point decided by the Court in Ordinary in *Jordan v. Frogley*, 8 O. W. R. 261, was that a woman married before the Act 22 V. c. 34 (O. c. 73) had power to dispose by will of her interest in the real estate of her deceased father, and that, by virtue of the Act in question, such interest did not vest in her husband.

**Injunction.]**—The plaintiffs in *London and Lancashire Loan and Agency Co. v. National Club*, 8 O. W. R. 262, having established a prima facie case of an intended interference with ancient lights, Anglin, J., “in exercise of that discretion which governs the Court in granting interim injunctions,” continued the injunction to the plaintiffs without stating any conclusions of law which might be embarrassing at a later stage, deeming it in the best interests of all parties that matters should remain in statu quo.

**Master and Servant.]**—The plaintiff in *Allan v. Massey Co.*, 8 O. W. R. 269, was one of some 15 workmen who were employed in a room “chipping castings.” In this operation the iron

good deal of velocity, and the plaintiff's eye was injured by a chip from a cylinder on which a fellow workman was working near by. It was shewn that the danger might have been prevented by the use of screens, by placing the cylinder on a pivot so that it could have been turned and the chip sent away from the plaintiff, or by having the work done in an open yard. A Divisional Court refused to set aside its judgment for the plaintiff, holding that the work was not negligent, and that the finding of the jury was in effect that the defendants had not taken reasonable precautions for the plaintiff's protection, and were consequently guilty of negligence.

A verdict of \$2,000 for the loss of an eye was not considered so excessive as to bring the case within the rule in *Edwards v. Graham*, 24 Q. B. D. 53, and *Johnson v. Great Northern R. W. Co.*, [1904] 2 K. B. 250.

**Municipal Corporations.]**—In *Re Talbot and City of Toronto*, 8 O. W. R. 274, MacMahon, J., concluded that the power of the city "to license and regulate the sale of cigarettes," imposing a license fee of \$200, was invalid, such a fee being in regard to the nature of the business and the necessity of supplying a great number of the male population with cigarettes, and to the fact that the yearly profits derived from the sale of this article by the different dealers were not sufficient to pay such fee, being unreasonable and oppressive, and, according to the statements of some of the witnesses, being intended to be the latter.

**Railway.]**—A motion by the railway company in *Re Toronto and Grand Trunk R. W. Co.*, 8 O. W. R. 277, for summary possession of a water lot, the property of the A. R. C. Company, pursuant to an order therefor made by the Board of Railway Commissioners, was dismissed, on the 1st of August, by MacMahon, J., upon its being made to appear that the work under the contract for the railway station it was intended to erect, partly upon the property in question, would not be begun until the coming autumn, and perhaps very late in the autumn, so that it could not be said that the company were



## IONS FROM THE COURTS OF THE MARITIME PROVINCES.\*

n.]—*Papageorgiou v. Turner* (N.B.), 1 E. L. R. is an action for malicious arrest and imprisonment. Plaintiff, a Greek, came to Canada in 1903, having been admitted to the United States because the medical officer had reported that he was suffering from trachoma. Defendant was the United States immigrant inspector at Portland, Maine. The plaintiff alleged that he had been induced by a special immigration officer, to allow himself to be smuggled into the United States from New Brunswick; that with the aid of S. and two Assyrians he was so smuggled at the end of August, 1903, into Eastport, Maine; that at the instance of the defendant, he and the others were arrested and taken to Portland, Maine; that no offence was charged against the plaintiff, but that he was kept in custody in Portland until December, 1903, when he was brought to court to give evidence against the two Assyrians; that at the Judge of the Court directed that he should be returned to New Brunswick; that he was not so returned, but taken to Ellis Island, New York, whence he was sent to the United States. He charged that there was collusion between the defendant and S., and that the arrest at Eastport, the detention in Portland, the transference to Ellis Island, and the removal to Naples, were all done at the instance of the defendant. The New Brunswick Supreme Court in banc affirmed the finding of the trial Judge that the defendant was in connection with or knowledge of the act of S. in inducing the plaintiff into Maine, and also agreed that the defendant was justified by the laws of the United States in his subsequent interference with the plaintiff's liberty. The legal questions arising were chiefly questions of fact, but there is an interesting discussion by Barker, J., as to the method of proof. See notes of the most important cases in Volume I. of the *Law Reporter*, No. 6, pp. 317 to 396, inclusive.





being taken one of the jurors was absent from the Court; second, that the Judge commented on the failure of the defendant to testify; and third, that the Judge failed to instruct the jury as to the restricted purposes for which certain documents and bills put in by the Crown could be used in evidence for the exclusion of other purposes for which there was danger that the jury might use them—these instruments not being those which the defendant was accused of forging, but there being some evidence that he forged them also. The case is, of course, not valuable as a decision, but there is a useful discussion of the effect of s. 746 (f) of the Criminal Code, which enacts that no new trial shall be directed, although it appears that some evidence was improperly admitted or excluded, or that something not according to law was done at the trial, or some misdirection given, unless, in the opinion of the Court of appeal, some substantial wrong or miscarriage has thereby occasioned on the trial.

**Damages.]**—The plaintiff in *Vanbuskirk v. Smith* (N. B. E. L. R. 383, contracted with the defendant, a broker, under which the latter should purchase shares for him on margin. The plaintiff always made such payments as were required of him, but the defendant, without the authority of the plaintiff, disposed of the shares and absconded, leaving the plaintiff without shares or money. The question was whether the plaintiff's damages were to be determined by the market value of the shares at the time when he had notice that the defendant had disposed of them, or by the highest market value of the shares between the time when the plaintiff had notice and the date of the trial. The plaintiff contended for the former, but was willing to accept the price at which the shares were purchased. "The contract," said Russell, J., "was to purchase the shares until they should come back to the purchase price, provided the requisite cover was always supplied. . . . The shares should have been sold when they reached the purchase price, and not before that date. If they had never reached that price, there may be some limit of reasonable time when the



anguinity, and would disqualify him if he was aware of fact—the objection being as effective at the instance of defendant as it would be if made by the prosecutor, who would naturally be the one to object. It was shewn that no objection on that score was made before the justices, and that the justice in question was unaware of any relationship. The question put by Hanington, J., is, whether the relationship and knowledge of the justice are such as would reasonably create a bias in his mind. That, of course, could not be said, and the conviction was affirmed.

**Parliamentary Elections.]**—After the *Shelburne Dominion Election Case*, *Cowie v. Fielding* (N.S.), 1 E. L. R. 369, came at issue, an order was made by the Nova Scotia Supreme Court en banc, 25th May, 1906, fixing the 10th July as the date of trial, the time within which the trial might commence having been enlarged till the 14th July. Parliament was then in session, and it was uncertain how long it might continue to sit. The respondent's presence at the trial was necessary. On the 3rd July, Parliament being still in session and likely to continue, an order was made by one of the Judges of the Supreme Court (who was also one of the trial Judges designate), upon the consent of both parties, extending the time for 60 days and fixing the 14th August as the date of trial. When the petition came on for trial on the 14th August before Weatherbe, J., and Russell, J., the respondent objected that there was no jurisdiction. By s. 13 of the Dominion Controverted Elections Act, the Court or any Judge may fix some convenient time and place for the trial. By s. 33 the time for commencement of the trial may be enlarged by a Judge from time to time. The Judges agreed that nothing had occurred to deprive them of jurisdiction to try the petition. Russell, J., said: "The statute nowhere suggests that the power of the Court to enlarge the time ceases when or because the Court has fixed a date for the trial of the petition, and I am unable to see any better reason that there would be for such a rule



## EDITORIAL REVIEW.

**Recent Judicial Appointments.**

The Dominion Government has since the last issue of this Journal filled the vacant place on the Canadian Supreme Bench by the promotion of Mr. Justice Duff from the Supreme Court of British Columbia; has appointed two new Judges for the North-West provinces, Messrs. T. C. Johnston, of Regina, and C. A. Stewart, of Calgary; and has taken Mr. William Renwick Riddell, K.C., from the Bar of Ontario to fill the place in the King's Bench Division of the High Court of Justice rendered vacant by the death of Mr. Justice Street. These are all excellent appointments and reflect credit on the new Minister of Justice, who is in closer touch with the members of the Bars of the different provinces than most of his predecessors, and has therefore better means of knowing the capabilities of the individuals from among whom a selection has to be made.

**Mr. Justice Duff.**

In choosing a western instead of an eastern man to fill the vacancy at Ottawa caused by the death of Mr. Justice Sedgewick, we think that no mistake has been made. If there must be representation of the various provinces or groups of provinces upon the Bench of the Dominion Court, it is time for the western group to have its turn; and if it be contended that for material to make up the highest Court country, distinguished jurists should be chosen irrespective of locality—which plan, however, can never be followed out, because of Quebec—there is reason that in the new Judge of the Supreme Court a rare man has been secured for the Ottawa cage. Distinguished men are perhaps rare, even in countries where there is opportunity for scientific study of the law than in this country, and distinguished jurists do not always make the



use such men have at least part of the equipment necessary for the Bench, and being much before the public, more known of their characters and attainments than of those in other walks of the profession.

**Mr. Justice Riddell.**

While venturing, for the reasons indicated, on no prediction, we believe that the best available man for the Ontario Court was secured in the person of Mr. Riddell. It is sometimes said of a successful advocate that he is "no great lawyer," but that will not be said of the new Judge. He has been a strenuous and forceful advocate, but no less a keen student of books as well as of men. Nor has his reading been confined to law; literature, and especially the humanities, have been the delight of his spare moments during a busy life. He is a quick thinker and a sound lawyer, with something of the ability to state readily and accurately a proposition of law which belonged so remarkably to the late Mr. Justice Giesbregt. Mr. Riddell was born about 54 years ago. He received his degree at Victoria University, and was for some time, but not long enough to spoil him for a lawyer, engaged in the study of law. He was called to the Bar in 1883, and practised at first in Cobourg, where he built up a large business. Moving to Toronto about twelve years ago, he developed great strength as a counsel, and has for the last half dozen years or more been an acknowledged leader of the Bar.

**The Ontario Bar Association.**

The following account of the formation of a new association is taken from *Mail and Empire* of Toronto:—The organization of lawyers formed by the delegates of the various Law Library Associations of this province, to be known as the "Ontario Bar Association," met yesterday morning at Osgoode Hall and elected officers. The following were appointed for the current year: Mr. A. H. Clarke, M.P., Windsor, president; Mr. Frank Arnoldi, K.C., Mr. F. E. Hodgins, K.C., both of Toronto, and Mr.

F. M. Field, Cobourg, vice-presidents; Mr. W. C. Mikel, Belleville, secretary; Mr. G. C. Campbell, Toronto, treasurer. A committee was appointed to select twenty names from whom a council of fifteen members will be chosen later to form, with the officers already elected, the Executive of the association. A meeting of the Executive will be held on the 19th October, and the association will hold a meeting every year during Christmas week. It is intended to request Chief Justice Fitzpatrick to read a paper at the first annual meeting.

A committee consisting of the three vice-presidents will confer with the Attorney-General and secure a confidential report as to the proposed law reforms to be brought up at the next session of the legislature.

The primary object of the association is to protect the legal fraternity and give it its proper influence in public matters bearing upon it. The association will also take upon itself to criticize the work of lawyers, and even Judges, whenever it is deemed necessary.

A resolution was adopted suggesting that legislation be obtained to amend the present method of electing Benchers so as to bring it into line with that adopted in the election to the senate of Toronto University. This change in the mode of election would mean the introduction of nominations as a preliminary, so as to secure a truly representative body.

Several members also expressed the view that vacancies among Benchers should be filled from the unsuccessful candidates in the order in which they had polled votes at the election, the present method savouring too much of favouritism.

With the aims of the association, as above outlined, every one will be in sympathy. The difficulty is to arouse sufficient interest in the members of the legal profession to make them assemble in anything like large numbers. Previous attempts to maintain associations have not been very successful; we







Where it was the custom of a railway company, at a station, to allow persons to get into its cars for the purpose of assisting passengers boarding the same, and to give signals before starting the train in order that they might safely alight, the company was held, in *Hill v. Louisville & N. R. Co.* (Ga.), 3 L. R. A. (N. S.) 432, not to be liable for the death of one who boarded its train for such purpose, who, in attempting voluntarily to alight after the train started without the usual signals, was, by a sudden movement of the train, thrown under it and killed, when none of the employees of the company had notice of the purpose of the deceased in boarding the train, or of his intention to alight therefrom.

One who attempts to leave a car upon learning that it is not the one which he intends to take is held, in *Robertson v. Boston & N. Street R. Co.* (Mass.), 3 L. R. A. (N. S.) 437, not to possess the right of a passenger, and the carrier is held to be bound to exercise toward him ordinary care.

The liability of a carrier for injury to a passenger by the breaking of a window pane by a missile thrown in sport by the conductor of another car at the motorman in charge of the one upon which the passenger is riding, is sustained in *Wayne v. Union Street R. Co.* (Mass.), 3 L. R. A. (N. S.) 438.

*Criminal Law.*—Knowledge on the part of one on trial for homicide, that decedent was a quarrelsome and dangerous man, is held, in *State v. Feeley* (Mo.), 3 L. R. A. (N. S.) 451, not to be necessary to admit evidence of that fact in support of his claim that he shot in self-defence. The prior cases on character and reputation of the deceased as a violent homicide are collated in a note to this case.

In a homicide case, testimony of antecedent threats or acts of violence by the deceased against the defendant is admissible in *State v. Tolla* (N. J. Err. & App.), 3 L. R. A. (N. S.) 452.

3, not to be admissible when it appears that at the time of the homicide there was no threat of death, which, even in the light of any previous acts, could not justify the homicidal act.

The accused of murder believed that it was necessary to take the life of his adversary to protect himself.

*Beckner (Mo.)*, 3 L. R. A. (N. S.) 470, 100 Mo. 100. A man from liability, unless he had reason to believe that there was a danger, which fact must appear from the standpoint of determination as to whether or not to kill in self-defence is the subject.

—Recovery for frightening a man by the placing of dynamite in front of his house. Recovery was allowed two weeks thereafter from the shock and mental exertion in aiding his wife, who was injured. *Huston v. Freemansburg (Pa.)*, 3 L. R. A. 470, 100 Mo. 100. This case is a note reviewing all the cases on recovery for physical injuries resulting from a wrongful act.

*Id. and Wife*.—Although no action will lie for alienating from a woman her husband, it is held, in *Randall v. Long*, 100 Mo. 100, 3 L. R. A. 470, that she may maintain an action for conspiracy to do so, and for securing a divorce for his desertion, which is a breach of his marriage contract, which is a criminal, and where the statute makes it a crime to prevent another from doing any lawful act.

*Id.*—A written agreement by the owner of a property, executed after the issuance of a writ of possession, to convey the property to his tenant, who is in possession, on the payment of a stipulated price. *Westchester F. Ins. Co. (N. J. F.)*, 100 Mo. 100, 3 L. R. A. 470.

R. A. (N. S.) 107, to be a change in the interest, title, possession of the subject of the insurance, sufficient to void the policy.

Where a mutual benefit certificate is obtained by actual payment, it is held, in *Taylor v. Grand Lodge A. O. U. W.* (N. S.), 3 L. R. A. (N. S.) 114, that the association is under no legal obligation to return what has been paid as premiums, before it can claim that the contract is not in force.

A stepfather not a member of one's household, nor maintaining the usual family relations toward him, is held, in *Supreme Lodge O. of M. P. v. Nevins* (Mich.), 3 L. R. A. (N. S.) 334, not to be a member of his family within the meaning of that term in statute permitting payment of mutual benefit fund to the family of the holder of the certificate.

To bind an insurance company to a waiver because of knowledge of a particular state of facts received by its agent acting as agent of a building association, it is held, in *Manan v. German Alliance Co.* (Va.), 3 L. R. A. (N. S.) 477, that such knowledge must be shewn, by circumstances and direct evidence, to have been present in his mind when performing the act which is alleged to have constituted the waiver.

The interest of a wife in an endowment insurance policy on the life of her husband, in which she is named as beneficiary, is held, in *Wallace v. Mutual Ben. L. Ins. Co.* (Minn.), 3 L. R. A. (N. S.) 478, not to be affected by a divorce which awards alimony against her husband.

*Negligence.*—A pedestrian seeking to cross a highway negligently, in *Hennessey v. Taylor* (Mass.), 3 L. R. A. (N. S.) 445, not to be bound to be constantly on the look-out to ascertain if auto cars are approaching, under the penalty of contributory negligence, if injured, must be conclusively presumed.



## PERIODICALS AND PAMPHLETS.

**General Digest English and American:**—Bi-monthly Advice Sheets, No. 51, June, 1906. Rochester, N.Y.: The Lawyers' Co-operative Publishing Co.

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**The Law of Canada respecting Immigration and Immigrants.** The Superintendent of Immigration, Ottawa, very thoughtfully prints and sends out copies of the Dominion Immigration Act of 1906.

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**Arqueologia Criminal Americana,** by Anastasio Alfaro. San José, Costa Rica: A. Alsina: 1906.

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**Liberty of Conscience, Speech, and Press,** by Theodore Schroeder, of 63 East 59th street, New York, Attorney for the Free Speech League; republished from the Liberal Review for August and September, 1906.

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**The Act to Regulate Commerce** (as amended) and Acts supplementary thereto:—Safety Appliance Acts; Act Regarding Monthly Reports of Accidents; Arbitration Act. Published by the Interstate Commerce Commission: Washington Government Printing Office: 1906.

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**Michigan Law Review** (June):—"The Validity of Contracts between Corporations having Common Directors," by Harold M. Bowman; "Is one Claiming Title under a Quitclaim Deed a Bona Fide Purchaser?" by L. W. Carr; "The Supreme Court and Unconstitutional Acts of Congress," by Edward S. Corwin.





(July):—"Early Iowa Lawyers and Judges," by the Hon. John F. Dillon; "What is Criminally Obscene?" by Theodore Schroeder.

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**Law Magazine and Review** (August):—"The Influence of Christianity upon the Law of Rome," by the Rev. H. W. Wilson, M.A., LL.B.; "Some Suggested Amendments of the Libel Act, 1905," by N. W. Sibley, LL.M.; "Responsibility in Law," by Rankine Wilson; "The Province of the Judge and of the Jury," by G. Glover Alexander, LL.M.

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**Natal Law Quarterly** (June):—"The Laws of Zululand;" "Sarede's Commentary on the Cession of Actions." Index to Vol. IV. (1905).

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**South African Law Journal** (15th May):—"The Hon. W. Schreiner, K.C." (with portrait); "Undue Preference," by Dr. P. C. Anders; "Covering Bonds;" "Liquidated Damages;" "The Cape University Law Examinations and Cramming," by George T. Morice.

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**Criminal Law Journal of India** (31st May):—"The Doctrine of Previous Jeopardy;" "The Prevalence of Perjury;" "The World's Most Celebrated Trials;" "Criminal Bloodstains;" "Immunity of Corporate Officers and Agents."

(15th and 30th June):—"The American Lawyers and Law Making;" "Criminal Anthropology—A Review;" "Disqualification of Justices on the Ground of Pecuniary Interests;" "The Law of the Vagabonds."

(15th July):—"Women as Witnesses."

(31st July):—"The Lawyer's Conscience;" "Corporal Punishment in India."



# THE CANADIAN LAW TIMES.

NOVEMBER, 1906.

## ROSS AND DAVIES, 7 O. L. R. 433, AND THE DEVOLUTION OF ESTATES ACT.

THE judgment delivered by the Court of Appeal in the above mentioned case was undoubtedly one of unusual importance, and merited considerably more attention than, up to the present, been vouchsafed to it.

It relates to the vexed question of the powers of personal representatives, under the Devolution of Estates Act, in relation to the realty.

The judgment is noteworthy not only by reason of its revolutionary character, having regard to what was, prior to its delivery, the generally accepted view of the law upon the point dealt with, but also of the circumstance that the Court of Appeal, although agreeing in the conclusion of the learned Judge who heard the application in the Court below, expressly differed from him on each of the three legal questions involved.

Additional interest attaches to the case also by reason of the fact that it seems difficult, for reasons to which we will refer, to assign to the judgment its exact position and value as an authority upon the points dealt with. If the judgment of the Court of Appeal could be accepted as an authoritative settlement of the law upon the question involved it would be an unmixed blessing; but for reasons indicated below it would seem that much doubt must necessarily exist as to whether that can be deemed to be the case, the result being that the judgment, instead of being an assistance, is an extremely unsettling element, shaking con-

fidence in the preconceived view of the law, while furnishing no authoritative exposition for future guidance.

The point of law in question occurs in relation to a practical question of very frequent occurrence, involving important property rights, and it is scarcely too much to say that the present state of the law upon the subject is, by reason of its uncertainty, a standing menace to the profession and the public.

In the case referred to the matter came up in the first instance in the form of a petition under the Vendors and Purchasers Act for the purpose of determining the question whether certain executors had power to sell the realty under circumstances stated in the judgment of Mr. Justice Britton, who heard the original application, as follows:

"The deceased was the owner of a large amount of real and personal estate. Part of the real estate consists of property in Queen Street, in Toronto, which the executors desire to sell and which Robert Davies desires to purchase, and in reference to which a contract has been made, but the title is objected to.

"The question of title depends upon the power of the executors, or of the devisees, or both, under the will of Elizabeth Tyler, to sell and make a good conveyance.

"The deceased died on the 29th July, 1902, at Toronto, leaving two children, Violet Mitchell Campbell, wife of John Campbell, and George William Parker. The deceased also left brothers and sisters surviving her. Violet Mitchell Campbell has three children, all living; George William Parker is an unmarried man.

"The will, apart from the formal beginning and ending, is as follows:—

"1. I give, devise, and bequeath to my daughter Violet Mitchell Campbell, wife of John Campbell, of Covan below Glasgow, Scotland, all my jewelry (save a diamond ring belonging to my late husband George Parker) and also all my wearing apparel, furs, etc., for her sole and absolute use.

“‘ 2. I further give, devise, and bequeath to my said daughter Violet Mitchell Campbell the sum of four thousand dollars (\$4,000) to be paid to her by my said son George William Parker within two years after my death, and I hereby charge the payment of the said legacy on the property hereinafter devised to my said son.

“‘ 3. All the rest, residue, and remainder of my real and personal property, whatsoever and wheresoever, of or to which I may at my death be seised, possessed, or entitled, in and over which I may have a general power of appointment, in my last will and testament, I give, devise, and bequeath unto and to the sole and absolute use of my said son George William Parker, of 76 Delany crescent, Toronto, but charged with the payment to my said daughter Violet Mitchell Campbell of the said legacy of four thousand dollars (\$4,000).

“‘ 4. And I hereby direct and it is my will that in case of the death of either of my said children without issue then the whole of my said property and estate is to go to the survivor, and in case of the death of both of my said children without issue to go to my brothers and sisters equally.

“‘ 5. And I hereby appoint Robert Ross, of 1349 Queen street east, Toronto, plumber, and James W. Fenwick, of 44 Dunn avenue, Toronto, manager of the Parkdale Fur and Skin Company, the executors of this my will.

“‘ In witness whereof I the said Elizabeth Tyler have to this my last will and testament set my hand this sixteenth day of September, A.D. 1899.’

“ The executors have proved the will.

“ The real estate is incumbered.

“ It is necessary to sell the real estate to pay off the incumbrances, and to pay the legacy to Violet.

“ After the offer to sell a portion of the real estate was made by the executors and accepted by Davies, the solicitors for the purchaser made ‘requisitions on title,’ all of which were satisfied except this:—‘Required evidence that

the will of Elizabeth Tyler author-  
 erty by the executors of her estate  
 orge William Parker and Viola  
 in the conveyance, and we will  
 om all the brothers and sisters of

have submitted a statement of  
 estate, shewing the necessity of  
 e payment of debts and for the  
 olet, and they are willing and a  
 ampbell and George William Pa

The vendors deem it unnecessary  
 ers of testatrix should join, and  
 o accept the conveyance offered.

cern of the vendors being to  
 conveyance tendered by them, e  
 was sufficient, and it being a ma  
 n upon what ground such sufficie  
 ed, the following three questions  
 adjudicated upon:

executors, with the concurrence  
 orge Parker, make title under t  
 act?

ould the executors make title und  
 Trustee Act, R. S. O. 1897 c. 11

and 18 of this Act are as follows:  
 ay will coming into operation after the  
 1865, or after the passing of this Act  
 ate, or any specific portion thereof, w  
 r with the payment of any legacy or  
 evises the estate so charged to any tru  
 of his estate or interest therein, a  
 provision for the raising of such deb  
 f such estate, the said devisee or devi  
 y trusts actually declared by the t  
 cy or money as aforesaid by a sale  
 ic auction or private contract, of t  
 thereof, or by a mortgage of the sa  
 rtly in the other; and any deed or de

C. If not, could the devisee George Parker make title under s. 20 of the last mentioned Act? (a)

Question A is the one with which we are more immediately concerned in the present article.

This question touches an extremely practical point, and may be useful to glance at the state of the law upon the subject at the time the case under comment was decided.

It will be remembered that when the Devolution of Estates Act was first passed (1886) very wide powers in respect of the realty were given to the personal representatives, s. 9 (which has never been altered in any material point) providing that they should "have power to dispose of and otherwise deal with" the realty "with all the incidents but subject to all the like rights, equities, and obligations, as if the same were personal property vested in them."

He so executed may reserve such rate of interest and fix such period of repayment as the person or persons executing the same think proper.

18. If a testator who creates such a charge as is described in section 16 does not devise the real estate charged as aforesaid in such terms as that his whole estate and interest therein become vested in any trustee or trustees, the executor or executors for the time being named in the will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore conferred upon the devisee or devisees in trust of the said real estate; and such powers shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship is for the time being vested; but any sale or mortgage under this Act shall operate only on the estate and interest of the testator.

(a) Section 20 is as follows:—The provisions contained in the preceding four sections shall not in any way prejudice or affect any sale or mortgage already made, or hereafter to be made, under or in pursuance of any will coming into operation before the eighteenth day of September, 1865; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if the said sections had not been enacted; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do. R. S. O. 1887 c. 10, s. 22.

Then came (1891) the amending enactment (a), which, with a subsequent amendment thereto, gives rise to the question debated in the present case.

It provided that the personal representatives "shall be deemed to have as full power to sell and convey" the real estate "for the purpose not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not, as they have in regard to personal estate; provided always that where infants or lunatics are beneficially entitled to such real estate as heirs or devisees, or where other heirs or devisees do not concur in the sale, and there are no debts, no such sale shall be valid as respects such infants, lunatics, or non-concurring heirs or devisees, unless the sale is made with the approval of the official guardian."

Later (in 1900) a further amending Act (b) was passed whereby the words "and there are no debts" in the last mentioned section were stricken out.

It is this last amendment that causes the difficulty.

We think we are right in saying that upon the enactment of the amendment of 1900 above mentioned the generally accepted view of the law upon the subject was that, upon a sale of the realty by the personal representatives, whether there were debts or not, the concurrence of all the beneficiaries (or the assent of the official guardian) was necessary to validate the sale.

Mr. Armour in his valuable work on Titles (3rd ed., p. 341), expresses his view to that effect as follows: "The effect of this enactment (c) was to disable the personal representative (where there were no debts) from making a valid sale, (1) where the beneficiaries were infants or lunatics, (2) where any heir or devisee did not concur in the

(a) 54 V. c. 18, s. 2 (1).

(b) 63 V. c. 17, s. 17.

(c) 54 V. c. 18, s. 2 (1).



sale, unless the official guardian gave his approval. A sale might be made, however, where there were debts.

"During this period, if there were debts, the former powers were unimpaired, but if there were no debts the concurrence of beneficiaries or the consent of the official guardian was necessary.

"In 1900 the words in brackets (a) were struck out by amendment (63 V. c. 17, s. 17). Consequently, the clause now applies to all cases, and the powers of the personal representative are restricted accordingly. The concurrence of all heirs or devisees, or the approval of the official guardian, must therefore be procured in order that the personal representative may make a title. It is not only in cases of the refusal of the beneficiaries to concur that the official guardian's approval is necessary; the mere want of a concurrence for any reason, whether the beneficiaries have been appealed to or not, disables the personal representative from making a good title, unless the official guardian approves."

And see Armour on Devolution, pp. 165 et seq.

When the case came before Mr. Justice Britton, that learned Judge adopted the generally accepted view of the law as above set forth, and consequently answered question A in the negative, on the ground that there were beneficiaries or contingent beneficiaries whose concurrence had not been obtained. Dealing with question B, the learned Judge answered that also in the negative, on the ground that this was a case of "a devise . . . for the testator's whole estate charged with debts or legacies," and thus fell under the exception in s. 20 of the Trustee Act (R. S. c. 1897 c. 129), above mentioned. Finally the learned Judge, for the reason last mentioned, answered question C in the affirmative, and decided that a good title could be made under s. 20 of the Trustee Act, and that the

(a) "And there are no debts."



declaration of the legislature that beneficial devisees subject to a charge have power to sell or mortgage;" which passage again is based upon *In re Wilson* (1886), 34 W. R. 512, 54 L. T. N. S. 600, a case which, though it has been considered of questionable authority, is strongly indorsed by Mr. Justice MacLennan in his judgment in the present case.

When the case came before the Court of Appeal, although the judgment of the Court below was upheld, the answers to the three questions A, B, and C above referred to were exactly reversed.

The judgment of that Court was delivered by Mr. Justice MacLennan, and that learned Judge, treating the three questions *seriatim*, disposed of them as follows:

A. This question is answered in the affirmative, the opinion being expressed that (there being debts) the executors can make a good title under the Devolution of Estates Act, R. S. O. 1897 c. 127, ss. 4, 9, and 16, without the concurrence of devisees or the consent of the official guardian. The learned Judge expresses his reasons for this view as follows (p. 441):—

"By s. 4 of the first Act all the testatrix's property vested in the executors, subject to the payment of debts. By s. 9, as amended by 2 Edw. VII. c. 17, s. 9, the executors are empowered to sell real property to the same extent as personal property, and that enables them to sell for the payment of debts. That clause is, however, subject to the other provisions of the Act, and it is contended that this power is qualified by s. 16. I do not think so. I think this section was intended to make it clear that executors had power to sell for purposes of distribution where there were no debts as well as where there were debts; and I think the consent of the official guardian, on behalf of infants, lunatics, and non-concurring heirs or devisees, is only necessary when the sale is for the purposes of distribution only, which is not this case."

B. This question is also answered in the affirmative, the opinion expressed being that, quite irrespective of the Devolution of Estates Act, the executors may make a good sale under the Trustee Act, R. S. O. 1897 c. 129, s. 18.

The reasons given for this view are as follows (p. 15):—

“By s. 2 of s. 16” (of the Devolution of Estates Act), it is declared that it is not to derogate from any right possessed by an executor or administrator independently of that Act, and that leaves the powers given by the Trustee Act, R. S. O. 1897 c. 129, which has been in force ever since 1855, unaffected.

“Section 16 of that Act authorizes a trustee to whom land has been devised subject to the charge of a legacy, to sell or mortgage the land in order to pay it. And s. 18 declares that if a testator, who creates such a charge, does not devise the land so charged so that his whole estate and interest is vested in any trustee, the executors shall have the same power as a trustee would have under s. 16.

“It was argued that the last clause of s. 20 makes s. 18 inapplicable to the present case, enacting as it does that s. 16 and 18 should not *extend* to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest, charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage, as he or they may by law now do.

“The effect of this section came before Kay, J., in 1886, in a case of *In re Wilson*, reported 54 L. T. N. S. 600, 12 Times L. R. 413, in which that learned Judge expressed his opinion as follows: ‘It seems to me that the meaning of the statute is unmistakably clear. The meaning is that where a testator has devised his whole estate and interest directly to A, or to A and B, or any number of persons, as tenants in common or as joint tenants in fee or in tail, so that the devisee, or devisees, could themselves mortgage the property, then the executors are not to

have the power. But where the estate is devised by way of settlement, so that there is not any individual, or it might be any number of individuals, who are unable to make a title, then that is the very case to which s. 16 is intended to apply. The opposite construction would make the section devoid of meaning.'

"In his recent excellent book on the Devolution of Land, Mr. Armour, when discussing these sections, considers the judgment of Mr. Justice Kay to be unsatisfactory; but, after a very careful consideration, I think the judgment is right, and that it ought to be followed.

"The object of the sections is to facilitate sales and mortgages, for the purpose of paying debts and legacies charged upon estates, and they confer the power of doing so upon trustees in the one case, and upon executors in the other, wherever there are not one or more devisees in fee or in tail to whom has been devised the whole estate and interest of the testator beneficially. If the testator was himself seised in fee, and devised his whole estate in fee or in tail to one or more persons, then that devisee or those devisees in fee could themselves sell, and it was not necessary to give the power to executors; and if the testator's interest was less than a fee, as an estate for life, or in remainder, or an executory devise, and he devised his whole interest, whatever it was, to one or more persons, then these could sell, and in this case also the giving of a power to executors would be unnecessary; and so s. 20 declares that s. 16 or s. 18 shall not extend to such cases, but the devisees may sell, as the section declares they might do, independently of the Act.

"In the present case none of the devisees is clothed with the whole interest of the testatrix. A fee is devised to her son, but there is an executory devise to her daughter, in one event, and in another event to her brothers and sisters. If we should hold the meaning of the section to be that in every case where the testator's whole interest, whe-

simple or a less estate, is devised beneficially, is distributed by estates for life and re-  
 18 should not be applicable, then, as  
 , J., that section would be devoid of mean-  
 ould be no case to which it could apply.  
 makes his will, he does not intentionally  
 of any part of his estate, or of any part  
 it, or, in other words, die intestate as to  
 a testator does dispose of his whole es-  
 but does not always devise the whole to  
 several persons in fee or in tail or for  
 and interest. A devise in the language of  
 ny person or persons in fee or in tail or  
 whole estate or interest, therefore, does  
 e of a life estate to one or more persons,  
 or several remainders to one or more  
 ntly or successively, and with, it may be,  
 over to still other persons, so that his  
 or less estate, whatever it may be, is dis-  
 means a devise of his whole interest, what-  
 hether it be an estate in fee simple or any  
 he same person or persons, either as joint  
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tion is answered in the negative, for the  
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he position of the matter, the practical  
 What is the state of the law upon the  
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 e before us the judgment of the Court of  
 ered by Mr. Justice Maclellan. The  
 What is the effect and significance of a  
 ed by one member of the Court?  
 the judgment of the Court so far as the  
 concerned.

In this case the point decided is that the granting parties in the conveyance in question have power to convey the fee simple.

That point was decided by the Court below, and it is affirmed by the Court of Appeal. To that extent, therefore, it may be taken that the opinion of each learned Justice of the Court of Appeal is ascertained and on record.

But it will be remembered that the reasons for the decision in the Court of Appeal were quite different from, and in fact contradictory of, those in the judgment of the Court below. Can it be assumed that the reasons given by Mr. Justice MacLennan for his judgment are the reasons also of each member of the Court of Appeal for his concurrence therein, or might it not equally be that some or all of the learned Judges of the Court of Appeal, who have not expressed themselves, were influenced to their conclusion by the reasons given by Mr. Justice Britton in the Court below?

So long as they concurred in the conclusion and general effect of the judgment, it might well seem to them to be immaterial whether they happened to coincide also with each step in the chain of reasoning. In other words, can it be properly assumed, where the judgment of the Court is delivered by one member thereof, that every member of the Court is committed to the opinion expressed in every obiter dictum that appears in the judgment.

The situation, therefore, created by this judgment would seem to be by no means free from uncertainty. . Prior thereto the law on the subject was considered to be well settled. Upon a sale made by the personal representatives, whether there were debts or not, it was considered that the concurrence of all devisees, &c., must be secured, or the consent of the official guardian obtained, and a requisition to that effect would have been deemed reasonable, and would have been complied with as a matter of course by a purchaser's solicitor.





case shall it be necessary that the persons entitled to such real estate as heirs or devisees shall concur in any such sale except where the sale is made for the purpose of distribution only.

However, possibly with a view of obtaining the sentiment of the profession before making the enactment law, a rider was annexed to the Act providing that it should not come into force until the issue of an order in council.

We venture to express the opinion that, in view of the ambiguous situation that had been created, legislative action upon the subject was urgently required, and that the decision of the Attorney-General to deal with the matter was well conceived and timely. At the same time, with all possible respect, we venture to express a doubt whether the Act as it stands deals with the matter in an entirely satisfactory manner. (a) (b).

It must be borne in mind that it is not sufficient that the legislature declare simply what is to be the state of the law on the subject for the future (i.e., from the time of the going into effect of the Act).

(a) Our comments on the remedial Act are confined to that portion thereof that deals with the point under consideration. Other portions of the Act, it seems to us, may possibly not meet with universal commendation.

Dr. Hoyles, in his review above referred to, has criticized s. 1, saying among other things: "If the principle of the section be adopted, why not make it applicable to actions for sale as well as foreclosure?" To which we would add, "and to proceedings under power of sale in mortgages?"

Dr. Hoyles has advanced the suggestion that the legislature might do wisely to refer the remedial Act to the revision commission "for very careful consideration when revising and remodelling the principal Act."

In this suggestion we cordially concur, and would be inclined to add the remark that the main Act itself is sadly in need of remodelling in many important respects, the particulars of which, however, would be too lengthy to be touched upon here.

(b) At the time this article was written the order in council had not been issued. It has, however, since been issued, naming the 15th September, 1906, as the day on which the Act shall come into force.

the period between the passing of the amendment of 1900 (repealing the words "and there are no adult heirs, &c., or the assent of the official administrator must have been obtained. Mr. Justice Maclellan controverted that view. The meaning of that declaration clearly was that the amendment made no change whatever in the pre-existing law. When comes this new legislation, and the question arises: What is the attitude of the legislature towards it? Clearly it is one of two things—either they considered that Mr. Justice Maclellan was wrong in his interpretation of the amendment of 1900, and they considered it desirable to pass an Act so declaring, or they considered that Mr. Justice Maclellan was wrong in that view, but at the same time entertained the view that it was highly desirable that it should be

remained as it was. The first mentioned was the true attitude of the legislature, and a declaratory Act would appear to be the remedy, declaring that, notwithstanding the amendment of 1900, the concurrence of the heirs, &c., &c., was necessary where there were debts. On the other hand, the secondly mentioned attitude would be, it was highly desirable that it should be

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tion in the law from the moment of its going into effect, and it would seem to be a matter of equal importance that that fact should be indicated by the Act itself.

A short preamble in either case would make the import of the Act clear. Of course there is always the view that Mr. Justice MacLennan's expression of opinion was under the circumstances the judgment of the Court of Appeal (and not an individual obiter dictum), and as such amounted to "judicial legislation" to the effect that the amendment of 1900 effected no change in the law, and if this view could be adopted it would be immaterial whether the new Act was declaratory or substantive. We venture to express the opinion, however, that to allow so important a point of law to rest on this view would be unsatisfactory in the extreme, and the legislature, by their action, have evidently so regarded it.

As to the question of what the legislature really did mean when it passed the amendment of 1900, it can only be said that the intention of legislatures is frequently inscrutable and not to be gathered from the words they use.

We venture, however, to express a doubt, notwithstanding the practically universal acceptance by the profession of the contrary view, whether the legislature intended by its amendment of 1900 to introduce the radical change in the law that became the practical outcome of that legislation. It may be that Mr. Justice MacLennan, in his courageous propounding of what might seem a revolutionary view of the enactment, was in reality merely reverting to what was the true intent of the legislature in framing the amending clause.

Let us consider the position for a moment. Prior to the amendment in question the law on the point was, as provided by the Devolution of Estates Act (R. S. O. c. 127, s. 16), as follows:

cutors and administrators in whom the deceased person is vested under this Act have as full power to sell and convey for the purpose, not only of paying debts, settling and dividing the estate among the persons entitled thereto, whether there are debts or not, in regard to personal estate; Provided that infants or lunatics are beneficially interested in the estate as heirs or devisees, or where the persons interested do not concur in the sale, and there is no such sale shall be valid as respects such persons as non-concurring heirs or devisees, unless with the approval of the official guardian under the Judicature Act; and for this purpose the persons aforesaid shall have the same power as in the case of infants."

On examination of this clause, that it was intended by the legislature for the purpose of enabling the personal representatives in cases where there are no debts. It was obviously intended, to apply only to such cases, and it may well be that the words "and there are no debts," in the latter part of the section, were in fact superfluous and harmless no doubt, but quite unnecessary reiteration of what would have been covered by the first part of the section without them. If it is admissible, there is room for the contention that the legislature, in striking out the words in question, merely meant to delete unnecessary verbiage, but not to change the law. Whatever the intention may have been, general opinion, on the subject, has not unnaturally jumped to the conclusion that the legislature must mean that the con-

currence of the heirs, &c., or the consent of the official guardian (a) was henceforward to be required in every case whether there were debts or not; and thus an enactment simple and almost immaterial, if the view mentioned were correct, became converted into a powerful engine for the alteration of the law in a particular of great practical moment. If this is the true explanation of the amendment, and apparently it must be the one adopted by Mr. Justice MacLennan, it seems a great pity that the legislature did not add some words indicating why the change in question was made, and thus put the matter beyond a peradventure.

It will be seen that Mr. Justice MacLennan's interpretation of the clause in question is much more consonant with reason and the requirements of the case than the generally accepted view.

If there are no debts to be satisfied, and it is merely a question of dividing or distributing the property among the beneficiaries, one can readily understand that the concurrence of the beneficiaries or the approval of the official guardian ought properly to be required before a sale is made. But when there are debts to be satisfied, it would seem to be merely placing gratuitous obstacles in the way of the performance by the personal representative of his duty, to require that he obtain the concurrence of each beneficiary before making a sale.

Under that view of the law it would be in the power of a single unreasonable or ill-disposed beneficiary to hold up the entire administration proceedings, and possibly to draw down an administration action upon the estate, a position which could surely never have been intended to be created by the legislature.

(a) It will be observed that the new Act omits all reference to the official guardian. Is it intended that the consent of that official can no longer be accepted as a substitute for the concurrence of the heirs, devisees, &c.? It might be well that the point should be made clear.



## THE LATEST ONTARIO DECISIONS.\*

**Arrest.]**—In *Fleming v. McCutcheon*, 8 O. W. R. 368, when the defendant had been arrested on an order for arrest made under s. 1 of R. S. O. 1897 c. 80, Teetzel, J., ordered his discharge and release of bail furnished by him, considering that the defendant had established that his departure from Ontario was not with the intention of defrauding his creditors, but that his purpose, as indicated by the circumstances enumerated, was honestly to better his position by establishing himself in the business of a druggist in Saskatchewan. In the opinion of the learned Judge, it is now well settled that to justify an arrest there must be not only the intention to quit Ontario, but also the intention thereby to defraud creditors, and that these are questions of fact in each case to be inferred from the facts and circumstances shewn by the affidavits: *Phair v. Phair*, 19 P. R. 67; *Beam v. Beatty*, 2 O. L. R. 362.

**Attachment of Debts.]**—It was sought to distinguish *Lee v. Ellis*, 8 O. W. R. 396, from *Central Bank v. Ellis*, 20 A. R. 364, on the ground that the defendant's appointment as police magistrate for the town of Toronto Junction and the County of York, by ss. 15 and 16 of R. S. O. 1897 c. 87, was made on resolution of the county council, and could be terminated in the same way, but the Master in Chambers was of opinion that an officer so appointed is just as much the holder of a judicial office as if he had been appointed under s. 2 or 3 of the Act, and that both appointees are equally public officers, and he refused to make absolute an order attaching salary due to the defendant as such police magistrate.

**Bees.]**—It was decided by a Divisional Court in *Lucas v. Pettit*, 8 O. W. R. 315, that the keeping by the defendant in

\* Short notes of the most important cases in Volume VIII. of the Ontario Weekly Reporter, Nos. 9, 10, 11, 12, pp. 303 to 414, inclusive.

a small lot and within 100 feet of the plaintiff's land, where it was necessary for the plaintiff to be with a team of horses, of 160 to 170 hives of bees, was such an unreasonable use of the defendant's land, both as regards the number and location of such bees, as unfairly to interfere with the rights of the plaintiff, and as to render the defendant liable for the damage sustained by the plaintiff by reason of the death of his horses and for personal injuries.

**Carriers.]**—Of general interest is *Jones v. Niagara Navigation Co.*, 8 O. W. R. 342, an action for damages for breach of the defendants' contract to carry the plaintiff from Toronto to Buffalo. In default of payment of the "head tax" of \$2, imposed by an Act of the Senate and House of Representatives of the United States, on certain persons entering that country, the plaintiff was prevented from landing at Lewiston. The case was tried by a jury, who found that the plaintiff was prevented from entering the United States by the purser of the defendants' boat, who obtained and retained possession of the plaintiff's return ticket, and that the occasion of this was the purser's refusal to give the plaintiff a receipt for the \$2 when tendered by him to enable him to obtain a refund on his return. A judgment of nonsuit was set aside by a Divisional Court, and judgment directed to be entered for the plaintiff, on the ground that the Act in question made this "head tax" payable by the carrier, and there was nothing in the plaintiff's contract (as set out in his ticket) which relieved the defendants from this liability.

**Company.]**—It was held by Teetzel, J., in *Titterington v. Distributors Co.*, 8 O. W. R. 328, that to entitle a plaintiff in an action against a company to an order allowing him to proceed with such action after a winding-up order has been made, "he should shew such special or unusual circumstances as make it reasonably clear that the matters in question cannot be satisfactorily dealt with by the tribunal specially provided in the winding-up proceedings." This case,



in which it was sought to set aside the plaintiff's subscription for stock because of misrepresentations and failure of consideration, and because conditions precedent to the same had not been fulfilled, and also to obtain a declaration that an assignment of unpaid calls on such stock to the Bank of Hamilton, also defendants, was invalid and inoperative, was deemed not to disclose such special or unusual circumstances as to entitle the plaintiffs to proceed against the company in liquidation.—The defence urged in *Evenden v. Standard Art Manufacturing Co.*, 8 O. W. R. 392, an action to recover \$1,000 lent to the defendants, was that the president and general manager of the defendant company was not acting for the company in procuring the loan, and that the same was part of an arrangement which the company had not power to enter into; but a Divisional Court held that as to the first objection the company could not be allowed to take this position as against the plaintiff, and as to the second, that the consideration for the advance would wholly fail if that argument prevailed; and that the defendants "having received the plaintiff's money and properly used it for their ordinary purposes, it would be a gross fraud upon the plaintiff if now they were permitted to retain that money upon the pretence that their general manager had no authority to negotiate for it."

**Costs.]**—A ruling of a taxing officer allowing the costs of a successful search for documents in preparation for trial was affirmed by Boyd, C., in *City of Toronto v. Grand Trunk R. W. Co.*, 8 O. W. R. 310, who held that, while conclusive as to the matters dealt with thereby, the tariff does not exclude other charges which may be proper, though omitted therefrom, and that the costs of such searches were properly allowed as between party and party as distinguished from mere preparation for giving evidence by preliminary experiment or investigation. An appeal by the defendants was dismissed by a Divisional Court, 8 O. W. R. 333.

**Interpleader.]**—Notwithstanding the previous refusal of an interpleader order on the summary application of Elgie & Co. (see 8 O. W. R. 33, 299), requiring Edgar and Clemens to interplead, the Master in Chambers in *Elgie & Co. v. Edgar, Edgar v. Elgie & Co., Clemens v. Elgie & Co.*, 8 O.W.R. 307, granted a stay of proceedings in the two actions last named, which were brought in respect of the matters involved in such interpleader application, until the disposition of that first named, which was an interpleader action in respect of the same subject matter. The Master was of opinion that the refusal of the interpleader order was not a bar to the bringing of the interpleader action, and that, if it were so, it must be set up as a defence, and could not be dealt with in Chambers.

**Master and Servant.]**—In *Willis v. Belle Ewart Ice Co.*, 8 O. W. R. 331, the plaintiff sued to recover damages for personal injuries resulting from the negligence of a driver of the defendants. It appearing that this driver's duty was to deliver ice on a route south of Queen street in the city of Toronto, and then to return to the defendants' stables also south of Queen street, and that the accident occurred in College street, entirely out of his homeward course, where he, "befuddled and bellicose," was hurrying in a direction opposite to that in which his proper destination lay, Boyd, C., dismissed the action, holding that the driver was "at large on a drunken bout, and himself alone liable for his tortious acts."—The Court of Appeal in *McBain v. Waterloo Manufacturing Co.*, 8 O. W. R. 333, refused to interfere with the judgment below, holding that the findings of the trial Judge, affirmed as they had been by a Divisional Court, that the machine which was the occasion of the accident was a dangerous one, and that it should have been guarded, could not, upon the evidence, be interfered with; and that the fact that by "a singular combination of circumstances" the plaintiff was thrown backwards into the gearing of this machine, did not make the absence of the guard any the less

the proximate cause of the accident.—A Divisional Court in *Finch v. Northern Navigation Co.*, 8 O. W. R. 412, refused to set aside the judgment of nonsuit entered by Anglin, J., because they considered that there was no evidence upon which the finding of the jury that the death of the plaintiff's husband in respect of which the action was brought was caused by the want of an additional watchman, or would have been prevented had such additional watchman been provided, could be supported, and if the death was due to negligence of the watchman, he was a person in common employment with the deceased, and the statute would not avail to enable the plaintiff to escape this defence.

**Mortgage.]**—The point decided by Teetzel, J., in *Re Muffitt and Mulvihill*, 8 O. W. R. 347, was that, where land is sold under a power of sale in a mortgage, it is not necessary that notice of intention to exercise the power be given to a mortgagor who has conveyed all his interest in the equity of redemption in order that the purchaser's title shall be unobjectionable.

**Municipal Corporations.]**—A Divisional Court in *Re Gerow and Township of Pickering*, 8 O. W. R. 356, set aside the order of Meredith, C.J., quashing a local option by-law of the township, holding that the number of absentee tenants who had voted (4) was not sufficient to affect the election, and that, as to the charge of bribery under ss. 245 and 246 of the Act, the doings of one Vanstone, admittedly not a "temperance man," but looked upon by those supporting the by-law as a "whisky man," in treating voters, did not produce any condition of general drunkenness or obvious demoralization to an extent which might have influenced the election: *The Tamworth Case*, 1 O'M. & H. 85.

**Police Magistrate.]**—It was held by Boyd, C., in *Rex v. Ferguson*, 8 O. W. R. 306, that there is no limitation of time within which an application to a police magistrate or justice for a stated case under s. 900 of the Criminal Code, made

applicable to a conviction under Ontario law by R. S. O. 1897 c. 90, as amended by 1 Edw. VII. c. 13, s. 2 (O.), must be made, and that it is sufficient if such application is made within a reasonable time.

**Promissory Notes.]**—In *Gillard v. McKinnon*, 8 O. W. R. 311, it was contended by the defendants that if circumstances calculated to arouse suspicion in the mind of an ordinary prudent man, that the note sued on had been fraudulently procured, were shewn to have been known to the plaintiff when he discounted the note, though they did not in fact create such suspicion, he was put upon inquiry, and in default could not recover, but a Divisional Court found it unnecessary to decide this question, since the evidence, in their opinion, did not establish the existence of such circumstances, a plausible explanation having been given for the discounting at Stratford of a note made in the eastern part of the province.—In *Crown Bank v. Brash*, 8 O. W. R. 400, an action on certain promissory notes, forged by one Campbell, partner in the firm of Brash & Campbell, and indorsed in the firm name and discounted with the plaintiffs, the jury found that the plaintiffs, through their local manager, had acted in good faith, but that he had notice of the fact that Campbell had no authority from his partner Brash, upon which Teetzel, J., dismissed the action as against Brash. An appeal by the plaintiffs was allowed by a Divisional Court, who considered that unless the two findings could be reconciled the latter should be rejected, both because of its vagueness, no time being indicated when notice was to be attributed to the plaintiffs, and as unsupported by the evidence, which disclosed only unusual items which if followed up might have led to results from which constructive notice might have been imputed, this being a doctrine not to be incorporated into the law of negotiable instruments.

**Railway.]**—*Mabee, J.*, in *Canadian Pacific R. W. Co. v. City of Toronto*, 8 O. W. R. 348, an action to recover the

proportion the defendants were liable to pay of the expense of guarding the intersections of certain streets with the plaintiffs' line of railway, under certain orders of the Railway Committee of the Privy Council, held that the defendants were concluded by authority upon all points raised by them, namely: that the streets in question existed prior to the railway; that the Railway Committee had no jurisdiction to make the orders in question; that the clauses in the Railway Act purporting to give the Committee power to make these orders were ultra vires; and that the Bathurst and Dufferin street crossings were not within the municipality of the city of Toronto, and the Avenue road crossing only since the 10th March, 1905.

**Stock Speculations.]**—An appeal by the defendant and a cross-appeal by the plaintiffs in *Ames v. Conmee*, from the order of a Divisional Court, 10 O. L. R. 159, 6 O. W. R. 89, noted 25 C. L. T. 396, were dismissed by the Court of Appeal: 8 O. W. R. 357.

**Third Party Procedure.]**—The Master in Chambers decided in *London and Western Trusts Co. v. Luscombe*, 8 O. W. R. 327, that certain shareholders in an insolvent company who had received dividends alleged to have been paid out of capital, were properly made third parties in an action by the liquidators against the directors of such company to compel them to refund the amounts of such dividends, but on appeal the service of the third party notice was set aside by Mabee, J. (8 O. W. R. 406), on the ground that the relief claimed was not an "indemnity," as the right of the defendants to recover from shareholders did not depend on the plaintiffs recovering the moneys sued for; that it was not a case of "contribution;" and that the right to "any other relief over" is limited to cases in which relief over arises by reason of the defendant being held liable to the plaintiff.

**Water and Watercourses.]**—The important decision of Anglin, J., in *Keewatin Power Co. v. Town of Kenora* and *Hudson's Bay Co. v. Town of Kenora*, will be found

at great length in 8 O. W. R. 369. It is to the effect that a grant from the Crown of lands of defined area extending to the water's edge of a stream such as the east branch of the Winnipeg river at Kenora, consisting of a short navigable watercourse connecting navigable waters, but obstructed by a non-navigable fall or rapid, does not carry with it title to the river bed *ad medium filum* (even at the point of interruption) and to the superadjacent waters, and the rights to any power that may be developed from them, but does, of course, carry with it the ordinary rights of riparian owners, and in the case of expropriation proceedings these rights should be a factor in arriving at the compensation to be awarded.—The plaintiff in *Stover v. Lavoia*, 8 O. W. R. 398, the owner of land extending to the shore of lake St. Clair, was held by the Chancellor entitled to succeed in an action of trespass against the defendant, who had entered by a roadway and proceeded along the shallow water to a shoal in front of the plaintiff's property between the water's edge and the navigable waters of the lake, and removed sand therefrom, thus interfering with the natural barrier against the encroachment of the lake, to which the plaintiff was entitled.

**Writ of Summons.]**—The defendants had become dissatisfied with their Toronto agent and wrote to him saying: "The bearer (a solicitor) has full authority to take over from you our Toronto office. Be good enough to turn him over the two office keys and all records and papers and property of this company in the Toronto office." The solicitor went into possession, which he retained for 19 days (when a successor was appointed), and visited the office at least twice and forwarded correspondence to the defendants at Winnipeg. It was held by the Master in Chambers, and affirmed by Falconbridge, C.J., though the solicitor made affidavit that he acted for the defendants only in taking possession and did not represent them in connection with any other business, that service of a writ of summons on the solicitor under Rule 195 was a good service: *Baird v. McLean Co.*, 8 O. W. R. 345.

## CASES FROM WESTERN CANADA.\*

**Costs.]**—The order of Dubuc, C.J., in *Valentinuzzi v. Lenarduzzi* (Man.), 4 W. L. R. 226, declaring the plaintiff's solicitor entitled as against other creditors of the defendant, notwithstanding Rule 852 of the King's Bench Act, to a charge upon the proceeds of property and effects of the defendant sold under attachment proceedings for his costs, as between solicitor and client, of the attachment and certain interpleader proceedings with respect to such property and effects, and of the action itself and the entering of judgment therein, was affirmed on appeal, the full Court being equally divided on the questions of the costs of the action and entering judgment therein and of the costs of the attachment proceedings.

**Pleading.]**—Upon an application by the plaintiffs in *British Columbia Anchor Wire Co. v. Smith* (B.C.), 4 W. L. R. 251, for an order under the new Rules of Court for leave to deliver a statement of claim, Morrison, J., decided that the Court had no jurisdiction to order the delivery of a statement of claim.

**Sale of Goods.]**—The evidence in *Haverson v. Smith* (Man.), 4 W. L. R. 249, disclosed that the plaintiff's assignor had sold to the defendant, to be delivered f.o.b. Carman, 195 cords of wood, that the wood was to be taken out of two piles at Leary siding, containing 200 cords, and that it was agreed that in case of the burning of the wood the defendant should bear the loss. The full Court held that the property in the wood had not passed, since the wood sold to the defendant had never been ascertained, although had

\* Short notes of the most important cases in Volume IV. of the Western Law Reporter, No. 3, pp. 221 to 252, inclusive.

the facts been in dispute, the fact that the defendant was to bear the loss in case of fire would have strengthened his claim.

**Solicitor.]**—The judgment of the full Court in *Meyers v. Munroe* (Man.), 4 W. L. R. 221, is to the effect that, ordinarily, where an order is obtained by a solicitor for the taxation of his bill of costs, such order should not contain any provision for payment of any amount that may be found due by the client, and that an action by the client for an accounting will not be stayed on the application of the solicitor pending taxation under an order secured by him. On the application of the client for an order for taxation, there is an implied undertaking by him to pay any balance found due, and the order may contain a direction to this effect.

**Trusts and Trustees.]**—The full Court in *Gordon v. Handford* (Man.), 4 W. L. R. 241, reversing the finding of Richards, J., decided that that plaintiff's contention that the defendant was a trustee of certain lands for him was established by the evidence, and that, though the statement of claim set up an express trust, and there was no writing to satisfy the 7th section of the Statute of Frauds, the case was one for the application of the principle laid down in *Roche-foucauld v. Boustead*, [1897] 1 Ch. 206, that the Statute of Frauds does not prevent the proof of a fraud, so as to entitle the plaintiff to adduce parol evidence of such express trust.

**Vendor and Purchaser.]**—The plaintiff in *Barlow v. Williams* (Man.), 4 W. L. R. 233, was held by the full Court entitled to succeed in her action for specific performance, although payments were long overdue, and the contract contained a provision that time should be of the essence thereof, because it appeared that it was not the true intention of the parties that time should really be of the essence of the agreement, and the defendant had waived his right to insist upon prompt payment. Although the plaintiff had been guilty of



laches in prosecuting her claim, this defence could not avail, since she was in possession under the agreement. Besides, the action had as a matter of fact been turned into a bare action for damages, and to an action for damages, as at common law, any delay short of that imposed by the Statute of Limitations would not constitute a defence.

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## DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.\*

**Bankruptcy and Insolvency.]**—In Prince Edward Island the legislature enacted at the session of 1906 a statute amending the Assignments Act, by s. 2 of which an assignment of an insolvent's property is void whether it be made voluntarily or under pressure, and by s. 5 of which the "intent" referred to in the Act is declared to be the intent of the assignor, and no concurrence therein or knowledge thereof or of insolvency need be shewn in the assignee. With this advanced legislation, it is not surprising that an assignment by an insolvent to his father-in-law of all the former's personal property, in consideration of the latter agreeing to give the former's wife and child a home while he was away from the province, was held void: *Forbes v. Dingman* (P.E.I.), 1 E. L. R. 435.

**Company.]**—A suit in equity was begun in October, 1904, by a shareholder in a company, on behalf of himself and all other shareholders except the defendant, and on behalf of the company, for the purpose of obtaining a declaration of right as to the use of land the legal title to which was in the defendant. No proceedings in the suit were taken after May, 1905, and in August, 1906, the defendant made a motion to dismiss the action for want of prosecution: *Partington v. Cushing* (N.B.), 1 E. L. R. 493. The delay was accounted for by the fact that an order for the winding-up of the company was made in September, 1905, and that the winding-up had since been actively going on. It was contended that the defendant's application should have been for an order that unless the plaintiff got leave to proceed within a specified

\* Short notes of the most important cases in Volume I. of the *Eastern Law Reporter*, Nos. 7 and 8, pp. 397 to end of volume, and in Volume II., No. 1, pp. 1 to 16, inclusive.

time, the bill should stand dismissed. That was the practice in the case of a bankruptcy, and Barker, J., points out the difference: "The property of a bankrupt vests by operation of law in his assignee; the title as well as the control is completed divested from the one and vested in the other. Nothing of the kind takes place in the case of a winding-up. The title to the company's property remains in the company; the control and management and disposal of it are taken from the directors and placed in the liquidators, who simply are officers of the Court, receivers and managers acting under the direction of the Court, for the purpose of closing up the company's business, realizing the assets, and making a legal distribution thereof." Another point made was that, as a winding-up order was made on the application of the defendant, and it stayed the proceedings, it must be taken as his own act, and the motion to dismiss must fail; but Barker, J., held that the winding-up order did not stay the suit; ss. 13 and 16 of the Winding-up Act, R. S. C. c. 129, are the only sections which provide for a stay of proceedings, and they both refer to actions against the company, not actions like the present brought by the company and presumably for the company's benefit. It was, of course, the right of the defendant to have the suit proceeded with or dismissed, but the plaintiff Partington was allowed time to apply to the Judge in charge of the winding-up proceedings for leave to use the company's name as co-plaintiffs in the suit, notwithstanding the winding-up order, which vested the control in the liquidators, and the disposition of the original motion was made to depend upon the result of that application.

**Criminal Procedure.]**—Two points were taken in *Ex p. Tompkins* (N.B.), 2 E. L. R. 1, upon a motion to quash a magistrate's conviction for unlawfully selling intoxicating liquor without a license. The accused was summoned to appear on "Tuesday the 8th day of February," which was an impossible day, the 8th day of February being a Thursday.

He did not appear on the 8th, and the magistrate convicted him on that day. The full Court held that he was bound to appear on the day of the month named, disregarding the day of the week. The information charged that the offence was committed on the 24th November, but the magistrate amended it at the hearing, the defendant not appearing, so as to charge that the offence was committed on the 20th November. The Court (McLeod, J., doubting), held that the magistrate had the power to make the amendment and to convict upon the amended charge.

**Husband and Wife.]**—Townshend, J., deals with two interesting questions in *Lockett v. Cress* (N.S.), 2 E. L. R. 3. The defendant was sued for the price of goods supplied to his wife before marriage and also after marriage. The wife had children by a former husband, and the goods supplied were necessaries for herself and children. As to the goods supplied after marriage the Judge held that the presumption of the wife's authority to pledge the husband's credit for necessaries might be rebutted in many ways, and was rebutted in this case by proof of the fact that the credit was given and the sales made to the wife and not to the husband. As to the goods supplied before marriage, it was sought to make the husband responsible on the ground that he received property of the wife (timber cut on her land) equal at least to the amount of the claim. He admitted the receipt of property of the value of \$50, but contended that he was entitled to appropriate that sum in part payment of a debt due to him by his wife before marriage. As to this Townshend, J., said: "He certainly could have sued and recovered from her the amount of her indebtedness, and I cannot see that this subsequent marriage with her precluded him from doing that which he could have done had he not married her. Had she sued him for the value of the timber cut on her land with her consent, I think he could have successfully set up the debt due from her as a defence." The action was therefore dismissed as against the husband upon both claims.

**Illegal Distress.]**—In *Clarke v. Green* (N.B.), 1 E. L. R. 552, an action for illegal distress, the findings of the jury were perhaps not altogether consistent nor easy to understand, but they found, upon sufficient evidence, that there was no rent due when the distress was made, and assessed the damages at \$650, and the full Court refused a motion for a new trial and allowed the verdict to stand, Barker, J., saying that the trial Judge was quite right in directing the jury that if there was no rent due, they could in assessing the damages include the full value of the goods sold. The goods sold being subject to a chattel mortgage, it was contended that the plaintiff could have only nominal damages, because the mortgagees would be entitled to bring an action for the same trespass; but the Court held that the party in possession is entitled to recover the full value of the property against the wrong-doer where the whole interest is sold. A point was raised as to the effect of the clandestine removal of the goods by the plaintiffs, and the law as to that is discussed in the judgment by Tuck, C.J.

**Justice of the Peace.]**—*Melanson v. Lavigne* (N.B.), 1 E. L. R. 520, was an action against a justice of the peace for malicious arrest and trespass. The trial Judge charged the jury that the action lay without proof of actual malice or want of reasonable and probable cause, the arrest having been made without any complaint under oath. The defendant contended that, as there was a complaint in writing for a search warrant, and as goods named in the warrant were found in the plaintiff's possession, there was not necessity for a new complaint, and also that the plaintiff could be arrested and brought before the magistrate on the search warrant. The full bench of the Supreme Court of New Brunswick negatived those contentions, held that the magistrate had no jurisdiction because he issued his warrant for the plaintiff's arrest without information under oath or in writing, and therefore, under s. 2 of C. S. N. B. 1903 c. 65, it was not necessary to allege malice and want of reasonable and

probable cause, and the plaintiff was entitled to hold her verdict. As to damages, the jury were entitled to take into consideration the expense to which the plaintiff had been put.—Upon a motion to quash a magistrate's conviction for selling intoxicating liquor in violation of the Liquor License Act, the full bench of the Supreme Court of New Brunswick held that the convicting justice was disqualified for the very plain reason that the defendant had previously been convicted by another magistrate for a previous offence upon an information laid by the very justice who made the second conviction: *Rex v. Daigle* (N.B.), 2 E. L. R. 12.

**Limitation of Actions.]**—In *Anderson v. Anderson* (N. B.), 1 E. L. R. 443, it appeared that the plaintiff had gone into possession of land in 1877, and had in 1879 made an agreement with the owner to purchase it. The plaintiff worked for the vendor, who kept the accounts between them in his day book; it appeared therein that on the 15th July, 1882, there was a settlement between them, and a balance of \$41.25 was found in favour of the plaintiff and credited as a payment on the land. The plaintiff admitted this, but denied that any other payment had been made in any way. The vendor died in 1890. The defendant bought the land from the grantee of the vendor's representatives. The plaintiff remained in possession, and brought this action for trespass, alleging a title by possession. To take the case out of the statute the defendant relied on a credit appearing in the deceased vendor's book on the 23rd May, 1886, which would be within the 20 years' period of limitation fixed by the New Brunswick statute. By the judgment of the majority of the full Court delivered by Hanington, J., the entry was held to be admissible evidence under s. 38 of C. S. N. B. 1903 c. 127, and proof of a payment on the land. It was contended, however, by the plaintiff that, he being a mere tenant at will since the purchase in 1879, s. 8 of the Real Property Limitation Act, C. S. N. B. 1903 c. 139, barred the defendant's right as assignee of the vendor's title and interest therein, and that

the action not having been brought within 21 years after the commencement of the original tenancy, a recovery was barred by the statute, and a payment made on the purchase money would not affect it. The Court did not agree with this contention, being of opinion that payment of a part of the purchase money by a purchaser in possession under an agreement to purchase, is a renewal of the tenancy at will by the purchaser to the vendor. Hanington, J., also suggested "that as between the vendor and his representatives and a vendee in possession under an agreement of purchase the vendor is substantially a mortgagee under and within the terms of and entitled to the privileges received to a mortgagee under s. 30 of c. 139, and is a mortgagee within the exception provided by s. 8 of that Act."

**Liquidated Damages or Penalty.]**—Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for the payment of an ascertained sum of money, the general rule is that the sum named is not to be treated as a penalty, but as liquidated damages: *Wallis v. Smith*, 21 Ch. D. 243; *Schrader v. Lillis*, 10 O. R. 358. In *Edwards v. Moore* (N.S.), 1 E. L. R. 422, the defendant sold his livery business, stock in trade, and goodwill to the plaintiff, and covenanted not to engage in the like business within a defined territory, and, in case of failure to observe the covenant, to pay to the plaintiff \$500 "as liquidated damages." The defendant, having deliberately broken his agreement, by assisting in the establishment and carrying on of a rival business, was held by Russell, J., to be liable for the liquidated damages agreed upon.

**Parliamentary Elections.]**—The result of the trial of the Shelburne Election Case, *Cowie v. Fielding* (N. S.), was that the respondent, the Dominion Minister of Finance, was unseated on account of the corrupt act of agents: 1 E. L. R. 375, noted ante 700. After the trial Judges (Weatherbe,

C.J., and Russell, J.), had rendered their decision, a peculiar question arose, viz., whether the report of the trial Judges should be forwarded to the Speaker of the House of Commons or to the Supreme Court of Canada. Counsel were heard upon the question, and considered opinions given by the Judges: 1 E. L. R. 415. There was no appeal to the Supreme Court of Canada from the decision of the Judges avoiding the election, the result of which was that a new election must be held, but the petitioner asserted an appeal to that Court from the finding or determination that the respondent had not personally been guilty of corrupt practices. The Judges, in fact, signed an order, which declared the election void, and also dismissed the personal charges, and the appeal purported to be from the latter part of the order. Weatherbe, C.J., was of opinion that there should be a report to the Speaker that the election was void, and also a report to the Supreme Court of Canada to the effect that the trial Judges were of opinion that the respondent was not personally guilty of corrupt practices. "I am far from saying very confidently," said the Chief Justice, "that in the circumstances the more reasonable construction is not that which would confine us to certify and report either to the appellate Court or to the Speaker, but I yield, though with doubt, to the argument that here, where the appeal is upon one matter which is distinct and separate from that which requires a certificate to the Speaker, though we may do what is required to promote an appeal, we are not precluded from certifying to the Speaker our determination—unappealed from—that the election is void." A different view was taken by Russell, J., but he also was of opinion that a report that the election was void could properly be sent to the Speaker. He was of opinion "that if there has been an appeal duly asserted in this case, the election Judges cannot send any certificate or report to the Speaker, and must send it to the Supreme Court of Canada. I think, furthermore, that if the question raised . . . is open to appeal, the appeal has been duly taken,



and it would have been our duty to take judicial notice of it. . . . But a careful perusal of the statute and examination of authorities have led me to the conclusion that, notwithstanding all that has been said, the conditions have not arisen which oblige us to withhold the certificate and report from the Speaker, or to send them to the Supreme Court of Canada. I think that no appeal has been taken from the judgment or decision on any question of law or of fact of the Judges who have tried the petition. The appeal that has been taken is from a statement which will doubtless appear in the report made by the trial Judges, but, to whomsoever made, constitutes no part of the determination to be certified to the Speaker. The petitioner has embodied this statement in the order taken out. . . . There is really no provision for such a statement in the order, and I know of no provision in the statute for any such order as has been taken out. The formal expansion of such a statement in the order drawn up cannot make it the decision or judgment of a Court, if it does not in reality and substance partake of that nature. The difference between the certificate and the report is as clearly drawn in the statute as anything could well be."

**Payment.]**—Moneys paid under protest for pilotage dues were held by the full Court in *Cumberland Railway and Coal Co. v. St. John Pilot Commissioners* (N.B.), 1 E. L. R. 397, to be recoverable, Barker, J., saying, "If the money was distributed and is not now in hand, the plaintiffs' judgment may not be very valuable, but that fact should not militate against their right to obtain one. Short of the Statute of Limitations—and the defendants have had the full benefit of that defence—I can see no reason why the plaintiffs should not be as well able to recover all the payments which have been made, as well as the first one, provided they were all made under the same circumstances, as seems to have been the case. As to the payments being voluntary, I think the evidence shews they were not. The pilots always claimed and exacted their dues, and the customs authorities refused to

clear the barges until the dues were paid. The plaintiffs therefore had no alternative except to pay as they did, unless they ceased doing business altogether or changed the mode of carrying it on so as to satisfy the defendants."

**Poor Law.]**—In *Irvine v. Stanley Overseers* (N.B.), 2 E. L. R. 5, it was held by the full bench of the Supreme Court (Tuck, C.J., dissenting), that the plaintiff, a physician and surgeon, was entitled to recover from the overseers of the poor of the parish of Stanley his fees and charges for medical and surgical attendance and medicines supplied to an indigent person who was injured by an explosion. The two points raised by the defendants were that the injured man was not a "pauper," and that the defendants were not bound as a corporation by the action of one member of their board. The majority of the Court held that it was a question for the jury whether the man was a pauper, that is, whether he was poor and stood in need of relief. They were also against the defendants on the other point. "In the present case," said Barker, J., "if Palmer were in fact poor and in need of relief, and his settlement was, by virtue of his residence, in Stanley, then that parish was liable to aid him, and the overseer necessarily, in the circumstances, had authority to contract for the surgical aid. That was a contract properly made in the discharge of a public duty, upon which an action can be maintained against the overseers in their corporate name."

**Savings Bank Deposits.]**—The testator whose estate was in question in *In re Daly* (N.B.), 1 E. L. R. 487, had deposited sums of money in two savings banks to the joint credit of himself and his daughter. The evidence disclosed no circumstances going to shew that the testator intended to make a gift of these sums to his daughter, and the question whether she by right of survivorship became entitled absolutely to the money, was answered in the negative by Trueman, Probate Judge, and the full bench of the Supreme Court on appeal. The Probate Judge said: "I think that the mere fact that the testator joined his daughter's name in the bank accounts

does not create a trust for his daughter. Unless other circumstances are shewn as to the intention of the testator, it will be presumed that the arrangement was for the convenience of the testator in the management of his estate, or in this case it may have been for the convenience of the daughter, she being both executrix and tenant for life: *Marshal v. Crutwell*, L. R. 20 Eq. 328."

**Ship.]**—Section 59 of the Pilotage Act, R. S. C. c. 80, provides that ships "propelled wholly or in part by steam" shall be exempted from the compulsory payment of pilotage dues. It was held by the full Court in *Cumberland Railway and Coal Co. v. St. John Pilot Commissioners* (N.B.), 1 E. L. R. 397, that coal barges, which are usually towed by tugs, but which have also masts and sails chiefly used to steady the barges, are "propelled," if not wholly, at least in part by steam, and so come within the exemption. Tuck, C.J., dissented, being of opinion that a towed vessel could not be said to be propelled by steam—that the propelling power must be within the vessel itself.

**Succession Duty.]**—An interesting case as to the liability of an estate for succession duty in a province other than that of the deceased's domicile came before the full bench of the Supreme Court of New Brunswick in *Rex v. Lovitt* (N.B.), 1 E. L. R. 513. The deceased resided and was domiciled in Nova Scotia, but at the time of his death he had on deposit in the Bank of British North America's office at St. John, New Brunswick, a large sum of money. The deceased's will was admitted to probate in Nova Scotia, and ancillary probate was subsequently granted by the Probate Court of St. John, under which the money was paid to the executors. The liability to succession duty depended upon the construction to be placed on s. 5 of the Succession Duty Act, C. S. N. B. 1903 c. 17, which declares that property not specially excepted by the Act situate in the province, and filling the other requisites mentioned in the section, shall be subject to succession duty, whether the owner at the time of his death had a

fixed abode in the province or not. "The real question involved," said Barker, J., "is whether the debt from the bank was property, within the meaning of the Act, situate in St. John at the time the testator died. It is not disputed that it is property, within the meaning assigned to that word by the Act itself. Was it situated in this province? The argument is that the Act has created no situs for a debt of this kind, and, therefore, it must be taken to be the place of the testator's domicile. There is no doubt that the English decisions are to this effect." He goes on to point out the distinction between the English and New Brunswick statutes; and refers to *Harding v. Commissioners of Stamps for Queensland*, [1898] A. C. 769, as authority for the proposition "that there is nothing unreasonable in legislation by which a duty is fastened on the succession to movable property actually situated within the county foreign to that where the testator had his domicile, and that effect will be given to it where the language of the Act plainly indicates that the liability is to depend upon the actual locality of the property, and not in any way upon any question of domicile." The facts of the case being almost identical with those upon which *Attorney-General v. Newman*, 31 O. R. 340, 1 O. L. R. 511, was decided, and there being so substantial distinction between the Ontario and New Brunswick statutes, Barker, J., with whom Hanington and McLeod, JJ., agreed, adopted the reasoning of that case, and held that the duty was payable. Tuck, C.J., with whom Landry, J., agreed, arrived at the same destination by a different route, and judgment therefore went for the Crown.

**Warranty of Title.]**—In *Nelson v. Wallace* (N.S.), 1 E. L. R. 500, the plaintiff made an agreement with the defendant to purchase all the growing timber upon a certain area of land, to part of which the title was in the Crown, as was known to both parties. The agreement contained a warranty of title; shortly after it was executed the plaintiff applied to the Crown land office and obtained a grant of the portion

of the land referred to. Graham, E.J., held that the plaintiff was not entitled to recover as damages for the breach of the warranty the value of the trees upon the Crown portion, even at the price he paid, but at most only the cost which he incurred in acquiring the title—his acquisition of the title being regarded, in the circumstances of the case, as the carrying out for the defendant of the agreement which he had entered into.

**Will.]**—The peculiar will construed by Weatherbe, C.J., in *Ward v. McKay* (N.S.), 1 E. L. R. 427, gave the whole of the testator's property to his son by his second wife, but provided that should the son "be called away by death," his wife should "have the benefit of my property for herself during her lifetime or widowhood, the remainder to be equally divided among my first family or the survivors of them, always acting most favourably towards the most necessitous." The will was made in 1862, the testator died in 1863, his son by the second marriage twelve years later, and the widow in 1904. Five daughters and a son, "the first family," survived their father, but predeceased the widow. All died intestate except Ann, who left a husband, to whom she bequeathed her interest in her father's estate. The husband contended that, as Ann survived her brothers and sisters, as the fact was, she was entitled to the whole. This was contested by the children of James and Susan, who alone of the first family left issue. Weatherbe, C.J., with some hesitation, adopted the view that the testator in speaking of his first family and the survivors of them included grandchildren, and intended the words in a sense which required the estate to be equally divided among them individually.

## EDITORIAL REVIEW.

**Bank Directors' Negligence.**

"Case and Comment," the well known Rochester, New York, legal periodical, thus deals with the important question raised by a recent decision of an Ohio Court, of considerable interest in Canada:—

Every notorious bank failure in which the dishonesty of a cashier or other officer has ruined the bank brings forth much vigorous denunciation of the directors of the bank for their failure to prevent the wreck. That directors owe to the bank the duty to exercise care for its protection is, of course, admitted by all; but the extent of their duty is one of the very difficult questions with which the Courts have to deal. Aroused by wrong to depositors or stockholders, many vigorous writers rush forward to demand the punishment of the directors, and often proceed on the assumption that, if the directors had done their duty, the loot of the bank must have been prevented. The Courts called upon to deal with the subject in all its aspects, with the responsibility for doing justice to the directors as well as to all others, have spoken far more wisely and justly than most of those who have written on the subject in newspapers and periodicals, unburdened by any personal sense of responsibility in the matter. The Courts have recognized that due care on the part of the directors did not mean the same thing as a guaranty of the honesty of the cashier or other officers whom they intrusted with the affairs of the bank.

A recent decision by the Supreme Court of Ohio in the case of *Mason v. Moore*, 73 Ohio St. 275, states the doctrine of the subject very clearly. It declares that, while the directors are charged with the duty of reasonable supervision and the exercise of that degree of care which is exercised by ordinarily careful and prudent men acting under like circum-

stances, yet they are not insurers of the fidelity of the cashier and other agents whom they have appointed, and not responsible for losses resulting from their wrongful acts or omissions, if the directors themselves act in good faith and with ordinary care. The Court also holds that the directors are not bound, as a matter of law, to know all the affairs of the bank, or what its books or papers would shew; and that such knowledge cannot be imputed to them for the purposes of charging them with liability. The other cases on the subject generally sustain this doctrine, that the directors must exercise reasonable care and prudence; but the difficulty is to determine just what will constitute that. Since directors are not expected to give their whole time and attention to the business of the bank, they are entitled to commit the actual management of the business to their duly authorized officers. But they cannot be mere figureheads, and must still maintain a general supervision over the business, and have a general knowledge of the manner in which it is conducted. If directors were held to be insurers of the honesty of the cashier or other officers, no responsible man would take office as a director. On the other hand, if the public should propose that the directors of a bank exercised no function of care and watchfulness over its business, few people would do business with that bank. It seems impossible to lay down definite rules to determine what constitutes due care on their part. The Courts lay much stress on any facts shewing some ground of suspicion which the directors knew, or reasonably should have known. Any speculations of bank officers which cause comment and suspicion among business men generally are obviously sufficient to put the directors on inquiry, and require very sharp scrutiny of their management; but there are, unfortunately, too many conspicuous instances of the wrecking of banks by men whose reputation has been of the highest both in personal and business relations. It may be impossible, doubtless it is, to institute any system of checks and safeguards which will make it impossible for the ingenuity of a

dishonest man to wreck a bank when he holds an important position of trust in it. There is a demand for legislation on the subject. But legislators may do serious harm by unwise enactments, and no legislation on such a subject can be safely attempted without the fullest participation and counsel of the ablest men in the banking business. It is not a case in which bankers have an interest adverse to that of the public. The interests of all honest bankers are identical with those of the public in this matter, and the public has a right to look to them to advocate the best measures possible on the subject.

**Mr. Justice Riddell.**

Upon Mr. Justice Riddell, the new Judge of the King's Bench Division of the High Court of Justice for Ontario, taking his seat upon the Bench for the first time after his formal swearing-in, his first assigned duty being to preside at the Toronto jury sittings, the congratulations of the Bar were offered by Mr. Frank Arnoldi, K.C., and Mr. W. A. Skeans.

"Gentlemen of the Bar," replied the Judge, rising: "The sentiments which you have just addressed to me are simply a culmination of a long series of kindnesses which I have received at the hands of my brethren of the Bar.

"I have been, as you have said, a very active practitioner now for more years than I care to think of, but I think I can say—I know I can say—that there is not a living man at the Bar in active practice from whose hands I have experienced anything else but the utmost kindness, courtesy, and consideration on all occasions.

"I am leaving the Bar—I have left the Bar—with something of a wrench. Perhaps had I quite appreciated the extent of that wrench I might have hesitated before accepting the very high honour which has been conferred upon me, but that is simply by the way. I am proud to know that



the members of the Bar, particularly of the junior Bar, have found in me a man whom they think worthily honoured. This I can promise, if I know myself, that whether senior or junior member of the Bar, each and everybody shall receive absolute justice and fair play. I could not have left the practice of the law, have left law entirely, and lived happily. The position which I have the honour now to occupy is an important one, is one in which one can do well by his country. In order that he may do well by his country it is necessary that he shall receive the assistance of those who have in the past been his brethren, and who are now continuing to be practitioners at the Bar. A Judge has a right to call upon the Bar for assistance in the administration of justice, for honest assistance, honest citation of cases, honest intellectual argument. The Bar has a right to call upon the Judge to exercise industry, intelligence, and strict impartiality. I shall endeavour, gentlemen, to give you the latter; I ask you, I demand of you, the former. I hope, I know, that our associations in the future will be quite pleasant—as they have been in the past—and when I have said that I have said, I think, all that can be said. I thank you gentlemen.”

The learned Judge's second assignment was to hold the autumn sittings at Cobourg, his early home, where he was enthusiastically welcomed and banqueted by the Bar Association of the united counties of Northumberland and Durham.

#### **The Oldest Members of the Law Society of Upper Canada.**

A correspondent who has been searching the lists of persons admitted as members of the Law Society of Upper Canada finds that the four members of longest standing who are still living are all retired County Court Judges—an extraordinary testimony to the oft-asserted opinion that a Judge's way of life is peculiarly conducive to longevity. James Robert Gowan was admitted in 1834, Robert Stuart

Woods in 1836, David J. Hughes in 1837, and Peter O'Brian in 1840. With the last-named, in Michaelmas, 1840, entered only five others, John Helliwell, Matthew Robert Van-Koughnet, William Leggo, James Patton, and Angus Morrison, all of whom have been long dead. Since this paragraph was written, the death of Mr. Woods has been reported.

**Notice of Action for False Arrest in New Brunswick.**

Mr. T. C. L. Ketchum, barrister of Woodstock, N.B., sends us the following interesting note of a *nisi prius* case:—

At the October session of the Circuit Court of Victoria county, Chief Justice Tuck presiding, an action was tried in which one Woodward sued Foster, deputy sheriff of Carleton county, and Miles McCrea, a constable of Victoria county, for false arrest and imprisonment. It was alleged by the plaintiff that he was arrested in Victoria county by McCrea, who acted on word from Foster in Carleton county that he had a warrant for the plaintiff's arrest. The plaintiff was arrested by McCrea, and taken to Carleton county, where he was delivered over to Foster. The actual merits of the case were not reached, as the defendant's counsel at the conclusion of the case for the plaintiff moved for a nonsuit. By C. S. N. B. 1903 c. 64, s. 2, respecting the protection of constables, it is provided, that "before any action shall be brought against a constable, or any other officer or person acting in his aid, for anything done in obedience to a warrant of a justice of the peace, a demand in writing of the perusal and copy of such warrant signed by the person making the same shall be served upon him personally or by leaving it at his usual place of abode for the space of six days." The defendant admitted that the demand had been made, and no perusal or copy given within the time specified. It was admitted on behalf of the plaintiff that Foster and McCrea were respectively duly appointed officers or

constables by their respective municipal counties. The counsel for the defence then relied on C. S. N. B. c. 165, s. 104, respecting municipalities, which reads: "No action shall be brought against any person for anything done by virtue of the office held under any of the provisions of this chapter, unless within three months after the act committed, and upon one month's previous notice thereof in writing."

The Chief Justice, in view of the fact that the provisions of this latter chapter had not been complied with on behalf of the plaintiff, ordered a nonsuit.

#### **The Use of the Word "Claim."**

"It seems to us that from laziness, ignorance, or inattention, Americans employ certain words in many instances where such words cease to have any significance at all, and the helpless slaves are done to death by toiling at unnatural tasks. A striking instance of this overworking may be taken in the word 'claim,' which in the United States is now employed in the most inhuman fashion, to do the work of a dozen healthy, willing substitutes. In the new language a man does not allege, assert, protest, profess, advance, propound, depose, avow—he 'claims' that he performed, saw, or submitted to an action. He does not declare the truth, he 'claims' to have spoken it. In fact, this word 'claim,' in company with many others, has been so disfigured by misuse and unsuitable tasks that the original significance, that of asserting a right, has been hopelessly weakened, if not entirely lost." These words of an English writer, quoted by the New York Literary Digest, are welcome as well expressing what we have been trying for some time to collect courage to say. An editor supervising for the press the writings of Judges and other lawyers has a special grievance in regard to the verb—not the noun-substantive—claim. In addition to being used as the equivalent of "allege, assert, protest, profess," etc., quoted above,

nothing is commoner than for "claim" also to do duty in place of "contend," "argue," "urge." In the same sentence we have often known it to mean, in the early part, allege, and in a later part, contend. In the forms of pleadings under the Judicature Act we have the proper use of the verb "claim"—and almost the only use to which it can be intelligibly put in legal writings. "The plaintiff claims possession," "claims a declaration," "claims foreclosure," "claims an injunction." It seems possible that the substitution of "claim" for "pray" or "pray for," authorized by the forms, has paved the way for the introduction into Canada, and we fear into England too, of the American use or misuse of the verb. English judgments are not quite free from such expressions as "claims that he was misled," "claims to be entitled," and the like, and Canadian judgments abound in them. A truthful person assures us that he once heard a man say to a surgeon, "Doctor, there's a man over there who claims to have broken his leg." And we find this sentence in a recent judicial opinion—"The plaintiff claims that in this way he was injured."

#### **The English Bench and Bar.**

Mr. Justice Buckley has been appointed a Lord Justice of Appeal, in the room of Lord Justice Romer, resigned.

Mr. Robert John Parker, junior equity counsel to the Treasury, has been appointed a Judge of the High Court, and has received the honour of knighthood. Mr. Parker was called by Lincoln's-inn in 1883.

The King has been pleased to approve for appointment to the rank of King's Counsel: The Right Hon. James Henry Mussen Campbell (late Attorney-General for Ireland). and Messrs. Herbert Addington Rigg, Corrie Grant, John Cameron Graham, Arthur Jacob Ashton, John Lloyd Morgan, Arthur James Walter, Arthur Frederic Peterson, George John Talbot, Gerald Fitzroy Hohler, Albert Henry

Jessel, Edmund Francis Vesey Knox, Mark Lemon Romer, James Richard Atkin, and Felix Cassel.

The appointment of Mr. Justice Buckley as a Lord Justice of Appeal in the place of Lord Justice Romer, who, to the great regret of the Bar, has resigned, was generally anticipated, and will be welcomed by the profession. Though the new Lord Justice was a good Judge of first instance, he will probably make a still better Judge of appeal. No one was more ready to listen to the arguments of counsel, even when they were not of the first order. His judgments are models of lucidity and conciseness, and will bear favourable comparison with the best. He is in the prime of life for judicial purposes, and, doubtless, still higher honours await him in the future. He was born in 1845, the son of the Rev. J. W. Buckley, for forty years vicar of St. Mary's Paddington. Educated at Merchants Taylors' School and Christ's College, Cambridge, of which society he was a scholar, he was elected Tancred law student in 1866, and was ninth wrangler in 1868, the year when Lord Justice Moulton was senior, and was elected a Fellow of his college. In 1869 he was called to the Bar by Lincoln's-inn, and acquired a large practice, especially in commercial cases. His "Law under the Companies Acts," first published in 1873, reached an 8th edition in 1902. He took silk in 1886, and was elected a Bencher of his Inn in 1891. From 1883 to 1898 he served on the Bar Committee and Bar Council, and in January, 1900, he was appointed a Judge of the Chancery Division in succession to Mr. Justice North. In 1901 he was elected an honorary Fellow of Christ's College, Cambridge. Some years ago he founded a scholarship at Merchant Taylors', his old school.

That Mr. R. J. Parker would, in due course, be raised to the Bench was a foregone conclusion. His appointment to succeed Lord Justice Buckley as a Judge of the High Court is unexceptionable. His experience in all branches

of work in the Chancery Division has been considerable, and, to a man of his large practice, the work of a Judge must come as a comparative relief. His capacity to deal with a mass of heavy work without worry is well known. That he will bring to bear upon his new duties all the resources of a powerful intellect and a ripe experience goes without saying. He had a traditional claim to promotion to the Bench, for he has been junior equity counsel to the Treasury since 1900. The son of the Rev. Richard Parker, rector of Claxby, Lincolnshire, he was born in 1857. He was educated at King's College, Cambridge, where he obtained Sir William Browne's medal for a Greek ode in 1878, and was bracketed fifth in the first class in the Classical Tripos of 1880, being elected a Fellow of his college in the following year. In 1883 he was called to the Bar by Lincoln's-inn, and has enjoyed an extensive practice.

The belated list of "silks" has also been made public, this being the first occasion upon which the present Lord Chancellor has seen fit to recommend His Majesty to promote members of the outer Bar to this honourable position, though we understand that barely a third of those who applied have proved successful. (*The London Law Times.*)

#### **The New Irish Master of the Rolls.**

Mr. Justice Meredith, who has been promoted from the position of Judicial Commissioner in the Irish Land Commission to the great office of Master of the Rolls in Ireland, rendered vacant by the resignation of Sir Andrew Porter, Bart., comes, like Sir Richard Henn Collins, the Master of the Rolls in England, whose predecessors have for generations been judicial dignitaries, of a legal stock. His father was an eminent Dublin solicitor; one of his brothers, Mr. Arthur Meredith, K.C., is an Irish equity leader; and two other brothers are solicitors, of whom one is vice-president of the Incorporated Law Society of Ireland. Two first cousins of the new Master of the Rolls in Ireland are

members of the Ontario judiciary—Sir William Meredith, the Chief Justice of the Common Pleas, and the Hon. R. M. Meredith, Justice of Appeal.

Mr. James O. Wylie, K.C., has been appointed Judicial Commissioner in the Land Commission in the room of Mr. Justice Meredith.

#### **Copyright in Photographs.**

Where the proprietors of certain private schools permitted the agent of a firm of photographers to take photographs of the schools entirely at the risk of the photographers, and the agent took photographs of the grounds and exteriors of the schools and the interior of schools and groups of the pupils, as the proprietor suggested or permitted, and proofs were afterwards submitted, and some copies purchased by the proprietors, who sent copies of some of them to the publishers of an advertising medium, who reproduced them and inserted them in their publication, and the proprietors then registered the copyrights of the photographs in their own names as authors, it was held, in *Stackemann v. Paton*, [1906] 1 Ch. 774, that permitting the photographer to enter the school and take the photographs on the chance of selling copies to the proprietors was a good consideration, and the photographs must be deemed to have been made for the proprietors for a good or valuable consideration within the meaning of the Copyright Act; and that the copyright therefore belonged to the proprietors of the schools, and not to the author of the photographs.

#### **Recent American Decisions.**

*Church.*—The right of equity to interfere to reinstate a pastor of a religious denomination who has been expelled without any violation of the trust under which the property is held, is denied in *Duessel v. Proch* (Conn.), 3 L. R. A. (N. S.) 854. The question of enjoining control, use of, or interference with church property is the subject of a note to this case.

*Damages.*—The measure of damages for the occasional flooding of land because of an insufficient culvert is held, in *Harvey v. Mason City & F. D. R. Co.* (Iowa), 3 L. R. A. (N.S.) 973, to be the difference between the fair market value of the land immediately before and after the injury, including therein the value and condition of the crops which may have been injured.

Loss of use of a portion of a manufacturing plant is held, in *Connersville Waggon Co. v. McFarlan Carriage Co.* (Ind.), 3 L. R. A. (N.S.) 709, not to be a proper element of damages for failure to deliver certain goods to a manufacturer.

*Deed.*—A personal covenant, and not a condition subsequent, is held, in *Hawley v. Kafitz* (Cal.), 3 L. R. A. (N.S.) 741, to be created by a provision in a deed that the same is given and accepted upon the express condition that a house shall be built on the premises within six months, and that such agreement is part of the consideration for the conveyance.

*Distribution of Estate.*—The right of the Court to ingraft an exception upon a plain provision of the statute of descent because the distributee has murdered his ancestor to secure possession of the property, is denied in *McAlister v. Fair* (Kan.), 3 L. R. A. (N.S.) 726. Homicide as affecting devolution of property is the subject of a note to this case.

*Easement.*—A deed partitioning land between heirs is held, in *Gaynor v. Bauer* (Ala.), 3 L. R. A. (N.S.) 1082, not to convey easements to continue existing stairways and drains on the division line.

*Evidence.*—A despatcher's record of the arrival and departure of trains is held, in *Louisville & N. R. Co. v. Daniel* (Ky.), 3 L. R. A. (N.S.) 1190, to be admissible to shew the location of a train at the time of an alleged accident.



*Homicide.*—Whether a killing with a deadly weapon was intentional, or the result of an accident, is held, in *State v. Legg* (W. Va.), 3 L. R. A. (N.S.) 1152, to be a question for the jury, where the evidence tends in an appreciable degree to establish both theories. Homicide by misadventure is the subject of a note to this case.

*Insurance.*—The property of a mutual insurance company for all except corporate purposes is held, in *Huber v. Martin* (Wis.), 3 L. R. A. (N.S.) 653, to belong to its members, whether stockholders in a technical sense or in a broader one, including policy holders.

The “legal heirs” of a member of a benefit society, to whom the benefit is payable, are held, in *Thomas v. Supreme Lodge K. of H.* (Wis.), 3 L. R. A. (N.S.) 904, to be the persons designated as distributees by the statutes for the distribution of personal property of intestates.

The removal of a tenant, of which the owner has no notice or reasonable opportunity to obtain notice, is held, in *Ohio Farmers' Ins. Co. v. Vogel* (Ind.), 3 L. R. A. (N.S.) 966, not to constitute a breach of a condition against vacancy.

An assignment of one-half of life insurance to one having no insurable interest, in consideration of his payment of premiums as they accrue, is held, in *Metropolitan L. Ins. Co. v. Elison* (Kan.), 3 L. R. A. (N.S.) 934, to be a contravention of public policy. The other authorities as to validity of assignment of interest in life insurance policy to one paying premiums are collated in a note to this case.

*Landlord and Tenant.*—The doctrine of assumed risk is held, in *B. Shoninger Co. v. Mann* (Ill.), 3 L. R. A. (N.S.) 1097, not applicable to relieve a landlord from liability to a tenant's employee for injuries caused by the unsafe condition of a common passageway.

The right of the lessor to recover damages for injury to the enjoyment and occupation of premises while they are in possession of a tenant, by the maintenance of a nuisance not of a permanent character on adjoining premises, is denied in *Miller v. Edison Electric Illum. Co.* (N. Y.), 3 L. R. A. (N.S.) 1060, although during such continuance the lease had terminated and been renewed at a reduced rental because of the nuisance.

*Mandamus.*—The right of mandamus to compel a medical college to comply with its contract to furnish a diploma to a student who had completed the course, is denied in *State ex rel. Burg v. Milwaukee Medical College* (Wis.), 3 L. R. A. (N.S.) 1115, on the ground that there is an adequate remedy by an action for a breach of the contract, or by a suit for specific performance.

*Master and Servant.*—A novel and interesting question is decided in *Farmer v. Kearney* (La.), 3 L. R. A. (N.S.) 1105, viz., that when workmen delegate to a labour organization the selection and control of fellow employees they absolve the employer from liability for injuries resulting from such improper selection or superintendence.

*Railway.*—A speed of 50 miles an hour over an ordinary country-road crossing for which the statutory signals have been given is held, in *Lake Shore & M. S. R. Co. v. Barnes* (Ind.), 3 L. R. A. (N.S.) 778, not to be negligence per se.

*Statute of Frauds.*—Taking possession sufficient to satisfy the Statute of Frauds is held, in *Roberts v. Templeton* (Or.), 3 L. R. A. (N.S.) 790, not to be shewn where one in possession of a mining claim under a prospecting contract with one part owner purchased the share of the other owner, and merely continued his possession and operations without anything to connect him with the later contract. A note to this case reviews the other authorities as to taking possession of real property as part performance to satisfy Statute of Frauds.

**Will.**—Ante-testamentary declarations of a testator are held, in *Hobson v. Moorman* (Tenn.), 3 L. R. A. (N.S.) 749, to be inadmissible as substantive evidence of undue influence in the making of a will.

A recital, in a will, of a conveyance of land to a certain person is held, in *Noble v. Tipton* (Ill.), 3 L. R. A. (N.S.) 645, not to be effective as a devise, if the conveyance proves ineffectual.

A devisee of land incumbered after the execution of the will is held, in *French v. French* (Va.), 3 L. R. A. (N.S.) 898, to be entitled to have the incumbrance removed, at the expense of pecuniary and specific legacies, out of the personal estate, where the will directs payment of all debts from any personal property that the testator may have at the time of his death.

A condition forbidding an alienation for five years, annexed to a conveyance in fee simple, is held, in *Latimer v. Waddell* (N. C.), 3 L. R. A. (N.S.) 668, to be void. A note to this case reviews the other authorities on validity of restraints on the alienation of a fee simple during a limited time.

A gift to take effect after the death of testator's children, and the youngest grandchild has been of age ten years, is held, in *Re Kountz* (Pa.), 3 L. R. A. (N.S.) 639, to be void under the rule against perpetuities.

A devise over upon the cessation of lineal descendants of the first taker is held, in *Merrill v. American Baptist Missionary Union* (N. H.), 3 L. R. A. (N.S.) 1143, to be void as against public policy.

## BOOK NOTICE.

**Banning on the Limitation of Actions:**—The Law of the Limitation of Actions, together with some observations on the Equitable Doctrines of Laches (or Delay) and Acquiescence. By the late Henry Thomas Banning, of the Inner Temple, Barrister-at-law. Third edition, by Archibald Brown, of the Middle Temple, Barrister-at-law. London: Stevens and Haynes: 1906.

This is something more than is commonly understood by a new edition. Mr. Archibald Brown tells us that he had conceived the idea of writing a book of his own on the "Limitation of the Times for bringing Actions," but the publishers of "Banning" having opportunely suggested that he should prepare a new edition of that work, he adopted the suggestion. He has, however, altered the original work, both in form and substance; he has wholly recast it, and has thrown into it also all the relevant results of his own lengthened experience at the Bar. The new and old materials are thoroughly fused, and the compound makes an admirable treatise on the law of limitation of actions.

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## PERIODICALS AND PAMPHLETS.

**Harvard Law Review** (November):—Professor Langdell—a View of his Career, by Eugene Wambaugh; His Student Life, by Jeremiah Smith; His Personal Influence, by Austin G. Fox; His Later Teaching Days, by Joseph H. Beale jun.; His Services to Legal Education, by James Barr Ames. Voluntary Assumption of Risk, by Francis H. Bohlen. Public Æsthetics, by Wilbur Larremore. A Study in the Law of Torts, by A. Inglis Clark.

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**Michigan Law Review** (November):—The Function of the State University Law School, by Andrew Alexander Bruce. Constitutional and Legislative Limitations of the Home Rule Charter in Minnesota, by Charles P. Hall. Amenability of Military Persons to the Law of the Land, by Charles E. Smoyer.

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**Albany Law Journal** (September):—Imprisonment for Debt, by Geo. F. Ormsby. The Pursuit of Happiness, by O. H. Myrick. Russell Sage's Career as a Litigant. The Divorce Congress.

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**Chicago Law Journal** (5th, 12th, 19th, and 26th October; 2nd, 9th, November.)

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**Chicago Legal News** (20th October.)

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**Central Law Journal**, St. Louis, Mo. (5th, 12th October.)

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**Law Notes**, Northport, N.Y. (November.)

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**Federal Reporter**, National Reporter System (13th, 27th September; 11th, 18th, 25th October; 1st, 8th November.)

**North-Eastern Reporter, National Reporter System** (26th October.)

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**South African Law Journal** (15th August):—Mr. H. F. Blaine, K.C. (with portrait); Notes on the History and Development of the Roman-Dutch Law (continued), by J. W. W.; Have Divisional Councils a Lien for Unpaid Rates? by C. J. Ingram; The Statute Law of the Cape in Pre-British Days, and Some Judicial Decisions in Relation thereto, by J. de V. Roos; Remission of Rent when Premises Destroyed by Fire, by P. C. A.

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**Natal Law Quarterly** (30th September):—The Law of Libel with Regard to Public Bodies, by C. J. Ingram; Negotiable Instruments; Landlord's Hypothec over Goods of Third Parties.

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**Madras Law Times** (Nos. 10, 11):—The Late Mr. Justice Budruddin Tyabjee; The Title of Esquire; Review of Legislation in British India, 1904, by Sir Courtenay Ilbert, K.C.S.I.; The Late Sir James Acworth Davies; The Reform of the Criminal Classes in India; The Registration of Partnerships in India; Hindu Law of Succession.

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**Criminal Law Journal of India, Lahore** (15th and 30th September):—An Historic Murder; A New Punishment for Wife Beaters; Accomplices in Thefts.

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**Punjab Law Reporter, Lahore** (September.)

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**Calcutta Weekly Notes** (10th September.)

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**Kathiawar Law Reports** (September.)

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**The Digest, Lahore** (May-June and July-August.)

# OCCASIONAL NOTES.

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## Supreme Court of Canada.

QUEBEC.]

[11TH OCTOBER, 1906.]

### ST. ANN'S ELECTION CASE.

*Parliamentary elections—Controverted election—Personal corruption—Inference—Charge in petition—Amendment—Evidence.*

On a charge of personal corruption by the respondent, if the adjudication by the trial Judges does not contain a formal finding of such corruption, this Court may insert it, if the recitals and reasons given by the Judges warrant it.

The respondent, the night before the election, took a sum of over \$4,000 and divided it into several parcels of sums ranging from \$250 to \$1,500. He then, after midnight, visited all his committee rooms and gave to the chairman of each committee, personally and secretly, one of such parcels. His financial agent had no knowledge of this distribution, and no evidence was produced of the application of the money to legitimate objects.

*Held*, that the inference was irresistible that the money was intended for corruption of the electors, and the respondent was properly held guilty of personal corruption.

Allegations in the petition that the respondent had himself given and procured, and undertaken to give and procure, money and value to electors and others named his agents, to induce them to favour his election and vote for him, for the purpose of having such money and value employed in corrupt practices, were sufficient to cover the offence of which the respondent was found guilty.

*Johnson, K.C., and Perron, K.C., for the appellant.*

*Bisaillon, K.C., and Carmichael, for the respondent.*

NOVA SCOTIA.]

[4TH OCTOBER, 1906.]

## HALIFAX ELECTION CASE.

*Parliamentary elections—Controverted election—Commencement of trial—Extension of time.*

An order fixing the time for the trial of an election petition at a date beyond the time prescribed under the Act operates as an enlargement of the time.

*St. James Election Case*, 33 S. C. R. 137, and *Beauharnois Election Case*, 32 S. C. R. 111, followed.

*Lovett*, for the appellant.

*Lafleur*, K.C., and *Drysdale*, K.C., for the respondent.

NOVA SCOTIA.]

[8TH OCTOBER, 1906.]

## QUEENS AND SHELBURNE ELECTION CASE.

*Parliamentary elections—Controverted election—Trial of petition—Evidence—Corrupt acts at former election—Agency—System of corruption.*

A petition against the return of a member for the House of Commons at a general election in 1904 contained allegations of corrupt acts by the respondent at the election in 1900, which were struck out on preliminary objections. On the trial of the petition evidence of payments by the respondent of accounts in connection with the former election was offered to prove agency and a system, and was admitted on the first ground. A question as to the amount of one account so paid was objected to and rejected.

*Held*, that such rejection was proper; that the question was not admissible to prove agency, for agency was admitted or proved otherwise; nor as proof of a system, which could not be established by evidence of an isolated corrupt act.

*Held*, also, that where evidence is tendered on one ground, other grounds cannot be set up in a court of appeal.

*Lovett*, for the appellant.

*Lafleur*, K.C., and *Drysdale*, K.C., for the respondent.



**Ercbequer Court of Canada.**

[BURBIDGE, J., 30TH JUNE, 1906.]

## CANADIAN PACIFIC R. W. CO. v. THE KING.

*Crown—Canal bridge—Agreement between Crown and company as to construction — Liability for maintenance and operation of bridge.*

In 1882 a company, the suppliants' predecessors in title, applied to the Minister of Railways and Canals for leave to construct a railway bridge across the Otonabee river, in the town of Peterborough, undertaking at the same time to construct a draw in such bridge in case the Crown should at any time thereafter determine it to be necessary for the purposes of navigation. By order in council of the 23rd October, 1882, and an agreement made in pursuance thereof on the 23rd December, 1882, between the company and the Crown, permission was given to the former to construct a bridge, upon the said undertaking to build a swing in the bridge if the Crown considered it necessary, or, in case of the carrying out of the proposed canal for the improvement of the Trent river navigation, and in that case it being considered necessary that there should be a new swing bridge over the canal, the cost of the swing and the necessary pivot pier therefor to be borne by the company. The canal having been constructed, it became necessary to have a new swing bridge over the canal on the company's line of railway. This bridge was built, and the suppliants discharged the obligation to which they succeeded to pay the cost of the pivot pier and of the swing or superstructure of the bridge. The cost of the maintenance and operation of the bridge being in dispute between the parties, the petition was filed to determine the question of liability therefor.

*Held*, that, in the absence of any stipulation in the agreement between the parties as to which should bear the cost of such maintenance and operation, the suppliants, having built the pivot pier and swing as part of their railway and

property, should maintain and operate them at their own cost.

*F. H. Chrysler*, K.C., and *D'Arcy Scott*, for the sup-  
pliants.

*E. L. Newcombe*, K.C., for the Crown.

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[BURBIDGE, J., 30TH JUNE, 1906.]

CANADIAN PACIFIC R. W. CO. v. THE KING.

*Crown—Canadian Pacific Railway Company—Construction of branch  
line—Subsidy—Agreement to pay—Ascertainment of amount—  
“Cost”—“Equipment.”*

By 3 Edw. VII. c. 57, s. 2, it was provided that the Governor in council might grant the Canadian Pacific Railway Company, in aid of the construction of a certain branch line, a subsidy of \$3,200 per mile, where the line did not cost more on the average than \$15,000 per mile, and that where such cost was exceeded, a further subsidy might be given of 50 per cent. on so much of the average cost of the mileage subsidized as was in excess of \$15,000 per mile, such subsidy not exceeding in the whole the sum of \$6,400 per mile. By s. 1 of the Act the expression “cost” was defined to mean the “actual necessary and reasonable cost,” to be determined by the Governor-General in council, upon the recommendation of the Minister of Railways and Canals, and upon the report of the chief engineer of government railways. The Minister of Railways and Canals, under authority of the Governor-General in council, entered into a contract with the plaintiffs respecting the construction of the branch line and the subsidy therefor, by which it was agreed that the Crown would “in accordance with and subject to the provisions of ss. 1, 2, and 4 of the Subsidy Act, pay to the company so much of the subsidies or subsidy hereinbefore set forth or referred to, as the Governor-General in council, having regard to the cost of the work performed, shall consider the company to be entitled to in pursuance of the said Act.”

*Held*, that, inasmuch as the Act and the agreement made thereunder for the payment of subsidy left the amount thereof to be determined by the Governor-General in council, the decision of the Governor-General in council was not open to revision by the Court.

*F. H. Chrysler*, K.C., and *D'Arcy Scott*, for the sup-  
pliants.

*E. L. Newcombe*, K.C., for the Crown.

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[BURBIDGE, J., 30TH JUNE, 1906.]

MCDONALD v. THE KING.

*Patent for invention—Crown's right to use—Compensation—Condition precedent to right of action.*

1. Apart from the statute, the Crown has the power, if it sees fit to do so, to use a patented invention without the assent of the patentee, and without making any compensation to him therefor.

2. By s. 44 of the Patent Act, the Government of Canada may at any time use the patented invention, paying to the patentee such sum as the Commissioner of Patents reports to be a reasonable compensation therefor.

*Held*, on demurrer, that a report by the Commissioner is a condition precedent to any right of action for such compensation.

*F. R. Latchford*, K.C., for the suppliant.

*E. L. Newcombe*, K.C., for the Crown.

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[BURBIDGE, J., 13TH SEPTEMBER, 1906.]

BOW, McLACHLAN, & CO., LIMITED, v. UNION S.S.  
CO. OF BRITISH COLUMBIA.

*Exchequer Court—Ship—Appeal—Interlocutory order—Different motion on appeal—Rehearing.*

Where a motion made on appeal was a different one from that made to the Court below, and the matter was one in

which relief could still be given in the Court below, the Court on appeal refused to entertain the motion, although in such cases the appeal is by way of rehearing.

*R. Cassidy*, K.C., for the appellants.

*W. D. Hogg*, for the respondents.

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[BURBIDGE, J., 13TH SEPTEMBER, 1906.]

UNION S.S. CO. OF BRITISH COLUMBIA v. BOW, Mc-  
LACHLAN, & CO., LIMITED.

THE "CAMOSUN."

*Ship—Counterclaim—Appeal from order striking out—Exchequer  
Court—Jurisdiction.*

The jurisdiction which the Exchequer Court of Canada may exercise under the Colonial Courts of Admiralty Act, 1890, and the Admiralty Act, 1891, is the admiralty jurisdiction, and not the general or common law jurisdiction of the High Court in England.

*The Cheapside*, [1904] P. 339, referred to.

In an action *in rem* for a claim arising upon a mortgage of a ship, the Court has no jurisdiction to entertain a counterclaim for breach of contract to build the ship in accordance with certain specifications.

*W. D. Hogg*, for the appellants.

*R. Cassidy*, K.C., for the respondents.

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[BURBIDGE, J., 1ST OCTOBER, 1906.]

GUNN & CO. LIMITED v. THE KING.

*Crown—Intercolonial Railway—Freight rates—Regular and special  
rate—Agent's mistake in quoting—Estoppel.*

A freight agent on the Intercolonial Railway, without authority therefor and by error and mistake, quoted to a shipper a special rate for hay between a certain point on another railway and on one on the Intercolonial, the rate being lower than the regular tariff rate between the two

places. The shipper accepted the special rate, and shipped a considerable quantity of hay. Being compelled to pay freight thereon at the regular rate, he filed a petition of right to recover the difference between the amount paid and that due under the special rate.

*Held*, that, as the claim was based upon the negligence or laches of an officer or servant of the Crown, for which there was no statutory remedy, the petition must be dismissed.

*H. A. Lovett*, for the suppliants.

*H. Mellish*, K.C., for the Crown.

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[BURBIDGE, J., 29TH OCTOBER, 1906.]

MACDONALD v. THE KING.

*Crown—Public works—Negligence—Canals—Natural channels of rivers—Distinction between public property and public works.*

The natural channels of the St. Lawrence river, which lie between the canals, are not public works unless made so by statute, or unless something has been done to give them the character of public works.

2. By the 1st clause of the 3rd schedule of the British North America Act, 1867, canals with land and water power connected therewith (of which the Cornwall canal is one) are enumerated as part of the provincial public works and property, that in virtue of s. 108 of the Act became the property of Canada.

*Held*, that this does not give the Dominion any proprietary rights in the river St. Lawrence, from which the water is taken for the Cornwall canal, beyond the right to take the water, nor make the river itself a public work of Canada.

3. By an order of the Governor-General in council of the 22nd March, 1870, the St. Lawrence river to the head of Lake Superior, the Ottawa river, the St. Croix river, the Restigouche river, the St. John river, and Lake Champlain, are declared to be under the control of the Dominion government.

*Held*, that this order did not have the effect of altering in any way the proprietary rights, if any, that the government of Canada then had in the rivers and lakes mentioned, or of making them or any parts of them public works of Canada.

*N. A. Belcourt*, K.C., and *J. A. Ritchie*, for the suppliant.

*F. R. Latchford*, K.C., for the Crown.

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[BURBIDGE, J., 12TH NOVEMBER, 1906.]

HILDRETH v. McCORMICK MANUFACTURING CO.

*Patent for invention — Manufacture and sale — Patent Act, s. 37 — Unconditional sale—License.*

The condition in s. 37 of the Patent Act that a patent shall become void if the patentee does not within two years of the date of the patent, or any authorized extension of such period, commence and after such commencement continuously carry on in Canada the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada, should be construed to mean that the patentee must not only manufacture his invention in Canada, but manufacture it in such a manner that any person who desires to use it may buy or obtain an unconditional title to it at a reasonable price..

2. It is not a compliance with the above condition that a person who desires to buy or obtain an unconditional title to the patented invention is put in a position to obtain the use of it at a reasonable rental.

*W. Cassels*, K.C., and *A. W. Anglin*, for the plaintiff.

*G. C. Gibbons*, K.C., *J. Harrison*, and *G. S. Gibbons*, for the defendants.

# THE CANADIAN LAW TIMES.

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DECEMBER, 1906.

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THE "LAW MERCHANT" OF A. D. 1906.

**I**N July last more than 500 delegates met in London, England, on the occasion of the Sixth (triennial) Congress of the Chambers of Commerce of the Empire, the last meeting having been held at Montreal in 1903. At this London gathering there assembled representative men from the most distant parts of our cohesive and expansive Empire; every dependency and colony (except Newfoundland), having its accredited participants, all "feeling the touch of British brotherhood," whether from Fiji or from Canada; all earnestly devoting their time, talents, and ability to the work in hand—co-operating for the common good, yet all presenting their different points of view. While tapping the reservoir of reserve power at the centre, at the same time they were contributing to the wealth of nations by words of wisdom and experience that appealed to Britons in the "Homeland," as well as to Britons from beyond the seas. Lawyers, as typical men of affairs, could find much to interest, much to instruct, in the proceedings of this Congress of business men, each representing a niche in the national structure. Subjects of Imperial moment, such as: "The Commercial Relations between the Mother Country and the outlying autonomous Parts of the Family of Nations;" "The Establishment of an Advisory Imperial Council;" "British Emigration and British Capital under the British Flag;" "Postage rates on British Publications;" "The Consular Service and the Accrediting of Commercial Agents;" "Con-

tributions to Imperial Defence;" "The Assimilation of Laws;" "The All-red Cable Service and the Intelligence Department of Empire;" "British Commercial Education in its widest Sense;" these and other ripe topics elicited eloquent, thoughtful, and thought-producing speeches—practical yet inspiring—which cannot fail to have good results both by way of influence upon the governments to whom their recommendations have been communicated, and in moulding as well as interpreting modern public opinion and sentiment.

As a good example of the well-balanced, pregnant, satisfying eloquence of a leading member of the English Bar, which at the same time expresses amply and clearly the main objects, the chief results, and some of the aspects of the gathering of these men of the "Empire that girdles the world," we cannot do better than cite the brief strong speech of Mr. Asquith, K.C., who addressed the Congress, while the Earl of Elgin, Colonial Secretary (himself born in Canada), presided. The delicacy with which the speaker restored the balance, and with gentle irony rallied one of the previous speakers, whose outlook had been perhaps too bumptiously "provincial," was appreciated by all. The general *curiosa felicitas* or "painstaking happiness of expression," and the cumulative strength of his vocabulary are apparent even in an after-dinner speech.

The Right Hon. H. H. Asquith, K.C., M.P. (Chancellor of the Exchequer and honorary Vice-President of the Congress), who received a very cordial welcome, said it was very gratifying to him, as it must be to all present, to be a guest on the occasion of such a gathering, which in so many ways brought to one's mind the diversity of interest, and at the same time the unity of sentiment, which characterized the British Empire. Nothing, he thought, could be more appropriate, nothing could be better conceived, than that from all parts of such an Empire as ours, which, after all, lived upon commerce, there should be brought about these periodical meetings of representative men from the different Chambers of Commerce to get to know one another better, and to discuss matters of common interest by a comparison of experience, and an interchange of ideas. From what he had heard, their proceedings, as compared with those of other deliberative assemblies, were carried on under peculiarly



advantageous conditions. In the first place, they were absolutely untrammelled in regard to their choice of subjects; they took for their province everything and anything which, directly or indirectly, concerned the trade and the industry of the Empire. And in the Empire for that purpose he included a place called the United Kingdom, with some 40 millions of people, and another place called India, inhabited by a population of not less than 300 millions. It followed, from that happy circumstance, that the range of relevant topics which came before the Congress was so large, and indeed so unlimited, that nothing could very well be ruled out of order; and, further, whatever might be the conclusions at which they finally arrived, they were under no responsibility for carrying them into execution at the expense of those whom they represented. Might he not say, in no invidious spirit, that the real or, at any rate, the chief value of such gatherings was this, that, on the one hand, they tended to focus and to intensify the sense of real identity of interest; and on the other hand, what was not less important, they tended, or ought to tend, to stimulate and to train that sense of proportion and perspective which, immersed as they all were every day of their lives in the special concerns of the community to which each one belonged, was, after all, pre-eminently necessary when they came to survey the relations of the different members of the Empire to one another and of each part to the whole. It was a truism often repeated, indeed it had become one of the commonplaces of political science, that the British Empire, if it had not completely solved, at any rate had done more than any similar organization in the history of the world had done towards solving, the great problem of how to reconcile Imperial with local sentiment. What was the secret of such success as in that matter they had attained? It was, in his opinion, a very simple one—the fact that the Motherland had had the wisdom, not confined to any particular party in the State, to grant to each group of families as they had attained the age of maturity, the freest and fullest autonomy, political, administrative, and fiscal. (Cheers.) And what they had given to others that they retained for themselves. (Cheers.) He rejoiced, as which of them did not, in everything which tended more closely to unite them in the pursuit of common purposes, and in the defence of common interests, without—and they must remember this was the governing condition—without weakening the independence and impoverishing the vitality of any member, be it the centre or be it in the limbs, of that great organ of civilization and humanity which was called the British Empire. English people welcomed all the delegates, as he was sure those who were guests were glad to find themselves in their presence. They welcomed them as members, united for a moment in friendly concern and counsel, of a scattered family which, in every quarter of the globe, by every means of ingenuity, of enterprise, of knowledge, of common sympathy, and of common loyalty, was seeking to guard and to develop the unsurpassed inheritance which belonged to them all.

These words ring true, and met with a hearty response from all. The able lawyer spoke in an appreciative forum. Mr. Asquith left the impression of great reserve power.

#### CODIFICATION OF COMMERCIAL LAW.

The codification of commercial law was given an important place among the vital—as distinguished from more formal—subjects for consideration, and in a bright speech, with apt illustrations, on behalf of the London Chamber of Commerce, Sir Albert Rollit moved the following resolution:

“That in view of the opinion repeatedly expressed both by this Congress and previous meetings, and by the Associated Chambers of Commerce of the United Kingdom, the time has, in the opinion of this Congress, arrived when it is desirable that his Majesty's Government should convene a conference, to which should be invited representatives of British Colonies, to consider or determine measures for the immediate assimilation, and where feasible the codification, of the mercantile law in His Majesty's Dominions.”

He said one of the great obstacles to commerce had been the difference of language, another the difference of weights and measures, and a third the conflict of the laws of various countries, so great in many instances as to lead to the sarcasm that law and equity were two things which God had joined together, and man had put asunder—and that had not been always an exaggeration. It had also led to reflections upon the lawyers, which had been deserved less by them than by those who had made the laws for administration by lawyers. He hoped some means would be devised of securing more uniformity with regard both to law-making and the administration of the law, otherwise there would be a continuance of a great deal of that illegality and fraud which, under a better system of common law, could be to a very great extent prevented. Something had been heard about the bankruptcy laws in Canada, and it was known that under the Company and Bankruptcy law in this country great frauds had taken place. A case had been heard of where a man had said: “I came to your country two years ago a penniless pauper, but thanks to my own energy and enterprise I leave your country to-morrow £20,000 in debt.” That state of law was bad enough between foreign countries, because if a verdict and judgment were obtained in any country it was most difficult to make it fertile and recoverable in any

other country; the case had generally to be tried over again. Under an enlightened system, a judgment given by a competent court should run equally in another country and be readily able to be made available without more expense. They boasted of the unity of the Empire, and he thought they ought also to be able to boast of the unity of its institutions, and the more those institutions were unified the greater would be the bond between the components of the Empire. There ought to be more common machinery and more common administration, and in that way a practical and tangible Imperial unity of the Empire would be brought about. He granted that the blame which was cast upon the laws was frequently caused by the system of law-making, and he had noticed a strong disposition on the part of Colonial legislatures to imitate what, in its legislative machinery, was a very bad example, namely, the House of Commons. He thought that what Sheridan sarcastically said was true in regard to their law-making. They first passed an Act to impose a tax, then an Act to amend the Act imposing the tax, then an Act to add certain clauses to the Act to amend the Act imposing the tax, and then an Act explaining the Act to add certain clauses to the Act to amend the Act imposing the tax, and so on almost forever. There was also a truth in what had been said that a Roman emperor hung his laws so high on the lamp-posts that people could not read them, and then cut off their heads because they did not obey them; but we were much more ingenious. We buried our laws so deep down in cases and statutes that nobody could ever unearth them, and yet everybody was assumed to know the law and was convicted if he did not obey it. There was vast room for improvement in those directions. The resolution suggested that there should be more consolidation of laws and more codification. The Roman accomplished that more than two thousand years ago, and sometimes when he heard, in proposing the toast of the Army and Navy, praise of our guns and Maxims, he thought what much greater praise was due to the Romans whose Maxims were discharged two thousand years ago, and had spread a splendid stream of light through the dark ages, and were still reverberating in judgments of the highest character for guidance in our own courts of law. The splendid system of the Roman Codes and the Digest and Institutes was the best tribute to the greatness of that ancient empire. In modern times Napoleon had no greater monument of his work than the French Code by which strangers in France could find out almost every legal detail and trace the action and principles and reasoning of the law. That state of affairs had been brought about in nearly every country in Europe modelled on the Code Napoleon, and by ourselves in India and in Egypt, and he asked that the same condition of things should be brought about throughout the Empire. The materials were largely ready to hand. The Mercantile Marine law had been codified, and as a ship owner he knew the vast advantage of a consolidated system like that. The Marine Assurance law had existed for ten or twelve years; it had been brought before Parliament every session to be blocked by some blockhead who

did not know the real interest of his country. One of the great claims of the London Chamber of Commerce to support was that it had done something to promote codification in the Factors' Act, in the Bills of Exchange Act, and above all in the Arbitration Act of 1889, which was drafted he believed in the London Chamber, and which had been applied largely, with great advantage to litigants and with considerable success, in the London Chamber's Court of Arbitration. The Empire ought to be marked not merely by its great sentiments, by its unity, by its commerce, and by its trade, but by securing those essential conditions in and for commerce which consisted in an easy and uncostly and wise and prudent administration of law and justice.

Mr. James Barron (Aberdeen) withdrew a resolution to a similar effect, in the name of the Aberdeen Chamber of Commerce, and seconded the London Chamber's resolution, which was carried.

Another resolution on the same subject, in the name of the Belleville Board of Trade, was considered as covered by the London resolution, and read as follows:—

“Resolved that, in the opinion of this Congress of Chambers of Commerce, the codification and assimilation of all the commercial laws of the various parts of the Empire is desirable, not merely for the economic convenience of trade and the stable security of commerce, but also in order to encourage and develop the interchange of business among the most distant parts, to promote the consolidation of Empire, and so far as possible and practicable to further the unity of language, of currency, and of custom for commercial purposes within the Empire or wherever British trade is carried on, and the British flag floats.”

This was supported by Messrs. Ponton and Johnson of Belleville, and is cited simply to indicate that Canadians put forward the same unifying ideas to the Congress, as their British brothers in law. Indeed the Toronto and Montreal Boards of Trade took the leading part throughout the proceedings, Mr. Drummond, of Montreal, and Colonel Denison, of Toronto, being facile principes in tactful and vigorous eloquence.

At a previous meeting Mr. Bodington, of the British Chamber of Commerce of Paris, France, made a strong speech in favour of this subject of uniformity, and, advocating codification, he spoke of the Code Napoleon as a "monument of legislative achievement." From his point of view it is interesting to the profession, as illustrating an evident tendency of the time, to note what he says. At the same time may the fates forbid that we ever have such an exemplification of the law of evidence as was given in the French Courts in the Dreyfus case. Mr. Bodington said:—

We have in England a Society of Comparative Legislation, of which I am a member, and which has for one of its main objects the collection of the material of the laws of the different branches of the British Empire, with a view to codification, in the first instance, of those branches of law which are most easily susceptible of codification.

Now, there is no branch of law which, perhaps, is easier of codification than commercial law, and, so far as the United Kingdom is concerned, we have begun to work, legislatively speaking. You know that in 1882 we codified very successfully, as I think, the law of bills of exchange. Since then we have codified the law of merchant shipping, and we were on the point of practically codifying the law of marine insurance if it had not been for that unfortunate system of blocking which is too easily permitted, perhaps in the British Houses of Parliament.

I have not with me here a copy of the French Code of Commerce, but it is a little book three inches by six. Every merchant can carry it about in his pocket, and very often does. It is couched not in mediæval jargon, but intelligible and modern French, readable by everybody, and I express the hope that it is within the bounds of possibility that at no great distance of time we may have a code as handy as that in good modern English, just as intelligible as the French code.

The French commercial law is not only simple of itself, but the French have specially wide rules of evidence applicable to commercial law. I think one of our great difficulties in England is the extraordinary technicality of the law of evidence, and I think that, especially in commercial law, we could somewhat relax these technicalities as the French have done, and by doing so we shall benefit the whole commercial community of the Empire.

Dr. William Osler, in his recent Harveian Oration at Oxford, said with regard to the medical profession that "the iron yoke of conformity has been upon our necks," but we

may say with him of law what he said also of medicine, having regard to modern education and evolution, that "the special distinction that divides modern from ancient science is its fruitful application to human needs," and like a living organism, truth grows.

The President of the Law Society of England, in a recent address, made some utterances which are germane to the subject so forcibly advocated by the Chambers of Commerce; among other things he said:—

Such improvements as the Judicature Acts have effected were concessions to the commercial view—the lawyers yielded to the demands of merchants of such towns as London, Manchester, and Liverpool. They have cleared away some few technicalities and delays. That there has been accomplished what the authors of those Acts contemplated few would venture to allow; much, very much, is yet required to carry out in practice the radical distinction between substance and form. I believe a careful study of the Acts and rules will result in the conviction that the Acts were intended to be preliminary to a larger and more beneficial change—namely, the entire codification of our system of judicature. For this they have prepared the way. I bring this subject to your attention, because I think the time has come when some attempt should be made to perfect by a proper and amended scheme of procedure what the authors of the Judicature Acts could only rudely sketch out for us. I do so because all experience has shewn that, but for the insistence of commercial men, we might have been far off from even the comparatively improved procedure we now enjoy. We solicitors are in close contact with business men. We know why it is the work of our law courts yearly decreases, and the work of commercial arbitrators increases. We know, for we are the interpreters of the law direct to laymen, and it is from us that the pressure must be exerted to obtain a simpler and more intelligible code of procedure than now exists for more business-like dispatch, and greater freedom from technicality in the administration of the law. I feel strongly that the time has come when the public have a right to demand that our course of procedure shall be systematized and made answerable to the wants and requirements of commercial men, and such as could be readily offered for adoption and imitation by the courts of our colonies.

While we may not all agree with the learned president, and while some of us may think that this crystallizing and simplifying process may be carried too far, yet all professional men will heartily accord with him in the eulogy and tribute which he pays to the reporters and compilers of the

digests, upon which we so largely depend in Canada as in Great Britain. His words may be appropriately described as "well merited, well digested, and on the tongue of good report."

Here I should like, if you will allow me, to perform an act of simple justice. It is to place on record, and in your name acknowledge, the enormous service which in these days has been rendered to our profession and to the public by the Council of Law Reporting, in the frequent presentation to us (not merely of the Reports, but also) of those admirable digests of the Reports which are from time to time issued, and which are of the greatest practical utility to us. I know of no work which is more valuable. The work is arduous and uninviting, and is, having regard to the amount of time and thought expended on it, but poorly paid. In this connection I should like in your name to express our acknowledgments also to the various compilers of annual digests which appear year after year. There is not one of us but must acknowledge the great obligation we are under to them; but for their work, the impatience we feel at the want of systematic codification of our laws would be immeasurably greater than it is. I am sure that in this matter there is but one feeling, that of the value and importance of the work done by the compilers, and of the deep obligation we are under to them.

We note a strange omission from the proceedings of the Chambers of Commerce in that no one seems to have spoken of one of the most important developments of modern commerce, and modern law, namely, the organization and ramifications of joint stock companies. Perhaps they desired to avoid being even verbal "contributories" to the stock of experience, and there may have been present to their minds two or three judicial dicta, which we may be pardoned if we quote, viz.:—

"It appears to me that the atmosphere of the temple of justice is polluted by the presence of such things as these companies."—James, L.J., *Wilson v. Church*, 13 Ch. D. 44.

"In their desire to check dishonest and reckless trading, Courts must be careful not to put tighter fetters on companies than the legislature has authorized."—Lindley, J., *Verner v. General and Commercial Investment Trust*, L. R. 2 Ch. 267.

“The director is really a watch-dog, and the watch-dog has no right without the knowledge of his master to take a sop from a possible wolf.”—Bowen, L.J., *In re North Australian Territory Co.*, 61 L. J. Ch. 135.

A resolution condemning “gambling in futures” was voted down by this staid and solid Congress. Another resolution advocating the recognition throughout the Empire of the naturalization certificate granted to an alien in any part, was also defeated, it being pointed out that in the case of Hong Kong and other eastern “outposts of Empire,” this might involve too large a responsibility.

Resolutions regarding Patents and Copyrights; the obnoxious Quebec Commercial Travellers’ Tax (which received universal condemnation); Emigration Regulations and Restrictions; the uniform Compulsory Registration of the responsible Partners of Firms (as in Ontario), and many other cognate subjects, were discussed and adopted.

While in this Parliament of Traders, the importance of law, and the uniform administration of law, was thus fully and ably recognized, it will not be forgotten that many of the Judges, the builders of our law, have been able business men and have clarified the stream of justice, reconciled conflicting interests, and done much to give the links in the chain of commerce an enduring permanence which individual selfishness and international aggressiveness, left to themselves, would not have rendered possible. That the Judges, especially in the formative periods, have recognized the importance of commerce may be seen by excerpts from recorded judgments, such for instance as the following illustrative selections which touch on some of the points referred to at the Congress:—

“The great source of the flourishing state of this kingdom is its trade and commerce.”—Ashurst, J., *Jordaine v. Lashbrooke*, 7 T. R. 605.



"The freedom of trade, like the liberty of the press, is one thing; the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this Court should do anything that should interfere with the legal freedom of trade."—Grose, J., *King v. Waddington*, 1 East 163.

"It must be remembered that all trade is and must be in a sense selfish; trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering (I give examples only), men fight on without much thought of others, except a desire to excel or to defeat them."—Lord Colridge, C.J., *Mogul Steamship Co. v. McGregor, Gow, & Co.*, 21 Q. B. D. 553.

"It is when merchants dispute about their own rules that they invoke the law."—Brett, J., *Robinson v. Mollett*, L. R. 7 H. L. 817.

"The great object of the law is to encourage commerce."—Chambre, J., *Beale v. Thompson*, 3 B. & P. 421.

"I should regret to find that the law was powerless to enforce the most elementary principles of commercial morality."—Lord Herschell, *Reddaway v. Banham*, [1896] A. C. 209.

"A trader is trusted upon his character and visible commerce: that credit enables him to acquire wealth. If by secret liens, a few might swallow up all, it would greatly damp that credit."—Lord Mansfield, *Worseley v. Demattos*, 1 Burr. IV. 483.

"An universal custom is a law, and I know no distinction between *lex mercatoria* and *consuetudo mercatorum*."—Holt, C.J., *Cramlington v. Evans*, Show. 4.

When a general usage has been judicially ascertained and established, it becomes a part of the law merchant,

which Courts of justice are bound to know and recognize.”  
—Lord Campbell, *Brandao v. Barnett*, 12 Cl. & F. 805.

“I have always thought it highly injurious to the public that different rules should prevail in the different Courts on the same mercantile case. My opinion has been uniform on that subject.—Buller, J., *Tooke v. Hollingworth*, 5 T. R. 229.

“In a perfectly new case—a case altogether *primæ impressionis*—I think the Judges are bound to hold fast to the principles of the common law—to remember the maxim, ‘*Salus reipublicæ suprema lex*,’ and if the condition be really in principle against the public good, to pronounce it in their judgment void.”—Pollock, C. B., *Brownlow v. Egerton*, 23 L. J. Ch. 382.

“Stereotyped rules laid down by judicial writers cannot be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character, and increased in complexity, and there can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal.”—Bowen, L.J., *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 601.

“The statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, makes only void that part where the fault is, and preserves the rest.”—Lord Hobart, C.J., quoted by Twisden, C.J., in *Maleverer v. Redshaw*, 1 Mod, 36.

“The statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time.”—Wilmot, L.C.J., *Collins v. Blantern*, 2 Wils. 341.

“Of course, Scotsmen are not foreigners. They are fellow-subjects of ours, and they are in the same position as any other fellow-subjects, with the important exception that their system of jurisprudence differs in very important particulars from ours. . . . and to call a Scotsman an Eng-

lish subject is a perfect absurdity."—Rigby, L.J., *MacIver v. Burns*, [1895] 2 Ch. 637.

"Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied."—Cockburn, C.J., *Wason v. Walter*, L. R. 4 Q. B. 93.

"It is essential, when persons in trade come into this Court, that they should remember that the administration of equity is founded on perfect truth."—Lord Romilly, M.R., *Cocks v. Chandler*, L. R. 11 Eq. 449.

"Some confidence there must be between merchant and manufacturer."—Lord Macnaghten, *Drummond v. Van Ingen*, 12 App. Cas. 297.

"The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the term of the contract between the shipper and the shipowner."—Lord Selborne, L.C., *Glyn, Mills, & Co. v. East and West India Dock Co.*, 7 App. Cas. 596.

"Common sense still lingers in Westminster Hall."—Maule, J., *Crosse v. Seaman*, 11 C. B. 525.

"Our business is to determine of meum and tuum, where the heats do not run so high, as in things belonging to the legislature."—Powys, J., *Ashby v. White*, 2 Ld. Raym. 946.

"I hope the Chancery will not repeal an Act of Parliament. Waste in the house is waste in the curtilage; and waste in the hall is waste in the whole house."—Hale, C.J., *Cole v. Forth*, 1 Mod. 95.

"Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender; but it is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*."—Lord Kenyon, C.J., *Fowler v. Padget*. 7 T. R. 514.

"Bankers have no right to establish a customary law among themselves, at the expense of other men."—Foster, J., *Hankey v. Trotman*, 1 Blach. Rep. 2.

Bankers are usually charged, rightly or wrongly, with blocking Dominion insolvency legislation, but the consensus of opinion in the Chambers of Commerce was unanimous in urging it. With regard to this our gallant British-Canadian ex-M.P. Lieut.-Gen. J. W. Laurie, C.B. (London), moved the following resolution:—

"That the unification of the law relating to bankruptcy by the enactment of a uniform law throughout the Dominion be pressed on the Government of Canada as a measure that will give greater confidence to those who carry on trade between this country and Canada."

"The Congress, he said, had given the government a good deal to do during the meeting in the duties they had called upon them to perform on behalf of Canada, and his own resolution proposed, in the way of a change, that the Canadian Government should do something. At the present moment every province had its own bankruptcy laws. It was quite true that, under the Constitution of Canada, the provinces were within their rights in dealing with the matter, but, at the same time, trade and commerce was a matter for the Dominion to deal with, and was more adversely affected by the differences in the bankruptcy law in the various provinces than probably any other matter. As an extreme case, he mentioned that an exporter from England who sent goods to Ottawa met with trouble, and his property was dealt with under the bankruptcy law of Ontario. Shortly afterwards he sent some goods to the other side of the Ottawa river, under the impression that Canada was Canada, and that the law that prevailed on one side of the river would be the law on the other. But he was mistaken, and again suffered. The London Chamber asked the Canadian Government to take the matter up and enact one bankruptcy law for the Dominion, so that people would know under what conditions they traded with Canada as a whole."

Mr. R. Wilson Smith (Montreal) seconded the motion, which was carried nem. con.

The multiplicity of topics on the agenda paper rendered concentration necessary, and the President, Mr. Blackwell, J.P. (of Crosse & Blackwell fame), ruled with a rod of iron, but with judicial impartiality. The Statute of Limitations was rigorously applied to many mortal speeches, that might have been terrestrially "immortal." The result, as in some Canadian Courts, was the survival of the fittest.

It is said that in the old days war was a business, and now business is a war. It was said in the old days that trade followed the flag, and now the flag follows trade. But national sentiment and national enterprise are not changed, and merchants and lawyers alike enjoy the privileges and feel the responsibilities of a common citizenship. May the fullest and most comprehensive definition of a State ever penned by legislator or poet, be ever applicable to the British Empire!

"What constitutes a State?

Men who their duties know, and know their rights,  
And knowing, dare maintain.

And Sovereign law, that State's collected will, . . .  
Sits Empress, crowning good, repressing ill."

Whatever we may think of preferential tariffs as a "universal solvent" for the problems of a United Empire, we must all admit that the statesman who has specially identified himself with this policy of sane and strenuous patriotism, has made us realize that trade and commerce—"the golden girdle of the globe"—are at least essential factors in present-day statesmanship. Members of the Bar—men of light and leading—have always been, will always be, associated with those who weave "the silken chain of commerce," in the progressive and public-spirited administration of government. As a law magazine reflecting the times, we

need not therefore apologize for devoting a few pages to some phases of the many topics so ably considered at this deliberative and consultative Congress. All such gatherings—even Bar Associations—tend to “keep the touch;” mind begets mind—opinions broaden opinions—and certainly there was apparent the *tactus peritus* of the true Ambassador of Trade, at this representative meeting held in the Heart of the Empire, where merchants most do congregate; for their speeches appeal *ad negotia et pectora*, to both business and bosoms; and they do not appear as laymen to have been averse to letting in a little of “the gladsome light of jurisprudence.”

W. N. PONTON.

Belleville, November, 1906.

## THE LATEST ONTARIO DECISIONS.\*

**Account.]**—An appeal by the plaintiff in *Gibson v. Gardner* from the order of Boyd, C., 7 O. W. R. 474, noted ante 339, was dismissed by the Court of Appeal: 8 O. W. R. 526.

**Action to Perpetuate Testimony.]**—While, considered as an action to perpetuate testimony, MacMahon, J., thought that *Millar v. Beck*, 8 O. W. R. 501, should have been commenced solely for that purpose, a finding that the signature to the agreement in question purporting to be that of the defendant was actually his and not a forgery was allowed to stand, and the plaintiff was given leave to amend his statement of claim in certain respects.

**Appeal to Court of Appeal.]**—In *Goodwin v. City of Ottawa*, 8 O. W. R. 541, leave to appeal from the order of a Divisional Court, 8 O. W. R. 77, noted ante 574, affirming the judgment of Teetzel, J., 7 O. W. R. 204, was refused by the Court of Appeal, because neither as to the effect of the agreement set up nor touching the claim to exemption under s.-s. 7 of s. 10 of the Assessment Act—the provisions of which as affecting the shares and dividends in question must be read in connection with sub-clause (i) of s.-s. 1 of the same section—was the case of such importance or did it present such special reasons for considering it exceptional as to justify the allowance of a further appeal.—Leave was given to the defendants in *Stephens v. Toronto R. W. Co.*, 8 O. W. R. 551, by Garrow, J.A., to appeal to the Court of Appeal from an order of a Divisional Court upon a question of practice as to the scale of costs taxable upon taking money out of Court paid in with the defence, both on account of the

\* Short notes of the most important cases in Volume VIII. of the Ontario Weekly Reporter. Nos. 13, 14, 15, 16, pp. 415 to 576. inclusive.

practical importance of the point involved and in view of the conflicting decisions upon it.—But leave was refused by the same Judge in *Rex v. Laforge*, 8 O. W. R. 551, where the ground mainly relied upon by the defendant as a reason for quashing the conviction was that the by-law respecting hawkers and pedlars under which it was made fixed so high a license fee (\$75) as to be prohibitive, because, there being evidence both to shew that it was prohibitive and that it was not, the Divisional Court had no alternative but to affirm the conviction: see 8 O. W. R. 104 and ante 585.

**Assessment and Taxes.]**—It was decided by Boyd, C., in *Canadian Oil Fields Co. v. Town of Oil Springs*, 8 O. W. R. 480, that the scheme of the Assessment Act is to put mineral lands and buildings on the footing of farming lands and buildings, and not to give mineral lands any further benefit by way of exemption of structures thereon, and that under s.-s. 3 of s. 36 the value of mineral lands and buildings is to be estimated not as if there were no buildings thereon, but as if they were agricultural lands with buildings.

**Betting.]**—The majority of the Judges of the Court of Appeal decided in *Rex v. Saunders*, 8 O. W. R. 534, that there was such finality or localization of structure of a booth 6 feet 2 inches by 5 feet 2 inches, on castors, and standing in a shed, on the Woodbine track, or moved out on the lawn in front of the shed in fine weather, or of the ground on which it stood, which was possibly changed from time to time, as the 36 bookmakers drew lots each day for position, as to bring it within the meaning of s. 198 of the Criminal Code as a house, office, or place, and that the exception provided for in s.-s. 2 of s. 204 does not apply to the case of a common betting house so as to authorize the keeping the same upon the race-course of an incorporated association, even though the betting were during the actual progress of a race; but Garrow and Meredith, J.J.A., dissented, holding to the view that ss. 197 and 198 have no application to the case



of betting upon such a race-course, so long as it is within the boundaries of the race-course and confined to races then in progress thereupon.

**Contributory.]**—There was evidence in *Re Canadian Tin Plate Co., Mortons' Case*, 8 O. W. R. 531, on which the Court of Appeal were of opinion that it might have been "plausibly contended" that the applications for shares had been withdrawn before allotment, but they decided that the names of the alleged contributories were properly removed from the list of contributories, on the grounds that an entry in the stock ledger shewing them as stockholders was not conclusive, and that the absence of any record in the minute book of any resolution of the directors dealing with their application, and the silence of the persons who ought to have known whether it was ever brought before or passed upon by the board, strongly supported the inference that the shares applied for were never allotted, and that the entry mentioned was the unauthorized act of the manager or a clerk. Notices of calls were held not to support the position of the liquidator, since there never was any appropriation of specific shares to the respondents, and the resolution making the calls could not be regarded as such. Whether the mere notice of a call can be regarded as equivalent to notice of allotment is perhaps questionable.

**Costs.]**—The peculiar situation in which the liquidator in *Re Baden Machinery Co.*, 8 O. W. R. 555, found himself, as a result of *Hood v. Eden*, 36 S. C. R. 476, was that, with assets of \$1,784.09, he was liable for the costs of that case, \$1,721.06, and the costs of the creditors who obtained the winding-up order, and other costs, and that he had received nothing by way of compensation. Mabee, J., was unable to grant him any relief, except as to the costs of and his time and trouble spent in the recovery of \$600, part of such assets, and ordered the balance to be distributed among the parties mentioned.—In *Schaeffer v. Armstrong*, 8 O. W. R.

564, the plaintiff had recovered, in the District Court of Manitoulin, a judgment for an amount in excess of the County Court jurisdiction, but was allowed costs on the County Court scale only. On appeal Boyd, C., held that s. 11 of the Unorganized Territory Act, R. S. O. 1897 c. 109, was not to be read so as to give no alternative between withholding costs altogether and having them taxed on the High Court scale, so that the District Judge had a discretion to make the order complained of.

**Damages.]**—An interesting and important question was squarely raised in *McCormack v. Toronto R. W. Co.*, 8 O. W. R. 467—Is a claim for damages for a tort assignable in law? This question was, after consideration of the authorities, answered in the negative by Anglin, J., who decided also that damages ex delicto arising from an injury to property were no more assignable than similar claims arising out of personal injuries.

**Declaratory Judgment.]**—In *Millar v. Beck*, 8 O. W. R. 561, MacMahon, J., refused to pronounce a declaratory judgment, since no consequential relief was asked nor indeed could be, because certain persons having interests in the timber limits in question in the action, were not parties to the record.

**Discovery.]**—The novel point decided by Teetzel, J., in *Davies v. Sovereign Bank and City of Toronto*, 8 O. W. R. 443, was that members of a municipal council are not officers of the corporation, within the scope of Rule 439 a (1), liable to be examined for discovery.

**Ditches and Watercourses Act.]**—It was decided by a Divisional Court in *Cudahee v. Township of Mara*, 8 O.W.R. 423, that s. 36 of the Ditches and Watercourses Act has the effect of maintaining the engineer's original powers, in abeyance it is true, but capable of being exercised when the necessary proceedings are taken, so that the engineer, hav-

ing power to make any award that might have been made in the first instance, may amend the specifications as to the location, description, and course of the ditch. The engineer's certificate is *prima facie* proof of the correctness of his claim for services, and the onus is on the party who questions it to shew its incorrectness. It is not incumbent upon the municipality, where a contractor who has given security fails to perform the work, to proceed to recover damages for breach of contract, but the work may be re-let.

**Estoppel.]**—The peculiar situation developed between the parties in *Leslie v. Township of Malahide*, 8 O. W. R. 511, was that the plaintiff on his appointment as the defendants' treasurer received from them an order on "the treasurer of Malahide," meaning the previous treasurer, for the sum of \$5,799.52. It was known to the parties that the latter was dead, and that the amount would have to be recovered, if at all, from his estate. The plaintiff carried forward the balance due in the old cash book, and prepared his annual statements as if these moneys were on hand, though he at no time debited himself with the receipt of them, and, anticipating an early liquidation of the debt, went on paying orders given by the defendants out of his own moneys, and so continued from year to year. He filed a claim against the estate and received two dividends, but the balance was never paid. He did not bring the facts directly to the notice of the council, or make any claim against the defendants for about six years, but the fact had been communicated to the clerk that the order had not been paid, though the claim had been filed. The Court of Appeal held that there was no evidence to support a finding that the plaintiff had agreed to charge himself with these moneys; that the case was not one for the application of the principle of "voluntary payment;" and that the plaintiff was not estopped from denying the receipt of the moneys referred to, and was entitled to recover the balance of moneys advanced by him.

**Husband and Wife.]**—An appeal by the defendant in *Lovell v. Lovell* from the order of a Divisional Court, 7 O. W. R. 303, 11 O. L. R. 547, noted ante 218, declaring the plaintiff entitled to alimony on the ground of cruelty not amounting to personal violence, was dismissed by the Court of Appeal: 8 O. W. R. 517.

**Lease or License.]**—A document under seal granting to the plaintiff the exclusive right for 5 years to enter upon certain lands of the defendant and search for petroleum and natural gas, and by which it was provided that such "lease" should be void if a well were not commenced within 6 months from date, unless the lessee should thereafter pay yearly to the lessor \$50 per year for delay, was held by Boyd, C., in *McIntosh v. Leckie*, 8 O. W. R. 490, not to be a contract revocable at the option of the grantor, but creating a right of profit à prendre, an incorporeal right to be exercised in the lands described which entitled the plaintiff to possession thereof for the purpose mentioned. No well having been commenced by the date referred to, the plaintiff paid the first \$50 on the 10th August following, and early in August of the next year tendered a second payment, which the grantor refused to accept (though he admitted that he would have accepted it if made before the 16th June), and deeming the plaintiff's rights forfeited made a new lease to his co-defendants. It was held that there was no such forfeiture and that the tender might be validly made at any time during the second year.

**Malicious Prosecution.]**—The plaintiff in *Bush v. Park*, 8 O. W. R. 566, having sued for damages for false imprisonment, alleging that, as a result of a conspiracy among the defendants, he was brought before a magistrate and committed to gaol as insane, and thence sent to the London asylum, from which he was shortly discharged as never having been insane, a jury found the conspiracy not proved, but found against the defendant Emily Bush, and judgment

was given against her. A Divisional Court, however, set this judgment aside, holding that, leaving out the conspiracy charge, the action was in effect one for malicious prosecution, and the plaintiff had not proved the favourable termination of the proceedings before the magistrate.

**Master and Servant.]**—It was held by a Divisional Court in *Smith v. McIntosh*, 8 O. W. R. 472, reversing the decision of Anglin, J., that, as a result of a correspondence with the defendants, the plaintiff was thrown off his guard as to seeking legal advice, and as to informing himself about and giving the notice required by the Workmen's Compensation for Injuries Act, and was therefore excused from giving such notice; and that, while the plaintiff, who was comparatively illiterate, knew that he had signed a receipt and indorsed a cheque for \$30, the circumstances, considered in the light of the confidential relationship of master and servant existing between the parties, and the inadequacy of the consideration, shewed that he did not understand the situation, or that a complete release was being asked of him, and did not intend to release the defendants from all liability, and therefore the release in question could not stand.

**Mines and Minerals.]**—It was decided by Anglin, J., in *Munro v. Smith*, 8 O. W. R. 452, that the duty of a mining recorder under the Mines Act of Ontario, 1906, in recording a claim, is ministerial and not judicial; that an applicant for the record of a claim has rights which might be prejudicially affected by failure to record such as to give him a status to ask the Court for relief; that the true construction of s. 157, having regard to form 14 and s. 58, is, not that only one claim can be of record at a time, but that the applicant is bound to make disclosure of any adverse claim, so that notice may be given to the adverse claimants; that the judicial functions of the recorder only begin after a claim has been recorded; that, though an appeal to the mining commissioner is provided for, such appeal is limited to cases

arising out of the exercise of those judicial functions; and that the concurrent jurisdiction of the mining commissioner, if it exists, does not oust the jurisdiction of the Court to grant relief by way of mandamus.

**Municipal Corporations.]**—An appeal by the plaintiffs in *Toronto R. W. Co. v. City of Toronto* from the judgment of Meredith, C.J., 8 O. W. R. 78, noted ante 584, was dismissed by a Divisional Court: 8 O. W. R. 431.—It having been decided by a Divisional Court in *Re Bell and Township of Elma* (not reported) that the provisions of s. 341 of the Municipal Act are imperative, Anglin, J., in *Re Kerr and Town of Thornbury*, 8 O. W. R. 451, quashed a by-law of the town, which required the assent of electors, because the mayor had failed to attend at the time and place fixed for the appointment of persons to attend the various polling places, and at the final summing up of the votes by the clerk, holding that the provisions of s. 342 are also imperative.—The plaintiff in *Burke v. Township of Tilbury North*, 8 O. W. R. 457, sued for damages to her lands occasioned by the construction of a drain which appeared to be a purely local work, in which the township as a whole was not interested, the only persons concerned being the owners of property within the drainage area, whose lands were being taxed for the expense. A Divisional Court allowed an appeal from the judgment of Clute, J., in favour of the plaintiff, on the ground that the plaintiff's remedy, if any, was under s. 93 of the Municipal Drainage Act (as re-enacted in 1 Edw. VII. c. 30), and that the action was improperly brought in the High Court. It is pointed out that in case of the plaintiff's success payment would be made out of the township funds generally, whereas in the case of damages and costs awarded under the section mentioned, the lands and roads assessed for the drainage works would contribute pro rata towards the payment thereof.—An appeal by the town corporation in *Re Sinclair and Town of Owen Sound* from the order of Mabee, J., 8 O.W.R. 239, noted ante

583, quashing a local option by-law, was allowed by a Divisional Court (8 O. W. R. 460), chiefly because the Court were of opinion that where a ratepayer was rated in several wards, in which he held property qualification, he was entitled to vote only once, and not in each ward where he had such qualification. Other objections to the by-law in question were also overruled.

**Negligence.]**—An appeal by the defendants in *Preston v. Toronto R. W. Co.* from the order of a Divisional Court, 6 O. W. R. 786, 11 O. L. R. 56, noted ante 33, was dismissed by the Court of Appeal: 8 O. W. R. 504.

**Parliamentary Elections.]**—Upon consideration of Rules 20 and 24 of the General Rules respecting the trial of election petitions, Teetzel, J., in *Re Port Arthur and Rainy River Provincial Election. Preston v. Kennedy*, 8 O. W. R. 419, granted the respondent, after he had filed and served particulars of votes objected to by him, leave to add further particulars of votes to which he intended to take objection on the scrutiny.

**Parties.]**—A motion was made by a creditor for an order substituting or aiding him as plaintiff in *Driffil v. Ough*, 8 O. W. R. 496, the original plaintiff, who instituted the action on behalf of himself and all other creditors of the defendant, to vacate a transfer of property alleged to be in fraud of creditors, having been paid his debt by the defendant. Boyd, C., thought that the application was not covered by the discretionary power as to the substitution and addition of plaintiffs given by such Rules as 266 and 313, and that the proper course for the creditor who desired to intervene would be to begin an independent action.

**Railway.]**—Following the cases already decided under s. 237, s.-s. 4, of the Dominion Railway Act, 1903, Boyd, C., in *Lebu v. Grand Trunk R. W. Co.*, 8 O. W. R. 418, awarded the plaintiff damages for the value of his horse, which had

escaped from an enclosure without the owner's knowledge by jumping a gate, and thus got upon a public street, from which it entered the defendants' freight yards through an opening with a gate, which was left open, it was decided, in violation of s. 199, and thence wandered upon the defendants' tracks, where it was killed.—A Divisional Court in *Crawford v. Tilden*, 8 O. W. R. 548, reversing the judgment of Clute, J., decided that the plaintiff and others were not entitled to mechanics' liens upon certain lands of the defendants the Guelph and Goderich Railway Co., since under the decision in *King v. Alford*, 9 O. R. 643, a mechanic's lien could not be enforced against a railway in Ontario, and, though the amended Act applies in terms to railways, the remedy is restricted to that part where the work was done, and therefore not enforceable because a mechanic's lien is operative as a statutory lien issuing in process of execution, and this limited process is not applicable to a line of railway running through several counties, and, chiefly, since, if the mechanic's lien is to be deemed as equivalent to a vendor's lien, the provincial legislature was not competent to put that burden upon a federal railway undertaking.

**Third Party Procedure.]**—An appeal by the defendants in *London and Western Trusts Co. v. Loscombe*, from the order of Mabee, J., 8 O. W. R. 406, noted ante 741, was, counsel assenting, dismissed by a Divisional Court, the liquidators undertaking, to enable the defendants to take proceedings to be indemnified by third parties, that there should be no distribution unless by leave of the Judge of the County Court of Middlesex, on notice to the defendants.

**Vendor and Purchaser.]**—After correspondence between the plaintiff and defendant in *Bohan v. Galbraith*, 8 O. W. R. 559, through the latter's agents, looking to the purchase by the plaintiff of certain property of the defendant, the plaintiff made a formal offer, half in cash and the balance in



instalments with interest at 5 per cent. To this the defendant answered by letter that the offer was not what he wanted, and that he would not care to sell "on payments," and that, therefore, if the plaintiff wanted the property he could get his own loan and pay cash, or give a mortgage for one-half of the purchase money at 6 per cent. The plaintiff replied that he would accept these terms and pay cash, and inclosed a deed for execution; but the defendant amended the plaintiff's offer in accordance with the terms on which he had declared himself willing to sell, and forwarded it for the plaintiff's signature, and on receiving it wrote that he would not accept it. Teetzel, J., decided that the first letter of the defendant mentioned was not merely a statement or quotation of price, but a counter-proposal, and that on receipt of the plaintiff's reply there was a binding contract, which was not abrogated by what was done subsequently, there being nothing in the correspondence indicating any condition that the plaintiff should sign a further formal offer.

**Venue.]**—The Master in Chambers in *Bell v. Goodison Thresher Co.*, 8 O. W. R. 567, in refusing a motion to change the venue from Barrie to Sarnia, founded upon an agreement that any action in respect of a machine sold, or notes given therefor, or renewals thereof, should be tried at the latter place, decided that 6 Edw. VII. c. 19, s. 22 (O.), applies to the case of an action brought by the buyer as well as the seller, and that the question of where an action was to be tried, being one of procedure only, there was no vested right created by the agreement which would prevent the statute having a retrospective operation.

**Will.]**—A clause in the will in question in *Re Farrell*, 8 O. W. R. 442, by which it was stated that the testator gave, devised, and bequeathed all his real and personal estate "in the manner following," was followed by a devise of certain lands which lapsed. The last clause was, "All

the rest and residue of my estate, consisting of money, promissory note or notes, vehicles, and implements, I give and bequeath to my brother Andrew." Mabee, J., held that the general words "all the rest and residue of my estate" were not cut down to property ejusdem generis with the property particularized in the words following, and therefore that the lands covered by the lapsed devise passed to Andrew.—Upon an appeal by the children of Warren Totten and Norman Totten, both deceased, from the order of Falconbridge, C.J., in *Re Totten*, 7 O. W. R. 886, noted ante 510, a Divisional Court construed the words "remaining sons" as meaning other sons surviving in person or per stirpes, as being both reconcilable with the other provisions of the will, and at the same time as being more in accord with the equality which the testator clearly had in view as a dominant idea, among the respective families of his sons, than the construction "surviving sons" put upon them in the judgment appealed from: 8 O. W. R. 543.

**Writ of Summons.]**—An order under Rule 162 (e) allowing service of a writ of summons upon the defendants in Glasgow, Scotland, was set aside by the Master in Chambers in *Anderson v. Nobels Explosive Co.*, 8 O. W. R. 439, an action for damages for injuries sustained by the plaintiff by reason of a premature explosion in blasting operations, on the James Bay Railway in Ontario, caused as alleged by a defective fuse manufactured by the defendants, on the ground that there was no duty cast upon the defendants as regards the plaintiff to send out only perfect fuses. This ruling was affirmed by Mabee, J. (8 O. W. R. 558), who inclined to the opinion that the defendants' tortious act, if any, was committed in Scotland.

## CASES FROM WESTERN CANADA.\*

**Appeal.]**—An appeal from an order dismissing an application to set aside a default judgment, where the notice of appeal was given more than 15 days after the order was made, was dismissed by the full Court in *Langevin v. Hebert* (Y.T.), 4 W. L. R. 367, under Rule 512, which provides that “notice of appeal from any interlocutory order shall be given within 15 days,” on the ground that the order appealed from was an interlocutory one.

**Attachment of Debts.]**—Since under the Ordinance respecting compensation to the families of persons killed by accident (C. O. 1898 c. 48, s. 3), it is provided that the action for such compensation shall be for the benefit of the wife, husband, parent, child, etc., of the deceased, though the action must be brought in the name of the executor or administrator, *Prendergast, J.*, in *McEwan v. Speckt* (N.W. T.), 4 W. L. R. 325, decided that moneys recovered in such an action were not garnishable in an action against such executor or administrator as such, notwithstanding the Trustee Ordinance (c. 11, 1903, s. 29), the case being one for the application of the maxim “*generalia specialibus non derogant*.”

**Bankruptcy and Insolvency.]**—In *Lennox v. Alaska Mercantile Co.* (Y.T.), 4 W. L. R. 333, it was held by *Craig, J.*, that where execution creditors had recovered judgment and seized certain goods of their debtor claimed by a third party, to whom they had been conveyed by bills of sale not registered within the time prescribed therefor, and an interpleader issue was directed, whereupon the claimant abandoned her claim, an assignee under a general assign-

\* Short notes of the most important cases in Volume IV. of the Western Law Reporter. No. 4. pp. 253 to 368, inclusive.

ment for the benefit of creditors, who had stood by with full knowledge of all the facts for three years while these proceedings were going on, was estopped by his laches and acquiescence from asserting a claim to such goods. In any event he could stand in no better position than if he had instituted an action himself to attack the bills of sale, in which case, under the common law or the statute of Elizabeth, applicable to this Territory, "the debtor who makes a deed fraudulent as against creditors cannot institute an action to set it aside, and his assignee can stand in no better position than his author."

**Carrier.]**—A hotel-keeper who furnished a bus hired by him with a driver from a livery stable, but in charge of his clerk, to carry his guests without charge, and as part of the general accommodation, from and to the railway station, was held by Prendergast, J., in *Barker v. Pollock* (N.W.T.), 4 W. L. R. 327, liable for injuries sustained by a guest, by reason of negligent driving on a particular occasion, although the vehicle was ordinarily a safe one and the driver reasonably skilful. It was decided that the defendant's undertaking was, not that he was simply to put a good and safe vehicle, horses and driver, at his patrons' disposal, but that they should be conveyed to the station with due care, and that the case was not one for the application of the doctrine of the independent contractor. The action was dismissed as against the livery stable-keeper (there being no privity of contract), as he could not be joined to answer for a tort in an action for breach of contract.

**Costs.]**—The costs of an application to unseat a councillor, ordered to be paid by him to the applicant, without any direction as to the scale on which such costs should be taxed, were, it was decided by Scott, J., in *Re Clark* (N.W.T.), 4 W. L. R. 316, taxable under the order on the higher scale, and the Judge who pronounced the order was *functus officio* (*Baker v. Oakes*, 20 Q. B. D. 171), and could not change it.

**Criminal Law.]**—Considering the nature of the stuff stolen (gold dust) and the impossibility of identifying it, and that it was stolen from a mining claim which the defendant was working by the “lay” method for the complainant, and that the theft charged covered the period when the events happened, the admissibility of which as evidence was questioned, Craig, J., in refusing a reserved case in *Rex v. Brindamour* (Y.T.), 4 W. L. R. 339, decided that evidence of other takings by the defendant of gold dust and nuggets, the produce of the claim, was properly admitted, and that there was no misdirection in the trial Judge commenting on this circumstance. Other facts deemed relevant were that the defendant had a quantity of gold dust the possession whereof he did not account for; that while himself across the street from the Bank of Commerce, and able to go there, he paid another a liberal sum to dispose there of the gold dust; his financial position; and his statements regarding such other takings. The statement in the Judge’s charge, “You have to remember that it (the gold dust) came from 249,” considering that it was immediately preceded by the remark, “That is the point you have to decide, did he take that gold dust from 249?” was held not to constitute a misdirection. Finally it was held that the impanelling of a jury exactly according to the provisions of the Yukon Ordinance respecting juries was a substantial compliance with s. 667 of the Criminal Code; that the Yukon Council had power to pass such Ordinance; and that the same had been complied with.

**Forcible Entry.]**—The two questions decided by the full Court in *Rex v. Walker* (N.W.T.), 4 W. L. R. 288, where there was a charge of forcible entry under s. 89 of the Criminal Code, were: (1) that the exercise of actual force is not necessary as an element constituting that offence, and that though alleged it was not necessary to prove it; and (2) that evidence of statements by the defendant offered in reply to contradict the defendant’s testimony that he had not parted with his interest in the property upon which the entry was

made, was inadmissible, because such a statement was not relative to the subject matter of the case, within s. 701 of the Code.

**Interest.]**—The mortgage under which the plaintiff in *Sparling v. Cunningham* (Y.T.), 4 W. L. R. 336, claimed, provided for the repayment of the principal moneys, “with interest thereon at the rate of 60 per cent. per annum,” and then followed this sentence: “It is hereby agreed by and between the mortgagor and mortgagee that interest shall be paid on all overdue principal moneys at the rate aforesaid.” Macaulay, J., decided, on consideration of the English and Canadian cases, that the plaintiff was entitled to recover interest at 60 per cent. per annum on all unpaid principal moneys after the maturity of the mortgage and until the same were fully paid and satisfied.

**Municipal Corporations.]**—Following the ruling in *Jones v. Gilbert*, 5 S. C. R. 356, the full Court in *Rex v. Pope* (N.W.T.), 4 W. L. R. 278, held that a by-law of the city of Calgary passed under its powers to pass by-laws to license, regulate, and govern auctioneers (Ordinance 33 of 1893, N. W. T.), by which it was enacted that before acting as auctioneer, a license should be obtained, and that the license fee for residents of the province of Alberta should be \$20 and for non-residents \$1,000, was invalid as making a discrimination between different classes of persons. The case was held not distinguishable from that cited by reason of the use of the words “regulate” and “govern” in addition to the word “license.” It appeared that the by-law was invalid for the additional reason that its object was to prohibit non-residents from acting as auctioneers, evidenced both by the by-law itself and the facts, which indicated clearly that it was passed to prevent the carrying on of the sale out of which the charge arose.

**Pleading.]**—Allegations in a statement of defence, in answer to a claim in respect of an alleged conspiracy by the

defendants to compel the plaintiffs to carry on their business in a manner required by the defendants or some of them, that the defendants had not been guilty of improper conduct, and that they had "entered into a trade combination with other workmen in the same trade for regulating and altering the relations between such workmen and their employers," and claiming the right to do certain specified things in furtherance of the objects mentioned, and asking that the Court make a declaration as to such right, were struck out by Richards, J., in *Vulcan Iron Works, Limited v. Winnipeg Lodge No. 122, International Association of Machinists (Man.)*, 4 W. L. R. 313, as not being (1) traverses or denials of the plaintiffs' charges, (2) defences by way of confession and avoidance, or (3) denials that the plaintiffs' charges, if true, shewed a good cause of action, and because, even if the Court had power, under s. 38 (e) of the King's Bench Act, to interpret a provincial statute on hypothetical facts, this jurisdiction would not extend to the interpretation of an Act of the Parliament of Canada.

**Principal and Agent.]**—The defendants in *Wood v. John Arbuthnot Co. (Man.)*, 4 W. L. R. 305, bought goods of the Imperial Implement Co., believing them to be the agents of the Canadian Steel and Wire Co., whereas the latter company had sold out to the plaintiffs, whose agents in making the sale the Imperial Implement Co. actually were. Since the essence of the defendants' right to set off a debt due them by the agents was that they should have believed that such agents were really the owner of the goods, the defendants' claim of set-off was disallowed by Richards, J., and the case was distinguished from *Boulton v. Jones*, 2 H. & N. 564, because here the goods were sold by the plaintiffs' agents, and it could not therefore be argued that there was no privity of contract.

**Railway.]**—The decision of the full Court in *Hayward v. Canadian Northern R. W. Co. (Man.)*, 4 W. L. R. 299,

was that a condition in a shipping bill providing that there should be no claim for damages to goods shipped by railway unless notice and particulars of claim were given to the company as therein set forth, was, where such shipping bill had been approved by the Board of Railway Commissioners, as required by s. 275 of the Railway Act, 1903, notwithstanding the provisions of s. 214 (3) of that Act, binding upon the plaintiff, even though the injury to his goods were caused by the defendants' negligence.

**Sale of Goods.]**—In *New Hamburg Manufacturing Co. v. Shields (Man.)*, 4 W. L. R. 307, the plaintiffs were held not entitled to recover the price of a traction engine sold to the defendants, because, in the opinion of Richards, J., their agent knew that the engine was required to drive a certain separator, and the defendants relied on his skill and judgment as to its fitness for this purpose, and it was an article of a description which it was in the course of the plaintiffs' business to supply, and it failed to comply with the condition implied under s. 16 (a), of the Sales of Goods Act, and because there were written on the face of the agreement, which, however, contained a printed warranty and a provision that the agent should not alter, abridge, or change such warranty, the words, "This engine to be satisfactory to the purchasers," since the written words could not be regarded as an addition to, abridgement of, or change in that particular warranty, and the plaintiffs had, with knowledge of this writing, filled the order, and thus waived any objection that they might have had, and since, in case of conflict, the written portion must prevail, and it had not been complied with.

**Solicitors.]**—Although Craig, J., in *Bowcher v. Clark (Y.T.)*, 4 W. L. R. 292, was of opinion that the express repeal by the Yukon Territory Ordinance (33 of 1901) of the North-West Territories Ordinance (c. 51 of the Consolidated Ordinances), which enacted fully and specifically regarding the very matters covered by the English Solicitors Act, 1843.



and which, by reason thereof and its not being workable along with the latter Act, previously in force in the Territories, repealed it by something stronger than implication, did not revive such Act, he considered, in the absence of any provision for the delivery and taxation of solicitors' bills of costs in the first mentioned Ordinance, that, under the common law, the Court had ample authority and power to regulate these matters, and might call upon a solicitor to deliver his bill and order a reference to taxation.

**Statutes.]**—An appeal by the defendant in *Emerson v. Skinner* (B.C.), from the judgment of Hunter, C.J., 3 W. L. R. 558, noted ante 603, was dismissed by the full Court: 4 W. L. R. 255.—The defendants in *Green v. British Columbia Electric R. W. Co.* (B.C.), 4 W. L. R. 273, an action under the Families Compensation Act (Lord Campbell's Act), sought to avail themselves of a provision in a private Act (s. 60 of c. 55 of the B. C. statutes of 1896), that all suits in respect of injuries should be commenced within 6 months after the damage was sustained, but the full Court considered that the damage in this case was sustained not at the time of the injury to deceased, but at the time when, by reason of his death, the plaintiffs, his dependents, were deprived of a provider, otherwise the action would not lie in many cases at all. *Markey v. Tolworth Joint Isolation Hospital District Board*, [1900] 2 Q. B. 454, was discussed and distinguished. The Court expressed the view that "it would be contrary to well settled rules of statutory construction to hold that the special cause of action, so specially provided for, came within the scope of a general limitation clause passed for the benefit of a private corporation.

**Trust.]**—Notwithstanding that the evidence on either side was very evenly balanced both as to the number of witnesses and the circumstances, the full Court in *Hill v. Bible* (N. W.T.), 4 W. L. R. 276, refused to disturb the finding of the trial Judge that a deed from the plaintiff to the defendant,

though absolute in form, was really in trust for the plaintiff, in spite of the ruling in *McMicken v. Ontario Bank*, 20 S. C. R. 548, because they were of opinion that the evidence on behalf of the plaintiff (if believed) did clearly and unquestionably establish that the transfer in question was made in trust for the plaintiff. It was held unnecessary that the character of the trust should, in a case like this, be established with the particularity required, in a case where the reformation of an instrument on the ground of mistake is sought.

**Vendor and Purchaser.** ]—The question arising in *Calon v. Andrews* (B.C.), 4 W. L. R. 259, whether the sentence, "We are ready at any minute to pay this money over to Mr. Andrews so soon as a proper title is evidenced to our satisfaction, and we shall be obliged if you will ask Mr. Andrews to have such title deeds as are in his possession forwarded here with a solicitor's abstract, to enable us to examine into the title fully," in a letter accepting an offer made by letter to sell land, subject to certain specified conditions, one of which was that the defendant should not be "called upon to produce or procure any title papers other than those in his possession," qualified such acceptance or imposed a new condition, was decided by the full Court in the negative. These letters were held, Irving, J., dissenting, to constitute a memorandum sufficient to satisfy the Statute of Frauds, although the purchaser's name was not mentioned, inasmuch as other letters containing it were sufficiently incorporated with these. It was decided that where there has been a definite offer in writing, intended to include all the terms of the proposed agreement, accepted in terms, the vinculum juris so established cannot be dissolved by subsequent correspondence. —The memorandum in question in *Lewis v. Hughes* (B. C.), 4 W. L. R. 269, was also held sufficient to satisfy the statute. The point was whether the description contained in the memorandum, "lots 16 and 17, block 106," was a sufficient description of lots 16 and 17, block 106, dis-

trict lot 196. On the authorities, evidence was held to be admissible to shew that the lots last mentioned were the lots the parties had been talking about, and therefore it was not arguable that the description in the memorandum did not apply to the property described as part of district lot 196. —But in *Berry v. Scott* (N.W.T.), 4 W. L. R. 282, the full Court, in dismissing the plaintiff's appeal from the judgment of Scott, J., 3 W. L. R. 84, noted ante, held that the receipt and letters in question in that case did not constitute a memorandum nor was there a part performance sufficient to satisfy the statute. —The defendant in *Moody v. McDonald* (Man.), 4 W. L. R. 303, having acted in good faith, but being unable to make title, and having, before action brought, offered to repay the plaintiff the sum of \$25 paid on account of his purchase money, Richards, J., gave judgment in the plaintiff's favour for the amount of such payment, but without costs. The defendant was deprived of his set-off for costs because he had not pleaded his good faith and inability to make title. It was considered that the facts brought the case within the rule established by *Flureau v. Thornhill*, 2 W. Bl. 1078, and approved in *Bain v. Fothergill*, L. R. 7 H. L. 158, that where a vendor of land has sold in good faith, but cannot make title, he is liable only for a return of the money paid to him on the purchase, and for the purchaser's costs of investigating the title.

## DECISIONS FROM THE COURTS OF THE MARITIME PROVINCES.\*

**Constitutional Law.]**—In *Rex v. Morneault* and *Rex v. Tardiff* (N.B.), 2 E. L. R. 17, it was held by the full Court that ss. 62 and 81 of the New Brunswick Liquor License Act are *intra vires*.

**Criminal Law.]**—The curious point was raised upon habeas corpus in *Rex v. Brindley* (N.S.), 2 E. L. R. 45, that the prisoner, convicted of a common assault and sentenced to 60 days in gaol, was illegally in custody because the maximum penalty for a common assault is two months, and if the term of imprisonment were to begin, say, in January, two months would be only 59 days. Graham, E.J., refused to give effect to this contention; but, when the prisoner exercised his right of applying to another Judge, Russell, J., ordered his discharge. The applications were made on the 26th and 27th October, and the defendant was then undergoing imprisonment. Graham, E.J., said that, as nothing which might interrupt the sentence, and cause it to be served at another time when months are shorter, was suggested, there was no chance of its turning out to be excessive; but Russell, J., stood by the Nova Scotia decision of *Regina v. Gavin*, 30 N. S. R. 162, and *City of Halifax v. Clusen*, 6 R. & G. 521, saying: "Among other things, the prisoner, it is suggested, may be let out on a ticket of leave and sent back to finish her sentence on the 1st February; or . . . I might now refer the matter to the full Court, and admit the prisoner to bail in the meantime." —*Rex v. Young* (N.S.), 2 E. L. R. 65, is in line with the decision of a Divisional Court in Ontario in *Rex v. Leconte*, 6 O. W. R. 970, 11 O. L. R. 408, inasmuch as *Rex v. Mc-*

\* Short notes of the most important cases in Volume II. of the Eastern Law Reporter. Nos. 2 and 3. pp. 17 to 108, inclusive.

Cormack, 7 Can. Crim. Cas. 135, is followed in preference to Regina v. Keeping, 4 Can. Crim. Cas. 497, though Rex v. Leconte is not referred to. The defendant was convicted for that she "was unlawfully an inmate of a disorderly house, to wit, a common bawdy house or house for the resort of prostitutes." Sections 207 and 208 of the Criminal Code in effect provide that every one is a loose, idle, or disorderly person or vagrant who (then follow a number of acts very different in character) "(j) is a keeper or an inmate of a disorderly house, bawdy house, or house of ill-fame or house for the resort of prostitutes." It was contended, as in the three previous cases—the contention being admitted in Regina v. Keeping—that, instead of stating in the conviction the specific act of vagrancy under (j), it should have been stated that she was "a loose, idle, or disorderly person or vagrant." But Graham, E.J., was of opinion that clause (j) with its context constituted an offence, and that the conviction properly stated a charge under it. By the warrant of commitment the defendant was committed to gaol for "three months or until she shall be therein delivered by due course of law." These last words have been held to vitiate a conviction where no term of imprisonment has been fixed, but here they were regarded as unobjectionable, being a limitation on the provision fixing the term of three months.

**Gift.]**—The question in Wright v. Kaye (N.S.), 2 E. L. R. 47, was whether a conveyance by which the plaintiff deeded to her brother, the defendant, without consideration, her interest in the property of her late father, should be set aside, the contention for the plaintiff being that the defendant was the trustee under the father's will to sell the property and distribute the proceeds among the beneficiaries, one of whom was the plaintiff. She was a young woman of 22, the defendant was old enough to be her father, she was living under the same roof with him, and she had no independent advice. It was held that the gift was voidable at her option, and that acquiescence, or even

express affirmation after the relationship which made it voidable had ceased, could not avail the defendant, the plaintiff being ignorant of her rights. The well known cases of *Rhodes v. Bate*, L. R. 1 Ch. 258, and *Allcaird v. Skinner*, 36 Ch. D. 185, were referred to, and 2 *Pomeroy*. 3rd ed., s. 958, note 4.

**Interest.**—The question involved in the application before Barker, J., in *Eastern Trust Co. v. Cushing Sulphite Co. (N.B.)*, 2 E. L. R. 93, was whether holders of the defendants' bonds were entitled to be paid out of the proceeds of the sale of premises mortgaged to the plaintiffs as trustees for bondholders, interest at the rate of 10 per cent. The mortgage was dated the 25th June, 1901, and purported to secure an issue of bonds amounting to \$280,000, with interest at 10 per cent., payable every 6 months, and by the bonds issued on the 1st July, 1902, the company undertook to pay the principal in ten years, and in the meantime to pay interest half-yearly at 10 per cent. upon presentation of the annexed coupons. The mortgage contained a clause providing that in case of default the plaintiffs might declare the whole of the principal and interest thereon due and payable. Default was made in payment of interest, and the plaintiffs made the declaration and notified the defendants. It was contended by the defendants that the effect of this election on the part of the bondholders was to accelerate the payment of the bonds and make them payable at the date of the notice of the declaration, and, neither the mortgage nor the bonds making any provision for the payment of interest post diem, such interest should be at the statutory rate of 5 per cent. only. The suit was not upon the bonds, but was to enforce the mortgage security, and the application was for distribution of the fund produced by a sale of the mortgaged property made under the decree in the suit. Barker, J., was of opinion, upon a consideration of all the terms of the mortgage and the bonds, that there was an agreement fixing the rate for the whole 10 years, which was unaffected by the acceleration clause.

**Judgment.]**—Some rather antiquated law was invoked in *Conrad v. Simpson* (N.S.), 2 E. L. R. 53. The plaintiffs had a judgment and execution against the defendant, under which the latter was arrested and placed in gaol. He was to have to come up for examination under the Judgment Debtors Act upon a certain Monday, but on Saturday night was set at liberty. The gaol records shewed the entry of his admission and of his release by the order of the sheriff, who had since died, and no one was able to get any information as to his authority or his reason for releasing the prisoner. No authority had been given by the plaintiff. The judgment having been more than twenty years entered, the plaintiff brought an action to revive it. The question was whether the judgment was satisfied. "If a plaintiff arrest his judgment debtor and release him, he can never be taken upon that judgment again. But . . . in *Bassett v. Salter*, 2 Mod. 136, the Court held that in the case of an escape there was no bar to further pursuit of the judgment. The release of the defendant in this case was largely in the nature of an escape. . . . At all events it was the result of no action or consent on the part of the plaintiff, and I therefore think he is entitled to recover." Thus Longley, J., who also held the plaintiff entitled to only six years' interest on the judgment.

**Justice of the Peace.]**—It was held by the full bench of the Supreme Court in *Rex v. Morneault* and *Rex v. Tardiff* (N.B.), 2 E. L. R. 17, that the office of justice of the peace is not incompatible with that of clerk of the peace and clerk of a County Court, so as to disqualify a justice who had been appointed to the other offices from continuing to act as a justice.—Upon an application to prohibit a magistrate from trying the defendant for an offence against the Canada Temperance Act, *Rex v. Murray* (N.S.), 2 E. L. R. 80, it was contended that the offices of town clerk and stipendiary magistrate were incompatible, and that the appointment of a person holding the office of town clerk as stipendiary magistrate did not take effect. Russell, J., did

not find it necessary to decide whether or not the offices were incompatible, but he held that, if they were, the consequence was not that the magistrate's appointment was void, but that the acceptance of office as stipendiary magistrate was an implied resignation of the office of town clerk—the latter office being one which the incumbent could determine by his own act. Upon the alternative application for a certiorari, Russell, J., held, following *Regina v. Major*, 29 N. S. R. 373, that it was no objection to the conviction that the magistrate was the second cousin of the license inspector, who was the informant. That is considered to be the law even without the aid of s. 117 of the Towns Incorporation Act, R. S. N. S. 1900 c. 71, which provides that no stipendiary magistrate of any incorporated town shall be disqualified from trying any cause or matter for any of the following reasons: . . . (c) that the prosecutor is related to the magistrate, provided that the prosecutor is acting in a public or official capacity. The defendant contended that this enactment could apply only to prosecutions for offences which might be the subject of provincial legislation, and not to prosecutions under the Canada Temperance Act, but Russell, J., found it unnecessary to decide the constitutional question so raised.

**Nuisance.]**—In *Rex v. Reynolds* (N.S.), 2 E. L. R. 42, the indictment was: "On the 16th day of July in the year 1906, and on and at divers other days and times before and since that date, (the defendant) unlawfully and injuriously did, and he does yet continue to, obstruct the highway, the same being a public highway of the district of the municipality of East Hants, by erecting fences on and across the said highway, and thereby unlawfully did commit, and does continue to commit, a common nuisance endangering the comfort of the public, and which common nuisance did at Tennycafe aforesaid on the said 16th day of July, 1906, occasion actual injury to George W. Smith and others." Graham, E.J., held that it did not come within the provisions of ss. 191 and 192 of the Criminal Code. because it



did not state that there had been an injury to the person of any one; and at common law it was not sufficient, for want of certainty, and therefore did not come within s. 193 of the Code; and he quashed the indictment.

**Parliamentary Elections.]**—In *Davidson v. Hall* (N.S.), 2 E. L. R. 75, Townshend, J., decided that in an action for a penalty for violation of the Nova Scotia Election Act, by offering money to a person entitled to vote, the fact, deposed to by the person himself, that his vote was received, was sufficient to establish his status as a voter.

**Penalty.]**—The short point decided by Townshend, J., in *Davidson v. Armstrong* (N.S.), 2 E. L. R. 73, is that the penalty for violation of s. 91 of the Nova Scotia Election Act, R. S. N. S. 1900 c. 5, is a fixed sum, and that the Judge who tries an action brought to recover the penalty has no discretion to reduce the amount. The words of the statute are: "And every person so offending shall be liable to forfeit the sum of \$400 to any person who sues for the same, with costs."

**Plant.]**—The difficulty of defining "plant" was felt by Barker, J., in *Eastern Trust Co. v. Cushing Sulphite Fibre Co.* (N.B.), 2 E. L. R. 28. He thought it was easier to decide what in the particular case in hand was not included in the word than to attempt any definition covering all cases. A mortgage given by a company doing the business of pulp millers, conveyed a piece of land, "together with all the mills, mill buildings, machinery, fixtures and plant . . . in or about the said lands and premises." Office furniture and a horse and carriage used for errands in connection with the mill business were considered not to be plant, but scows with waterproof canvas covers, used in lightering pulp shipped to Europe, from the company's wharf to the steamers, and also in lightering cargoes of coal from ships to the wharf, was held to be a part of the plant,

though not included in the words "mill" "machinery," or "fixtures." The fourth class of property claimed as plant gave rise to more difficulty. It consisted of what were called "stores," that is, a great variety of articles used for making repairs to the engines and machinery to keep them in running order, such as packing, nuts, valves, oil, pieces of machinery, etc. These were held not to be plant. "They are not machines, they are not fixtures, they are not appliances or apparatus of themselves capable of use in carrying on the work, and are only useful when they become a part of the machinery." Axes, shovels, piles, and some other articles, were, however, considered to be part of the plant, being ready for use and complete in themselves as tools or appliances.

**Railway.]**—A question of some difficulty arising upon the Railway Acts was decided by Barker, J., in *Barnhill v. Hampton and St. Martins R. W. Co.* (N.B.), 2 E. L. R. 31. The plaintiff sued as trustee for bondholders to enforce a mortgage made by the defendant railway company in 1897, and obtained a decree for sale, under which the railway was sold subject to claims of lien by the Dominion government and by persons who had made repairs and advanced money for wages, etc. The company was incorporated in 1897, and acquired a railway which had been declared by statute to be a work for the general advantage of Canada. By the Dominion Railway Act of 1888, it was only the "rents and revenues" of the company which were subject to the lien of the Crown and liens for payment of working expenses; but by s. 112 of the general Railway Act of 1903, the "property, assets, rents, and revenues" were made subject to those liens. It was contended that the company were not subject to the Act of 1903, but, in the view taken by the Court, it was not necessary to consider this. Barker, J., put it thus: "The lien created by the Act of 1888, which covers that part of the expenditure made before the Act of 1903 came into force, is expressly limited to rents and

revenues. The fund in Court is in no way either the one or the other—it is the proceeds of a sale of the railway property itself, with its franchises conveyed by the mortgage. There was nothing sold under the decree upon which before the sale these claimants could have claimed a lien as being either rents or revenues of the company. The expenditure was, however, practically all made after the Act of 1888 was repealed, and the mortgage was made long before the Act of 1903, under which the lien is claimed, was passed. It was never intended that s. 112 should be retro-active in its operation so as to impair the security on which the bondholders had lent their money, by making the working expenditure a prior lien to theirs.”

**Telephone Companies.]**—In *New Cumberland Telephone Co. v. Central Telephone Co. and New Brunswick Telephone Co. (N.B.)*, 2 E. L. R. 101, the plaintiffs sought an interim injunction to restrain the defendants from carrying out an agreement for the purchase of the Central Telephone Co.’s system by the other defendants. The plaintiffs, incorporated in Nova Scotia, and operating a telephone system in that province, had a working arrangement with the defendants the Central Telephone Co., a New Brunswick corporation, as were the other defendants. Barker, J., held that by the arrangement made between the two New Brunswick companies the rights of the plaintiffs were sufficiently recognized and preserved to them, if that were necessary, and that the plaintiffs had no status to attack the agreement on account of its alleged illegality. He therefore refused the injunction.

**Water and Watercourses.]**—In *City of St. John v. Barker (N.B.)*, 2 E. L. R. 20, a motion was made before Barker, J., for an interim injunction to restrain the defendant from permitting the waters of lake Lomond to be polluted by the sewage from water closets in a building used by the defendant as a hotel. Lake Lomond is a non-tidal body of water.

The Mispic river flows from the foot of the lake for a short distance, and then spreads out into Robertson's lake, from which it again flows to its outlet in the bay of Fundy. The plaintiffs, in the exercise of powers conferred upon them by the legislature of New Brunswick, for the purposes of utilizing the water of lake Lomond as a part of their system of water supply, constructed a dam at the foot of Robertson's lake so as to make a reservoir there, and connected the water of that lake with the water of lake Latimer by a conduit, and thence conveyed the water into the city. The right to the injunction was based on two grounds: (1) that the plaintiffs were riparian owners of property on the Mispic river, and as such entitled to have the water flow in an unpolluted condition along the land; and (2) that they were entitled under certain Acts of the legislature to the use of the water of the lake free from pollution in the interests of public health and for the use of the inhabitants of the city. The fact of pollution not being denied, Barker, J., held that the plaintiffs, as riparian owners lower down on the stream, were entitled to the intervention of the Court, notwithstanding that there was no evidence of actual damage. "As riparian owners, they have the right to have the waters of the river flow through or past their land in their natural state, undeteriorated in quality, unless the defendant can shew, and there is no pretence that she can, a justification for her act by grant or prescription or some other way." Upon the second point it appeared that by 5 Edw. VII. c. 59, s. 2, the plaintiffs were authorized to erect and maintain the reservoir and to build the dam above alluded to, and by s. 3 to abstract from lake Lomond 7,500,000 gallons of water daily; and the learned Judge held that the plaintiffs were entitled, in exercising their riparian rights as arising out of and incident to the powers conferred upon them, to say to the defendant: "You have no right as against us to pollute these waters as you are doing, for we have the right for the purpose of extending our water system and supplying the inhabitants of St.

John with water for drinking, domestic, and manufacturing purposes, to have the water flow down to us unimpaired in quality and in its natural state." Any other view would render the whole legislation useless. An injunction was therefore awarded to the plaintiffs restraining the defendant from fouling the water above or within the limits of the plaintiffs' land on the Mispic river, and from fouling the water of the lake or river flowing into the reservoir.

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## EDITORIAL REVIEW.

### **The Court of Appeal for Ontario.**

The days for the commencement of the four sessions for 1907 have been fixed as follows: Monday, 21st January, 22nd April, 16th September, 11th November. The Court at its last session in 1906 was in the unusual position of waiting for cases, and in a three-weeks sitting finished the hearing of all that were ready.

### **Delay in Giving Judgments.**

The following questions, of which Mr. Taylor, M.P., has given notice, will be asked in the House of Commons at Ottawa:—"Is the Government aware that Mr. Justice Magee (of the Ontario High Court of Justice, Chancery Division), has heard several cases at the different Assize Courts throughout the province of Ontario, and that in many of them he has reserved judgment, and that although in some cases over one year and in other cases over two years have elapsed since he tried such cases, he has not yet seen fit to render judgment thereon, and that this delay has operated to the great injury of litigants? If so, what action does the Government propose to take to procure a speedy delivery of judgment in these several cases so reserved?"

### **Overholding Tenants' Act.**

A Belleville correspondent calls attention to what he suggests as a possible improvement that might be made in the Overholding Tenants' Act, R. S. O. 1897 c. 171. When an order for possession in favour of the landlord is made (with costs), there should, he submits, be also provision for the inclusion in the writ of *fi. fa.* of the amount of rent actually found due by the tenant to the landlord. The landlord's remedy by distress is probably gone once the writ of posses-

sion issues, and it would avoid circuitry of action if in the one proceeding the amount of rent could be determined and its payment, with costs, enforced under the writ. Another salutary provision would be that nothing in the Act contained, and no proceedings taken thereunder, should interfere with or prejudice the landlord's right of distraining, even after the order for possession was made. It is generally found that the class of tenants who resist the proceedings under this Act, are of the worst type, and not merely succeed in putting the owner of the property to great expense, but also escape free from liability through the inability of the landlord to collect rent in arrear in the usual summary way. The landlord's notice as to exemptions being seizable unless premises vacated should also apply. An amending or enabling provision to the above effect might be a move in the right direction.

**Action for Money Paid on Implied Request.**

In the case of *Anderson v. Churchill*, a plaint in a Division Court in the county of Lanark, the plaintiff was financial secretary of the Perth Lodge of the Ancient Order of United Workmen, and was the officer to whom the members of the lodge were required to pay their dues and assessments. The defendant was a member of the lodge. The defendant failed to make payment of his dues and assessments for the months of May, June, July, and August, 1905, but the plaintiff remitted the payments for the four months to the Grand Lodge, reporting the defendant suspended in September, 1905. The action was to recover the amount paid by the plaintiff for the defendant's dues and assessments for the four months. It was established that, according to the constitution of the society, the mere fact of non-payment for one month would, without any formal notice by the member, operate as a suspension from the society. It was shewn that the defendant had upon a former occasion requested the plaintiff to carry him for a month, and had afterwards paid his arrears.

It was also shewn that the defendant did not pay his assessment for the month of April, 1905, until after the 1st May. The learned Judge held that, as the defendant had upon a former occasion requested the plaintiff to keep him in good standing, the onus was on the defendant to shew that he had revoked what was an implied request to keep him in good standing. The Judge further held that, although the plaintiff had in the first instance remitted for the defendant out of the funds of the local lodge, as he was obliged to make good the amount, he was entitled to be subrogated to the rights of the lodge, and had the right to sue. Judgment was given in favour of the plaintiff for the full amount of the four months' dues and assessments. This case will interest solicitors and members of benefit societies and fraternities. It is sent to us by Messrs. Rogers & Stewart, solicitors, of Perth.

#### **Bench and Bar at Belleville.**

The County of Hastings Law Association gave a dinner at the Hotel Quinte in Belleville, on the 27th November last, to Mr. Justice Anglin, then holding the Assizes, and Mr. A. H. Marsh, K.C., and Mr. H. W. Mickle, of Toronto, who were in attendance as counsel. Lieut.-Col. Ponton, president of the association, was of course an inspiring chairman, and the dinner was so successful that the association, we learn, proposes to repeat it at the next Assizes, "so that," to quote one of the local papers, "Bench and Bar may be kept in touch." The example of Belleville might well be followed at other Assize towns. Improved relations between members of the same society cannot be brought about if the social side is neglected.

#### **Mr. Justice Clement.**

When Mr. W. H. P. Clement, of the British Columbia and Ontario Bars, was appointed a County Court Judge in 1905, we remarked (25 C. L. T. 517) that we should like to see him made a Superior Court Judge. He has now actually



been appointed to the Supreme Court Bench of the western province, in the room of Mr. Justice Duff, promoted, and we are glad to know that so excellent a successor has been found for that learned Judge.

#### **Promotion of County Court Judges.**

Instances of the promotion of County Court Judges to the Superior Courts are rare, probably because of the well-understood rule that Judges should not be encouraged to look for promotion or any favour from the Crown. An occasional breach of the rule, however, will do no harm. If we are not mistaken, Mr. Justice Prendergast, of the Supreme Court of the North-West Territories, was a County Court Judge in Manitoba first, and the late Mr. Justice John Wilson, of the Upper Canada Common Pleas, was County Court Judge of Middlesex.

#### **The Chinese Chicken Oath.**

The following interesting description of the taking of a Chinese oath is from the *Vancouver News-Advertiser* of the 27th November last:—

The unusual sound of the squawl of a scared hen in the corridors of the court house yesterday afternoon told that something unusual was in the air. And so it proved, for the famous Chinese chicken oath was about to be administered. It is now three years since this oath was last administered in Vancouver, that occasion being in connection with the perjury charge against one Lai Ping arising out of his connection with the murder of a Chinaman at Lulu Island. Yesterday the administration of this ancient oath arose from a much simpler cause. The County Court case of Doon Chong v. Ching Qu had been referred to Registrar Beck to take accounts.

The plaintiff and defendant had been partners in a market garden business. Doon Chong alleged that Ching Qu owed him \$316.77 on account. The defendant, on the other hand, alleged that he had worked for him so long that very little of

the debt remained. The plaintiff said that the defendant had only worked for him 13 days, and he had deducted that from the original account.

Mr. Wilfrid Sullivan appeared for the plaintiff and Mr. A. B. Pottenger for the defendant. A question arising as to the accuracy of the plaintiff's statement, the defendant demanded that he should swear to it on the King's oath, as the form most binding on the Oriental conscience. After considerable parley this was agreed to, and yesterday afternoon a black Spanish hen was procured, and while it squawked as if with foreknowledge of its fate, that oath was prepared. It was written on yellow paper, in tabular Chinese characters, and by it the plaintiff swore that his statement was true, and if it were not true he would die like that chicken, and his family would never be happy on earth, while like that chicken he would wander round without his head in the mystic Hades of Cathay.

Near the court house steps on the east side of the building some punk-sticks and two red Roman candles were lighted, sending up pleasant odours into the chilly November air; a number of coloured papers with Chinese characters inscribed were collected there; the chicken was brought forth; the Chinaman bareheaded read aloud the yellow oath; then, seizing the chicken from Tom Whitehouse, the assistant caretaker of the court house, he placed its neck on a stick of cordwood and after giving it a vicious slash threw it away. To the consternation of the Chinese and the amusement of the white men assembled, the hen spread its legs and wings and clucked in hurried flight; but the plaintiff gave chase and cornered his quarry by the court house wall. He then returned to the block and with a well directed blow completely decapitated his yellow oath sacrifice. The hen's body gave a few galvanic jerks, and was then gathered into a sack by Tom Whitehouse for the purpose of being converted into a family dinner; while the candles and junk were left to waste their fragrance on the desert air.

**Puisne Judge a Privy Councillor.**

"The appointment of Mr. Justice Kekewich as a Privy Councillor," says the *London Law Times*, "is a graceful recognition of twenty years' service on the Bench, and, coming as it does from a Government whose political principles differ from those of the learned Judge when he was at the Bar, does honour to both parties. It is hardly necessary to say that the Right Hon. Sir Arthur Kekewich has done more work on the Bench than any other Judge of the Chancery Division. Many of his judgments shew a close acquaintance both with law and practice, and on more than one occasion when the Court of Appeal has differed from him his judgment has been restored by the House of Lords. To have taken a first class in classics and a second in mathematics at Oxford; to have had a large practice for many years at the Bar; to have sat on the Bench for twenty years; and to have attained to the dignity of a Privy Councillor—is a record of which but few can boast."

"It is certainly unusual and, so far as we are aware without precedent," it continues, "that a puisne Judge of the High Court in this country should be sworn of the Privy Council while still a member of the Bench, although many puisne Judges have been recipients of that honour on their retirement from a judicial career. The Lord Chancellor, the Lord Chief Justice, the Lords of Appeal in Ordinary, and the Lords Justices of the Court of Appeal, are all, on taking office, sworn of the Privy Council if they have not been previously members of that body. Puisne Judges are not sworn of the Privy Council on appointment to the Judicial Bench, and the appointment to a Privy Councillorship of a Judge during his tenure of office is open to comment as an acceptance of favour from the Crown by one who is bound in the discharge of his duties to stand indifferent as between the Crown and the subject. In Ireland, where the Attorney-General is invariably sworn of the Privy Council, and where, since 1834, it has been the practice of the holders of the

Attorney-Generalship to accept puisne judgeships, many of the puisne Judges as ex-Attorneys-General are members of the Privy Council. When in the late eighties and early nineties of the last century some puisne Judges in Ireland were sworn of the Irish Privy Council during the tenure of their judicial positions, the proceeding was the subject of severe stricture as calculated to weaken the independence of the judiciary as between the Crown and the subject, in the view of the public, however mistaken that view might be."

#### **The James Wilson Memorial.**

Extraordinary honour was paid to the memory of a Revolutionary jurist on the 22nd November last, when the body of James Wilson, a signer of the Declaration of Independence and a Justice of the Supreme Court of the United States, by appointment of Washington, on the establishment of that Court, was removed from an obscure resting place in North Carolina, and re-interred with great pomp and circumstance just outside the walls of Christ Church, Philadelphia, sometimes termed the Westminster Abbey of America. The "Pilot" of Norfolk, Virginia, thus speaks of Wilson's claim to remembrance:—

The foremost citizen of Pennsylvania in his day, saving Benjamin Franklin alone, a devoted patriot, a ripe scholar, a jurist of luminous mind and unrivalled learning, his talents and services were extolled by all the great men of that era of giants, and his speeches in the convention and decisions on the Bench inaugurated the Federal theories of the Government which Marshall afterwards expounded and Webster defended. In the famous debate of the latter with Hayne of South Carolina, the whole basis of his reasoning was borrowed from Wilson's earlier interpretations of the Constitution, and not Hamilton himself was so influential in giving the tinge of Federalism to our infant institutions. But for Wilson, Pennsylvania would have refused to become a member of the Union by ratifying the Constitution, and of his oratory in

the State convention Livingstone wrote to Jefferson that "it combined information, logic, and eloquence, with resistless effect."

**Recent American Decisions.**

*Arson.*—An attempt to commit arson is held, in *State v. Taylor* (Or.), 4 L. R. A. (N.S.) 417, to be made by employing and paying persons to do the act, furnishing them materials and a horse, shewing them how to start the fire, and starting them on their way, although the persons employed do not in fact intend to carry out their agreement, and one is acting with the knowledge of the owner of the building for the purpose of entrapping the others.

*Carriers.*—The right of a sleeping car company to refuse to admit to its car a person having a contagious disease, although he has purchased a ticket for passage thereon, is sustained in *Pullman Co. v. Krauss* (Ala.), 4 L. R. A. (N.S.) 103.

A street railway company is held, in *Omaha Street R. Co. v. Boesen* (Neb.), 4 L. R. A. (N.S.) 122, not to be an insurer of its passengers, nor to be bound to do everything that can be done to insure their safety; but to fulfil its obligations in that regard when it exercises the utmost skill, diligence, and foresight consistent with the practical conduct of the business in which it is engaged.

Where a passenger was injured by the starting of the train while he was alighting therefrom, the fact that the train stopped the usual and ordinary time at the station is held, in *Chicago, R. I. & P. R. Co. v. Wimmer* (Kan.), 4 L. R. A. (N.S.) 140, not to be conclusive that a sufficient length of time was given the passenger to alight; and whether the stop was reasonably sufficient under the circumstances is held to be a question for the jury.

A carrier who fails to perform promptly his contract to transport the scenery and properties of a travelling show,

knowing that their absence will prevent a performance. is held, in *Weston v. Boston & M. R. Co.* (Mass.), 4 L. R. A. (N.S.) 569. to be liable for the value of the ordinary earnings of the properties during the time the owner is deprived of their use, less the expense which he is saved by inability to exhibit; and the fact that such damages are not provided for in the shipping articles is held to be immaterial.

*Defamation.*—Stating of a woman that “she is a dirty, vile woman” is held, in *Feast v. Auer* (Ky.), 4 L. R. A. (N.S.) 560. not to impugn her virtue, and not to be actionable.

*Homicide.*—Mere words, however abusive and insulting, are held, in *State v. Buffington* (Kan.), 4 L. R. A. (N.S.) 154, not to justify an assault, nor to constitute a sufficient provocation to reduce to manslaughter what would otherwise be murder. The other cases on insulting words or conduct as a provocation to homicide are reviewed in a note to this case.

The mere attempt to flee from the scene of a homicide before the fatal shot was fired is held, in *State v. Forsha* (Mo.), 4 L. R. A. (N.S.) 576, not to absolve from responsibility one who aided, abetted, and encouraged its commission to the extent of commanding the one who committed it to shoot deceased. The question of withdrawal from participation in homicide which will relieve from criminality is the subject of a note to this case.

*Husband and Wife.*—Refusal by an English woman to accompany her husband upon his emigration to this country to better his condition in life, without other excuse than disinclination to leave her native land, is held, in *Franklin v. Franklin* (Mass.), 4 L. R. A. (N.S.) 145, to be desertion which will entitle him to a divorce.

*Master and Servant.*—The owner of a vessel is held, in *The Kenilworth* (C. C. A. 3d C.), 4 L. R. A. (N.S.) 49, not

to be liable for the result of improper treatment of a sailor's fractured leg, if the master concluded, in the exercise of his best judgment, that no fracture existed, which conclusion, under the circumstances, was not unreasonable, and the treatment afforded would have been neither negligent nor improper had the conclusion been correct. The question of master's duty to provide medical assistance for his servants is the subject of a note to this case.

That a master does not fulfil his duty to his servants with respect to repairing a broken chain which is part of the permanent equipment for handling bars of iron, by furnishing a competent smith with sufficient materials, is declared in *Haskell v. Cape Ann Anchor Works* (Mass.), 4 L. R. A. (N.S.) 220. The other cases on duty of master to furnish safe appliances, as affected by fact that defective appliances are prepared by fellow servants, are reviewed in a note to this case.

Where a master owes to a third person the performance of some duty to do or not to do a particular act, and commits the performance of the duty to a servant, it is held, in *Stranahan Bros. Catering Co. v. Coit* (Ohio), 4 L. R. A. (N.S.) 506, that the master cannot escape responsibility if the servant fails to perform it, whether such failure is accidental or wilful, or whether it is the result of negligence or malice. With these cases is a note on the liability of master for malicious act of servant when master owes special duty to party injured.

*Solicitor.*—The power of an attorney, under his general authority, to discontinue an action by a dismissal without prejudice, is sustained in *Bacon v. Mitchell* (N.D.), 4 L. R. A. (N.S.) 244, and his client is held to be bound thereby.

*Telegraph.*—In the absence of notice of facts or circumstances calculated to arouse suspicion in the mind of a person of ordinary prudence and intelligence, it is held, in *Bank of Havelock v. Western U. Teleg. Co.* (C. C. A. 8th C.), 4 L.

R. A. (N.S.) 181, that the operators of a telegraph company are not required to investigate or ascertain the identity, or authority to send it, of the person who tenders a message for transmission, whether that message is in writing, or is spoken directly to the operator, or is communicated to him by telephone.

*Vendor and Purchaser.*—Knowledge by a purchaser of real property of an unexpired lease of the property is held in *Browne v. Taylor* (Tenn.), 4 L. R. A. (N.S.) 309, not to prevent his maintaining an action for breach of covenant because of such lease. All the other cases on effect of purchaser's knowledge of incumbrance in action for breach of covenant are collated in a note to this case.



## BOOK REVIEWS.

**Indermaur's Manual of the Principles of Equity.**—A Concise and Explanatory Treatise intended for the use of Students and the Profession, by John Indermaur, Solicitor, Author of "Principles of the Common Law," "Manual of Practice," "Epitomes of Leading Cases," etc, etc. Sixth Edition, by Charles Thwaites, Solicitor. London: Printed and published by Geo. Barber, Furnival Press: 1906.

This is the sixth edition of a work which was first published in 1886. It is somewhat difficult to fairly describe such a work. It is said to be intended for the use of students and the profession. It is not sufficiently large and complete to make it a satisfactory work of reference for the workshop of the practising lawyer, yet, even for such a purpose, it will be useful because of the fact that it is up to date, in the matter of citing the latest authorities, the citations being brought down to September, 1906.

The cases cited are not numerous (about 1,200), but nearly every one of them is a modern case. Nearly all of them are to be found in the Law Reports since 1865.

It is, however, from the standpoint of a student's text book that it must be chiefly considered. The work is written by teachers for students, and doubtless the experience of the author and of his editor as teachers of law has greatly assisted them in presenting the subject in a manner calculated to overcome many of the difficulties which are commonly encountered by students when entering upon the study of equity jurisprudence.

The book is well supplied with convenient side-notes, which facilitate its use as a book of reference. Another excellent feature is that the leading cases are printed in marginal notes, so that the students' attention is pointedly drawn to them. There is one remarkable omission, namely, there is no chapter on principal and surety.

Having said so much by way of appreciation, it becomes necessary to point out certain defects which should be remedied in a future edition.

At p. 32 we find the following:—"In a certain sense, therefore, it is not altogether inaccurate to state that the effect of the Statute of Uses was simply to cause to be added to every conveyance of freeholds the words 'to the use of,' for, whereas, before the statute, if A. was meant to hold for the benefit of B., A. would have been enfeoffed to the use of B., all that was afterwards required to be done was to make the feoffment unto and to the use of A. to the use of B., and the same result was arrived at."

This is a heresy which was formerly found in many text books, but see now *Savill v. Bethell*, [1902] 2 Ch. at p. 540, where it is held that a grant "unto and to the use of A. in fee simple" operates at common law and not under the Statute of Uses, which statute only operates when some person seised to the use, confidence, or trust of some other person. See also *Armour's Real Property*, p. 123, note h.

At pp. 48-9 the subject of executory trusts is dealt with, but it is safe to say that no student could from these pages acquire any clear idea of the equity doctrines concerning executory trusts.

At p. 179 it is stated that there are three kinds of accounts: (1) an open account; (2) a stated account; and (3) a settled account, which is where it has not only been acknowledged to be correct, but has been discharged by payment or otherwise between the parties." This definition of a settled account will come as a surprise to most people.

At pp. 285-6, an attempt is made to state the doctrine of *Maddison v. Alderson*, 8 App. Cas. 473, with reference to the distinction between representations as to existing facts and representations as to future intentions. We venture to think that the student's ideas upon the point will

be muddled rather than clarified by the text, and he will probably be misled, because it is not made clear that a statement of future intention may amount to a promise which, upon being accepted and acted upon, will operate as a valid and binding contract.

Taken altogether, however, the book will well repay any student of equity for his trouble taken in reading it.

A. H. M.

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**Attenborough on the Recovery of Stolen Goods and Goods Obtained by Fraud.** A new work by Charles L. Attenborough, of the Inner Temple and Midland Circuit, Barrister-at-law. London: Stevens and Haynes: 1906.

This book deals specially with the rights and remedies of persons who have, by the thefts or frauds of others, been deprived of their goods. It will be useful to those who have to advise such persons, and to Judges and magistrates to whom applications for orders for restitution are made—in Canada under ss. 803 and 838 of the Criminal Code. As a result of the decision of the House of Lords in *Bentley v. Vilmont*, 12 App. Cas. 471, it came to be considered in England that in every case where a conviction for larceny or false pretences was obtained, the prosecutor had a right to recover the goods, usually by an order of restitution, and it was not until some time after the Sale of Goods Act, 1893, was passed, that Courts administering the criminal law generally recognized that in deciding an application for such an order it was necessary to distinguish not only between larceny and obtaining by false pretences, but also between different cases or kinds of false pretence. The result has been that such Courts now find it necessary in some cases either to decide questions of property or to leave the determination of them to civil Courts. Mr. Attenborough's treatise is not confined to orders of restitution—he deals also with recapture or self-help and civil actions for the recovery of the stolen goods. The book is an excellent one in all respects.

## PERIODICALS AND PAMPHLETS.

**Law Magazine and Review** (London, England, November):—"The West Riding Judgment," by the Attorney-General for the Isle of Man; "The Exemption of Private Property at Sea from Capture in Time of War," by Mr. Justice Kennedy; "Dissenting Opinions," by C. A. Hereschoff Bartlett; "Our Jury System Reformed," by T. R. Bridgewater; "The Province of the Judge and of the Jury," by G. Glover Alexander, LL.M.; "The International Law Association at Berlin," by T. Baty.

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**Harvard Law Review** (Boston, Massachusetts, December):—"Voluntary Assumption of Risk" (II.), by Francis H. Bohlen; "Executive Judgments and Executive Legislation," by Edmund M. Parker; "The Power of Congress to Prescribe Railroad Rates," by Frank W. Hackett.

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**Case and Comment** (Rochester, November):—"Unfair Competition;" "Federal Power to Enforce our Treaty Obligations;" "Government by Private Citizens;" "Election Comment."

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**Albany Law Journal** (Albany, New York, October):—"Latent Equities," by George A. Lee; "The Court of Burgomasters and Schefens Expounds the Law of the Chase," by Lee M. Friedman; "American Reverence for Law;" "Do We Need a Sale of Goods Act in New York?" by E. Lyman Tilden; "The Statutory Prohibition of the Sale of Infants' Real Estate Contrary to the Provisions of Instruments giving them Title," by Samuel Huntington; "Tricked into a False Statement," by Robert Waters.

**General Digest American and English** (Bi-monthly Advance Sheets, No. 52, August, 1906): The Lawyers' Co-operative Publishing Co., Rochester, N.Y.

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**Federal Reporter** (National Reporter System, 15th, 22nd, 29th November): West Publishing Co., St. Paul, Minn.

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**Chicago Legal News** (17th November, 1st December.)

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**Chicago Law Journal** (16th November.)

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**Central Law Journal** (St. Louis, 16th, 23rd November.)

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**Madras Law Journal** (August): "The Madras Estates Land Bill, I."; Notes of Indian Cases; Summary of English Cases; Jottings and Cuttings; Reviews; Reports.

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**Punjab Law Reporter** (Lahore, October.)

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**Civil Law Notes** (Madras, October): "Fraudulent Preference among Creditors;" Notes of English Decisions; "Professional Ethics."

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**Criminal Law Notes** (Madras, October):—"Following Misappropriated Property into its Product;" "Legislative Enactments relating to Criminal Law."

## OCCASIONAL NOTES.

### ERRATUM.

In the Occasional Notes (November) ante p. 779, in the case of *Canadian Pacific R. W. Co. v. The King*, for "*F. H. Chryster*, K.C., and *D'Arcy Scott*, for the suppliants," substitute "*Travers Lewis*, for the suppliants."

### Supreme Court of Canada.

EXCHEQUER COURT.]

[15TH NOVEMBER, 1906.

#### HATTON v. COPELAND-CHATTERSON CO.

*Patent for invention—Infringement of patent—Sale for a reasonable price—  
Use of patented device—Contract—Patent Act, R.S.C.c. 61, s. 37—  
Evidence*

The patentee of a device for binding loose sheets sold the defendant H. binders, subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants, contrary to the condition. In an action for infringement of the patent:—

*Held*, that the condition in the contract with H. imposing the restriction upon the manner in which he should use the binders was not a contravention of the provisions of s. 37 of the Patent Act, R. S. C. c. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent.

Judgment appealed from, 10 Ex. C. R. 224, affirmed.

*Mignault*, K.C., and *Perron*, K.C., for the appellant.

*W. E. Raney*, for the respondents.

ONTARIO.]

[22ND NOVEMBER, 1906.]

## GLOSTER v. TORONTO ELECTRIC LIGHT CO.

*Negligence—Electric wire—Proximity to highway—Injury to child—Dedication—Neglect of duty.*

Several years before 1894 the owner of land in the township of York built a bridge over a ravine for access to and from the city of Toronto, and about 1894 the defendants placed wires across the ravine about ten feet from the bridge. In 1904 the bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires, which had become worn and ceased to be insulated.

The plaintiff, a boy under nine years of age, while playing on the new bridge, put his arm through the railing, and, his hand touching the wire, he was badly injured.

*Held*, that the plans and deeds in evidence shewed a dedication as a public highway of the bridge and land on each side of it, and such highway included the land over which the wires passed.

*Held*, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway, and the company were liable for the injury to G.

Judgment of Court of Appeal, 12 O. L. R. 413, 8 O. W. R. 57, reversed.

C. Millar and D. J. McDougal, for the appellants.

I. F. Hellmuth, K.C., and G. L. Smith, for the respondents.

ONTARIO.]

[22ND NOVEMBER, 1906.]

## CANADA CARRIAGE CO. v. LEA.

*Appeal—Jurisdiction—New trial—Discretion—Ontario Appeals—60 & 61 V. c. 34.*

*Held*, per Fitzpatrick, C.J., that s. 27 of R. S. C. c. 135 prohibits an appeal from a judgment granting, in the exercise of judicial discretion, a new trial in the action.

*Per Davies, J.*:—Under the rule in *Town of Aurora v. Village of Markham*, 32 S. C. R. 457, 22 Occ. N. 354, no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial, unless it comes within the cases mentioned in 60 & 61 V. c. 34, or special leave to appeal has been obtained.

*Per CURIAM*:—Appeal from judgment of the Court of Appeal, 11 O. L. R. 171, 6 O. W. R. 633, quashed.

*G. Lynch-Staunton*, K.C., for the appellants.

*G. F. Shepley*, K.C., for the respondents.

QUEBEC.]

[11TH OCTOBER, 1906.]

### DESERRES v. BRAULT.

*Deed—Construction—Ambiguity—Discharge of debtor—Contract—Illegal consideration—Right of action.*

Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement.

A deed of settlement between B. and a bank declared that he owed the bank \$4,731.61 for interest on an advance in respect to a lottery scheme, and a further sum of \$18,762.02 for advances on an account for the purchase of stock, two notes being given for these amounts, respectively, and the shares of stock being pledged as security for the larger note only. Subsequently the directors of the bank passed a resolution authorizing the discharge of B. on payment of \$15,000 by one V., "jusqu' à concurrence de la dite somme de \$15,000," and the transfer of the shares to V. This resolution was followed by a deed of compromise, V. paying the \$15,000, and obtaining a transfer of the shares: and it was thereby declared that by the transaction B. was discharged in so far as concerned the bank's advances on the stock account "vis-à-vis la banque des avances qu'elle



lui a faites du chef susdit mentionnées en un acte de règlement," etc., the resolution being annexed and the deed of settlement referred to for imputation of the payment, and V. was to become creditor of B. under conditions mentioned "jusqu' à concurrence de \$15,000." In an action by D., to whom the notes held by the bank were assigned:—

*Held*, reversing the judgment appealed from, that the effect of the deed of compromise was to discharge B. merely to the extent of the \$15,000 on account of the larger note; and further, affirming the judgment appealed from, that no action could lie upon the smaller note, as it represented interest on a claim in relation to a contract of an illegal nature.

*L'Association St. Jean Baptiste v. Brault*, 30 S. C. R. 598, followed.

Appeal allowed in part.

*Beique*, K.C., and *Delfasse*, for the appellant.

*Belcourt*, K.C., and *Lamothe*, K.C., for the respondent.

QUEBEC.]

[17TH OCTOBER, 1906.]

# ATTORNEY-GENERAL FOR QUEBEC v. FRASER AND ADAMS.

*Rivers and streams—Navigable and floatable waters—Obstructions to navigation—Crown lands—Letters patent of grant—Evidence—Collateral circumstances leading to grant—Title to land—Riparian rights—Fisheries—Arts. 400, 414, 503, C.C.*

A river is navigable when, with the assistance of the tide, it can be navigated in a practicable and profitable manner, notwithstanding that at low tides it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth.

*Bell v. Corporation of Quebec*, 5 App. Cas. 84, followed.

Evidence of the circumstances and correspondence leading to grant by the Crown of lands on the banks of a navi-

gable river cannot be admitted for the purpose of shewing an intention to enlarge the terms of letters patent of grant of the lands, subsequently issued, so as to include the bed of the river and the right of fishing therein.

The judgment appealed from, Q. R. 14 K. B. 115, was reversed.

*Steadman v. Robertson*, 18 N. B. R. 580, and *The Queen v. Robertson*, 6 S. C. R. 52, referred to.

*In re Provincial Fisheries*, 26 S. C. R. 444, [1898] A. C. 700, discussed.

Appeal allowed with costs.

*Stuart*, K.C., and *Lafleur*, K.C., for the appellant.

*Flynn*, K.C., for the respondents.

QUEBEC.

[29TH OCTOBER. 1906.]

### CANTIN v. BERUBE.

*Tenant by sufferance—Use and occupation of lands—Art. 1608, C.C.—Promise of sale—Vendor and purchaser—Reddition de compte—Action ex vendito—Practice.*

The action for the value of the use and occupation of lands does not lie in a case where the occupation by sufferance was begun and continued under a promise of sale; in such a case the appropriate remedy would be by action *ex vendito* or for *reddition de compte*.

Judgment of the Court below affirmed.

*A. Coriveau*, K.C., for the appellant.

*L. A. Taschereau*, K.C., for the respondent.

QUEBEC.]

[15TH NOVEMBER, 1906.]

## TANGUAY v. PRICE.

*Rivers and streams—Floatable river—Boom—Logs from up river—Retention—Freshet salvage.*

P. owned a saw-mill on the bank of a floatable river, and placed a boom across the stream to hold logs floated down to the mill. T. had a boom further up-stream, in which he had stored pulp-wood. An unusual freshet broke T.'s boom, and brought a quantity of his pulp-wood down with the current into P.'s boom, where it was caught and held until removed some time afterwards by T.'s men, without causing any damage or expense to P. In an action by P. to recover salvage or the value of the use of his boom for the time during which T.'s logs had been held therein:—

*Held*, that, as P. had no right of property in the river where he had placed the boom in which T.'s wood had been caught, those waters remained *publici juris*, notwithstanding the construction of the barrier; that T.'s wood came to the boom and remained there in a lawful manner; that the service rendered in stopping the pulp-wood was involuntary and accidental; and that P. could recover nothing therefor.

*Per* FITZPATRICK, C.J., that there is no difference between the laws of the province of Quebec and those of England in respect to the rights of riparian owners to the water of floatable streams flowing past their lands.

*Miner v. Gilmour*, 12 Moo. P. C. 131, referred to.

Appeal allowed with costs.

*Belcourt*, K.C., and *Turcotte*, K.C., for the appellant.

*Stuart*, K.C., and *Bender*, K.C., for the respondent.

YUKON TERRITORY.]

[11TH OCTOBER, 1906.]

RUTLEDGE v. UNITED STATES SAVINGS AND  
LOAN CO.

*Foreign judgment—Action in—Limitation of actions—Contract—Yukon Ordinance, c. 31 of 1890—Statute of James—Statute of Anne—Lex fori—Lex loci contractus—Absence of debtor beyond seas.*

Under the provisions of the Yukon Ordinance c. 31 of 1890, the right to recover simple contract debts in the Territorial Court of the Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose, notwithstanding that the debtor has not been for that period resident within the jurisdiction of the Court.

Judgment appealed from, 2 W. L. R. 471. reversed,  
GIROUARD and DAVIES, JJ., dissenting.

*J. S. Ewart*, K.C., for the appellant.

*F. H. Chrysler*, K.C., for the respondents.

THE  
CANADIAN LAW TIMES  
ANNUAL DIGEST

OF CANADIAN CASES REPORTED AND  
NOTED DURING THE YEAR 1906,

DECIDED IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, IN  
THE SUPREME AND EXCHEQUER COURTS OF CANADA,  
AND IN THE COURTS OF ALL THE PROVINCES,

TOGETHER WITH A

TABLE OF THE CASES DIGESTED

AND A TABLE OF THE CASES AFFIRMED, FOLLOWED, ETC., IN  
THE CASES DIGESTED.

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EDITED BY

EDWARD B. BROWN, B.A.,

*Of Osgoode Hall, Barrister-at-Law.*

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TORONTO:

THE CARSWELL CO. LIMITED, 30 ADELAIDE STREET EAST  
1907.

Entered according to the Act of the Parliament of Canada, in the year one thousand nine hundred and seven, by THE CARSWELL COMPANY, Limited, in the office of the Minister of Agriculture.

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# DIGEST—1906

## DIGEST OF ALL REPORTS OF CANADA FOR 1906

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1—WAY, VI. 1, 4.

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### ACCORD AND SATISFACTION.

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### ACCOUNT.

1. **Action en reddition de compte**  
— *Idrogate*—*Mandate*—*Professional ser-*  
*vices*—*Pleading*.]—When a declaration  
does not shew that the moneys paid or

remitted to the defendant were moneys  
intrusted to him by the plaintiff to be  
used in business or invested or used in  
the execution of a commission as agent,  
but that they were paid voluntarily for  
professional services, there is no ground  
for an action *en reddition de compte*.—  
The allegation of a promise of the de-  
fendant to furnish a statement of ac-  
count for professional services, for which  
sums of money were paid, cannot serve  
as the basis of an action *en reddition de*  
*compte*, unless it is coupled with an  
allegation of administration of property.  
*Lafond v. Beaulne*, 7 Q. P. R. 458.

2. **Action en reddition de compte**  
—*Defence*—*Res adjudicata*—*Judgment*  
*for account*—*Setting up in account item*  
*adjudicated upon*.]—One who opposes, to  
a demand *en reddition de compte*, the de-  
fence that the right of the plaintiff is  
subject to the preliminary reimbursement  
of a sum of money advanced, and who,  
upon trial, fails in this defence and is  
ordered to account, cannot, in rendering  
an account pursuant to the judgment, set  
up the claim urged in the defence as a  
credit item in his account. The judg-  
ment, having passed into *res adjudicata*,  
while simply declaring against the de-  
fence, without specially adjudging  
whether the claim is well or ill founded,  
is regarded as having virtually rejected  
it. *Huot v. Huot*, Q. R. 14 K. B. 522.

3. **Redemption**—Trustee in posses-  
sion—Profits—Master's report—Appeal.  
*Hull v. Allen*, 8 O. W. R. 604.

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### ADULTERY.

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**AFFIDAVIT.**

**1. Sworn before attorney in cause.]**—An affidavit sworn by the plaintiff before one of the attorneys in the cause to prove damages in an action in ejectment by default is irregular, and the *délibéré* will be discharged. *Haddey v. Shields*, 8 Q. P. R. 30.

**2. Sworn before notary public for Ontario.]**—Affidavits taken by a functionary calling himself "notary public for the province of Ontario," have no validity before the Courts of the province of Quebec. *McNee v. Marchessault*, 8 Q. P. R. 102.

See APPEAL, II. 3, V. 1—ARREST, 1-4, 7—ATTACHMENT OF DEBTS, II. 1—COLLECTION ACT, 2—COSTS, V. 2, 21, VII. 5—CREDITORS' RELIEF ACT—CROWN, 7—EVIDENCE, III. 4—EXTRADITION, 4—HUSBAND AND WIFE, III. 2—JUDGMENT, I. 1, IV. 8, 11—MINES AND MINERALS, 7, 8—OPPOSITION, 2—PARLIAMENTARY ELECTIONS, II. 5—PENALTY, 2, 5—PRACTICE, 2—REPLEVIN, 2—SALE OF GOODS, II. 4—VENUE, 7—WRIT OF SUMMONS, 2, 9.

**AFFIDAVIT ON PRODUCTION.**

See DISCOVERY, IV.—HUSBAND AND WIFE, VII. 5.

**AGENCY.**

See MUNICIPAL ELECTIONS, 7—PARLIAMENTARY ELECTIONS.

**AGENT.**

See PRINCIPAL AND AGENT.

**AGENT'S COMMISSION.**

See PRINCIPAL AND AGENT.

**AIDING AND ABETTING.**

See CRIMINAL LAW, III. 29.

**AIR.**

See EASEMENT, 1.

**ALDERMAN.**

See DISCOVERY, I. 10—MUNICIPAL ELECTIONS.

**ALIEN LABOUR ACT.**

See ALIENS—CONSTITUTIONAL LAW, 1—COSTS, V. 12—PENALTY, 3.

**ALIENATION, RESTRAINT ON.**

See WILL, II.

**ALIENS.**

**1. Alien Labour Act—Conviction—***County Court Judge—Territorial jurisdiction.]*—A Judge of a County Court has no jurisdiction to convict for an offence under the Act to restrict the importation and employment of aliens, (60 & 61 V. c. 11 (1)), and the amending Act, 1 Edw. VII. c. 13, where the offence was not committed within his territorial jurisdiction.—The objection that the Act was *ultra vires* was raised but not decided. *Rex v. Forbes, Ex p. Chestnut*, 37 N. B. R. 402; *Rex v. Chestnut*, 1 E. L. R. 437.

**2. Right of exclusion and deportation—Foreign law—Finding of fact—Review by appellate court—International law—Trespass in foreign country—Wrongful entry.]**—The Court on appeal will not disregard the finding of a Judge who tries a question of fact without a jury on *viva voce* evidence, and substitute for it a finding which they may think should have been made, unless they are satisfied that the Judge was wrong, and the *onus* of shewing that is on the party moving. If the question is left in doubt the presumption that the Judge was right is not displaced.—The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore the plaintiff, an alien, being unlawfully within the United States territory in violation of an Act of Congress, and a person liable to be deported, has no right of action in this Court against an officer of the United States government for his arrest in, and deportation from, that country. — Foreign law is a matter of fact to be ascertained by the evidence of experts skilled in such law. Where the evidence is unsatisfactory and conflicting, the Court will for itself examine the decisions of the foreign courts and

text writers referred to in order to arrive at a satisfactory conclusion upon the question of foreign law: C. S. N. B. 1903 c. 127, s. 60.—By international law, and apart from any civil enactment, a sovereign state has the right at its pleasure to exclude or deport any alien from its dominions; therefore no action will lie in a British court against an official exercising that right at the command and on behalf of the state, of which he is the servant. *Papageorgiou v. Turner*, 37 N. B. R. 449, 1 E. L. R. 387.

See IMMIGRATION ACT—MASTER AND SERVANT, II. 10, 13.

### ALIMENTARY ALLOWANCE.

**1. Liability of step-son.]**—A child, issue of a prior marriage, cannot be sued for an alimentary allowance by the widow of his father. *Oliver v. Woodfine*, 7 Q. P. R. 444.

**2. Reduction — Action — Petition.]**—The reduction of an alimentary allowance granted by a judgment must be demanded by an action, and not by a petition in the cause in which the judgment was rendered. *McCraw v. Vailancourt*, 7 Q. P. R. 396.

See ATTACHMENT OF DEBTS, II. 2—SET-OFF, 2.

### ALIMONY.

See HUSBAND AND WIFE, I., IX. 5.

### ALLOTMENT.

See COMPANY, II., III.

### ALTERATION OF PROMISSORY NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 9.

### ALTERING VOTERS' LISTS.

See CRIMINAL LAW, III. 1.

### AMALGAMATION.

See COMPANY, IV. 1.

### AMBIGUITY.

See DEED—INFANT, 11.

### AMENDMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 6—CANADA TEMPERANCE ACT, 10, 17—CONSTITUTIONAL LAW, 12—CONTRACT, VII. 4, VIII. 4, X. 5—COSTS, VI. 4—CRIMINAL LAW, II. 5, III. 11, 21, 30, 35, 37, IV. 4, 6—EJECTMENT, 4—EVIDENCE, III. 2—EXECUTORS AND ADMINISTRATORS, 2, 15—FRAUDULENT CONVEYANCE, 8—HABEAS CORPUS, 3—HUSBAND AND WIFE, V. 6—JUDGMENT, I. 1, II. 3—LIQUOR LICENSES, 2, 13—MECHANICS' LIENS, 7, 10—MINES AND MINERALS, 3, 15—MORTGAGE, 4, 7—PARLIAMENTARY ELECTIONS, III. 6—PARTIES, I. 11, II. 6—PARTNERSHIP, 2—PLEADING—TRIAL, III. 1—VENDOR AND PURCHASER, I. 34, 36—WRIT OF SUMMONS, 5, 6, 27.

### ANCILLARY PROBATE.

See EXECUTORS AND ADMINISTRATORS, 16.

### ANIMALS.

**Escape of bees — Injury to neighbour — Negligence — Scienter — Danger from number and situation of bees — Findings of jury.]**—The defendant placed a large number of hives of bees upon his own land within 100 feet of the plaintiff's land. While the plaintiff was at work with two horses upon his own land the bees attacked and stung the horses so that they died and also stung and injured the plaintiff. In an action to recover damages for his loss and injury, the jury found, *inter alia*, that the bees were in ordinary flight at the time of the occurrence; that they were the defendant's bees; and that the defendant had reasonable grounds for believing that his bees were, by reason of the situation of his hives, or their numbers, dangerous to persons or horses upon the highway or elsewhere than on the defendant's premises:—*Held*, that the doctrine of scienter



ter, or notice of mischievous propensities of the bees, had no application, nor could the absence of negligence, other than as found by the jury, relieve the defendant; it was his right to have on his premises a reasonable number of bees, or bees so placed as not unfairly to interfere with the rights of his neighbour, but if the number was unreasonable, or if they were so placed as to interfere with his neighbour in the fair enjoyment of his rights, then what would otherwise have been lawful became an unlawful act; the finding of the jury meant that the bees, because of their number and situation, were dangerous to the plaintiff; and the defendant was liable for the injury flowing directly from his unlawful act. Judgment of Magee, J., affirmed. *Lucas v. Pettit*, 12 O. L. R. 448, 8 O. W. R. 315.

See CONVERSION, 3 — CRIMINAL LAW, IV. 6—NEGLIGENCE, 11—NEW TRIAL, 3 — RAILWAY, I.—REVENUE, 1—TRESPASS TO LAND, 2.

### ANIMALS CONTAGIOUS DISEASES ACT.

See CONSTITUTIONAL LAW, 2—CRIMINAL LAW, III. 33—SALE OF GOODS, V. 1.

### ANNUITIES.

See WILL, I. 7.

### ANSWER TO PLEA.

See PLEADING, I.

### APPEAL.

- I. BRITISH COLUMBIA — APPEAL TO SUPREME COURT.
- II. NEW BRUNSWICK—APPEAL TO SUPREME COURT.
- III. NORTH-WEST TERRITORIES — APPEAL TO SUPREME COURT.
- IV. NOVA SCOTIA—APPEAL TO SUPREME COURT.
- V. ONTARIO—APPEAL TO COURT OF APPEAL.
- VI. ONTARIO—APPEAL TO DIVISIONAL COURT OF HIGH COURT.
- VII. ONTARIO—APPEAL TO JUDGE OF HIGH COURT.
- VIII. PRINCE EDWARD ISLAND—APPEAL TO SUPREME COURT.

### IX. PRIVY COUNCIL—APPEAL TO.

X. QUEBEC—APPEAL TO COURT OF KING'S BENCH.

XI. QUEBEC — APPEAL TO SUPERIOR COURT IN REVIEW.

XII. SUPREME COURT OF CANADA—APPEAL TO.

XIII. YUKON TERRITORY — APPEAL TO TERRITORIAL COURT.

See ARBITRATION AND AWARD, 6—ASSESSMENT AND TAXES, 15, 17—ATTACHMENT OF GOODS, 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 11, 19—COLLECTION ACT, 1—COMPANY, III. 24, 25—CONSOLIDATION OF ACTIONS, 2—CONTRACT, X. 1—COSTS, I. 4, VII. 1, 2, 7—COURTS—CRIMINAL LAW, II. 1-4, IV. 4—CROWN, 4—DAMAGES, 5, 6—EXCHEQUER COURT OF CANADA, 2—EXECUTION, 2—FISHERIES, 2—HABEAS CORPUS, 3—HUSBAND AND WIFE, V. 8—INDIAN, 1, 2—INSURANCE, II. 9—JUDGMENT, V. 3—JUSTICE OF THE PEACE, 1—LIQUOR LICENSES, 1, 11—MASTER AND SERVANT, I. 9—MEDICAL PRACTITIONER, 4—NEGLIGENCE, 17—PARLIAMENTARY ELECTIONS, II. 7, 11—PARTIES, II. 3, 6—PATENT FOR INVENTION, 4—PROHIBITION, 1—RAILWAY, II. 1, V. 1—RECEIVER, 1—REGISTRY LAWS, 7—SALE OF GOODS, I. 7—SCHOOLS, 2—SHIP, 1, 9, 26—STAY OF PROCEEDINGS, 1, 3—TRUSTS AND TRUSTEES, 6—VENDOR AND PURCHASER, I. 24, II. 4—WILL, I. 2.

### I. BRITISH COLUMBIA—APPEAL TO SUPREME COURT.

1. **New point raised on appeal—***Question of fact.*]—D., who was with others jointly indebted to the plaintiff on certain promissory notes in relation to the transfer of a business as a going concern, did not in his pleadings, nor at the trial, until the close of the evidence in the case for both sides, raise the point that he claimed a lien on certain merchandise in stock, which was sold by the plaintiff, the proceeds of which ought to have been, but were not, applied in reduction of the debt:—*Held*, that where a point is one of fact, or of mixed law and fact, it cannot be raised in the Court of Appeal for the first time unless the Court is satisfied that by no possibility could evidence have been given which would affect the decision upon it; but where the point is wholly one of law, such, for instance, as the construction of a statute, it may be raised for the first time on appeal, subject to such terms, if any, as the Court may see fit to impose. *Stone v. Rossland Ice and Fuel Co.*, 12 B. C. R. 66, 3 W. L. R. 55.

**2. Right of appeal—Award—Workmen's Compensation Act.]**—No appeal lies to the Supreme Court of British Columbia from the award of an arbitrator appointed by a Supreme Court Judge under clause 2 of schedule II, to the Workmen's Compensation Act, 1902. *Lee v. Crow's Nest Pass Coal Co.*, 11 B. C. R. 323, 1 W. L. R. 527.

See COSTS, II. 1, 2.

## II. NEW BRUNSWICK—APPEAL TO SUPREME COURT.

**1. Contradictory evidence—Finding of trial Judge—Documentary evidence—Weight.]**—Where a cause is tried without a jury, and the Judge finds facts on contradictory evidence, the onus of proving the Judge wrong is on the party moving, and, if he fails to satisfy the Court of this, his motion must fail.—In such a case the appellate court has the same jurisdiction as the trial Judge, and where the facts found are largely based on written evidence, they should disregard his finding if, in their opinion, it is against the weight of evidence. *Adams v. Alcroft*, 37 N. B. R. 332.

**2. Entry of verdict against finding—Evidence.]**—On appeal, where it appears that, by reason of misdirection or an erroneous application of the law, a verdict is wrongfully entered, the Court will not order a verdict to be entered against the finding, though they should be of opinion that it should be so entered on the evidence. *Patterson v. Larsen*, 37 N. B. R. 28.

**3. Notice of appeal—Extension of time—Affidavit.]**—An application for enlargement of the time for giving notice of motion against a verdict, etc., under C. S. N. B. 1903 c. 111, s. 372, on the ground that the transcript of the stenographic report of the trial had not been filed, should be supported by an affidavit shewing that the transcript is necessary to enable counsel to prepare the notice. *McCutcheon v. Darrah*, 37 N. B. R. 1.

**4. Question of fact — Affirmance of judgment — Partnership.** *Leighton v. Hales*, 2 E. L. R. 136.

## III. NORTH-WEST TERRITORIES—APPEAL TO SUPREME COURT.

**1. To Court en banc—Preliminary objections—Order appealed from not issued—Irregularity — Waiver—Objection**

not taken on settlement of appeal case — Effect of order for leave to appeal. *Bank of Hamilton v. Leslie* (N. W. T.), 3 W. L. R. 394.

**2. To single Judge — Appeal from justices' conviction — Deposit of money with justices to cover costs of appeal — Neglect to pay money into Court—No jurisdiction to hear appeal.** *Re v. McLeod* (N.W.T.), 4 W. L. R. 124.

See COSTS, V. 3.

## IV. NOVA SCOTIA—APPEAL TO SUPREME COURT.

**1. Reversal of finding of Judge of facts—Trial.]**—In an action to recover a balance of \$100 alleged to be due on account of two lots of land sold by the plaintiff to the defendant, the evidence satisfied the majority of the Court that the whole amount which the defendant agreed to pay had been paid either to the plaintiff or to her duly authorized agent:—*Held*, that the judgment of the trial Judge in the plaintiff's favour must be reversed. *McKinnon v. Petrie*, 38 N. S. R. 41.

**2. Stay of proceedings — Refusal.** *Town of Dartmouth v. Dartmouth Rolling Mills*, 1 E. L. R. 263.

See COSTS, I. 3.

## V. ONTARIO—APPEAL TO COURT OF APPEAL.

**1. Extending time for—Excuse for delay—Importance of case—Costs—Objectionable affidavit.** *Airby v. Township of Pelee*, 7 O. W. R. 864.

**2. Failure to set down—Extension of time—Special circumstances.** *Hull v. Allen*, 7 O. W. R. 712.

**3. Increased security for costs—Exceptional circumstances.** *McLeod v. Lawson*, 7 O. W. R. 699.

**4. Leave to appeal from judgment at trial—Final judgment—Reference as to damages.** *Playfair v. Turner*, 7 O. W. R. 744.

**5. Leave to appeal from order of Divisional Court — Action against municipal corporation for non-repair of highway—Notice of accident—Reasonable excuse for not giving—Grounds for leave—Previous decision.** *Morrison v. City of Toronto*, 7 O. W. R. 607.

**6. Leave to appeal from order of Divisional Court**—Discovery—Examination of plaintiff—Libel—Qualified privilege—Malice. *McKergow v. Comstock*, 7 O. W. R. 558.

**7. Leave to appeal from order of Divisional Court**—Surrogate Court appeal—Selection of trust company as administrator—Further appeal to Court of Appeal. *Re Burgess*, 7 O. W. R. 454.

**8. Leave to appeal from order of Divisional Court**—Special grounds—Assessment and taxes.]—Leave to appeal from the order of a Divisional Court, 12 O. L. R. 236, was refused by the Court of Appeal, the amount in question being about \$425 only, and the matter in dispute, viz., whether the plaintiff was liable to assessment and taxation in respect of income derived from dividends upon the stock of the Ottawa Electric Railway Company, not being one affecting the rights of the whole body of shareholders. *Goodwin v. City of Ottawa*, 12 O. L. R. 603, 8 O. W. R. 541.

**9. Leave to appeal from judgment at trial**—Amount involved—Reasons for granting leave—Form of order—Recital. *Mathewson v. Beatty*, 8 O. W. R. 869.

**10. Leave to appeal from judgment at trial**—Extension of time—Mistake of solicitor. *Hamilton v. Hamilton, Grimsby, and Beamsville R. W. Co.*, 8 O. W. R. 669.

**11. Leave to appeal from order of Divisional Court**—Practice—Scale of costs—Conflicting decisions. *Stephens v. Toronto R. W. Co.*, 8 O. W. R. 551.

**12. Leave to appeal from order of Divisional Court**—Trifling amount involved—Unimportant questions—Jurisdiction of Drainage Referee. *Burke v. Township of Tilbury North*, 8 O. W. R. 862.

**13. Leave to appeal from order of Divisional Court refusing to quash conviction**—Special grounds—Municipal by-law. *Rea v. Laforge*, 8 O. W. R. 551.

**14. Leave to appeal from order of Divisional Court reversing judgment at trial.** *Hogaboom v. Hill*, 8 O. W. R. 979.

**15. Leave to appeal from order of Divisional Court reversing judgment at trial**—Grounds of appeal—Judicature Act, s. 76 (1) (g). *Crown Bank of Canada v. Brash*, 8 O. W. R. 483.

**16. Leave to appeal from order of Divisional Court reversing judgment at trial**—Small amount involved—No special circumstances—Leave refused. *Vivien v. Kehoe*, 8 O. W. R. 955.

**17. Leave to appeal from order of Divisional Court reversing order quashing municipal by-law**—Special grounds—Passage of local option by-law procured by treating. *Re Gerow and Township of Pickering*, 8 O. W. R. 497.

**18. Leave to appeal from order of Judge quashing municipal by-law**—Judicature Act, s. 76a—Grounds for granting leave. *Re Sinclair and Town of Owen Sound*, 8 O. W. R. 298.

**19. Right of appeal—Third party**—Appeal on his own behalf—Third party procedure—Directions.]—An order under Con. Rule 213 giving a third party the right to appear at the trial of an action, even though he be declared to be bound by the judgment, is not equivalent to an order giving him leave to defend.—In an action where the third parties had no right to defend the action, but had obtained leave to appeal in the name of the defendants, of which they had availed themselves:—*Held*, that an appeal in their own names was not competent. *Gaby v. City of Toronto*, 1 O. W. R. 635, considered and distinguished. *Deseronto Iron Co. v. Rathbun Co.*, 11 O. L. R. 433, 7 O. W. R. 162.

**20. Security on appeal from order for new trial—Stay of trial—Rule 827—Removal of Stay.]**—A new trial having been ordered by a Divisional Court, the plaintiff gave notice of trial, but the defendants appealed to the Court of Appeal from the order directing the new trial, and gave the security required by Con. Rule 826, which was duly allowed:—*Held*, that the order for a new trial was a "judgment or order appealed from," within the meaning of Con. Rule 827 (1), and, the security for the appeal having been allowed, the execution thereof, by proceeding to a new trial or otherwise, was stayed pending the appeal, by force of that Rule, such judgment or order not being one of the excepted cases mentioned in the Rule. The Rule is not confined to the case of a judgment or order directing the payment of money, but extends generally to all appealable judgments or orders which are to be "executed" by proceedings to be taken thereunder or in consequence thereof.—In a proper case the stay may be removed and permission given to proceed to trial notwithstanding the appeal; but as a gen-

eral rule such permission ought not to be granted; and in this case it was refused. *Uplaki v. Dawson*, 10 O. L. R. 683, 6 O. W. R. 738.

See COSTS, III. 7, VI. 2—EXECUTORS AND ADMINISTRATORS, 6—PARLIAMENTARY ELECTIONS, V.

#### VI. ONTARIO—APPEAL TO DIVISIONAL COURT OF HIGH COURT.

**1. County Court appeal**—Final order—Dismissal of action for want of prosecution. *Diamond Harrow Co. v. Stone*, 7 O. W. R. 685.

**2. County Court appeal**—*Right of appeal—Final or interlocutory order—Order striking out part of pleading.*—An order of a County Court Judge purporting to be made under Con. Rule 261, striking out part of a defence as disclosing no reasonable answer, is in its nature final, and an appeal from it will lie under s. 52 of the County Courts Act. R. S. O. 1897 c. 55. *Smith v. Traders Bank*, 11 O. L. R. 24, 6 O. W. R. 748.

**3. County Court appeal**—Right of appeal.—Appeal from order of County Court in term dismissing motion for new trial in action tried by a jury—County Courts Act, s. 51. *Booth v. Canadian Pacific R. W. Co.*, 8 O. W. R. 860.

**4. Decision of Local Master upon reference for trial**—Appeal heard by consent. *Potter v. Orillia Export Lumber Co.*, 8 O. W. R. 804.

#### VII. ONTARIO — APPEAL TO JUDGE OF HIGH COURT.

**Master's report**—Extension of time—Delay—Explanation—Grounds of appeal. *Campbell v. Croil*, 7 O. W. R. 86, 157, 237.

#### VIII. PRINCE EDWARD ISLAND—APPEAL TO SUPREME COURT.

**Charlottetown City Court**—No right of appeal from. *Wheatley v. Long*, 1 E. L. R. 132.

#### IX. PRIVY COUNCIL—APPEAL TO.

**1. Amount in controversy**—*Damages—Original claim—Abandonment of portion.*—The plaintiff in an action in

a Superior Court may at any time abandon a part of his claim, and upon such abandonment the remainder only is deemed to be in controversy.—On the trial of an action in which the damages were laid at \$5,000, a nonsuit was entered, but it was agreed that in case the plaintiff should, on appeal, be held entitled to maintain the action, the damages should be fixed at \$1,000. On appeal to a Divisional Court, the plaintiff was held so entitled, and a new trial was directed unless the defendants consented to judgment for the \$1,000. This the defendants refused to do, and appealed to the Court of Appeal, when the judgment of the Divisional Court was affirmed. An application was then made for leave to appeal to the Privy Council, on the ground that the matter in controversy exceeded \$4,000. In answer thereto the plaintiff, by affidavit, stated that he was only claiming \$1,000, which he regarded as agreed upon for all purposes, and offered to amend his statement of claim:—*Held*, that the application must be refused, as the damages must be deemed to be limited to the \$1,000. *Preston v. Toronto R. W. Co.*, 13 O. L. R. 78, 8 O. W. R. 753.

**2. Application for leave**—*Form.*—A Judge of the Court of King's Bench in Chambers has no jurisdiction to entertain an application for leave to appeal to the Privy Council from a judgment rendered by the Court. *Palliser v. Consumers Cordage Co.*, Q. R. 14 K. B. 338.

**3. Leave to appeal**—*Amount in controversy.*—In determining the question of the value of the amount involved, upon which the right to appeal to the Privy Council depends, the Court, on a motion for leave to appeal, will look at the judgment as it affects the parties; and where it appeared from affidavits in support of the motion that the defendants in obeying an injunction would be put to an expense of over £300, they were granted leave to appeal. *Centre Star Mining Co. v. Rossland-Kootenay Mining Co.*, 11 B. C. R. 509, 1 W. L. R. 336.

**4. Motion to allow security**—*Matter in controversy exceeding \$4,000—Value.*—On a motion by the plaintiffs for the allowance of the security on an appeal from the Court of Appeal to the Privy Council, in an action brought by the corporation of a city against two electric light companies, to have it declared that they had forfeited their rights under certain agreements with the city, under which they held their franchises, on the ground that they had amalgamated contrary to the terms of such agreements, which action had been dismissed:

— *Held* (MEREDITH, J.A., dissenting), that the whole matter in controversy at the trial (being the destruction, not the acquisition of the defendants' franchise) was whether the companies had forfeited their right by amalgamation, and this clearly did not come within the last branch of s. 1 of R. S. O. 1897 c. 48, and that there was nothing before the Court to shew that such matter was of value to the plaintiffs of more than \$4,000, or of any sum or value capable of being ascertained or defined. Per MEREDITH, J.A.—The matter in controversy much exceeded \$4,000, and if controverted leave should be given to the appellants to prove the value. *City of Toronto v. Toronto Electric Light Co.*, *City of Toronto v. Incandescent Light Co. of Toronto and Toronto Electric Light Co.*, 11 O. L. R. 310, 7 O. W. R. 119.

See COSTS, III. 2—PRACTICE, 1.

#### X. QUEBEC—APPEAL TO COURT OF KING'S BENCH.

**1. Leave to appeal**—*Judgment allowing demurrer in part—Leave to both parties to appeal.*—Where a judgment has sustained in part and dismissed in part a defence in law, and leave to appeal has been granted upon the demand of the party against whom the defence in law has been partly sustained, leave to appeal will also be granted to the party whose defence in law has been partly dismissed. *Cantlie v. Cantlie*, 8 Q. P. R. 39.

**2. Leave to appeal—Time—Vacation.**—The 30 days allowed by article 1211, C. P. C., for moving for leave to appeal from an interlocutory judgment run during the long vacation, and fall under exception 11 of art. 15, C. P. C. *Poirier v. City of Montreal*, Q. R. 14 K. B. 481.

**3. Record—Depositions and documents omitted—Two actions tried together.**—Where two causes have been joined together for the purpose of trial, according to the terms of art. 292, C. P. C., and an appeal has been launched from the judgment rendered in one of them, and the record sent up to the appellate Court does not contain all the depositions and documents produced in accordance with the order for trial of the two actions together, the appeal should not on that account be declared defective, and a motion to so declare will be refused, if the depositions and documents omitted do not refer to the appeal and are without

importance in regard to the decision of it. *Bernard v. Carbonneau*, Q. R. 15 K. B. 287.

**4. Right of appeal—Final or interlocutory judgment—Jurisdiction of Circuit Court.**—An action brought in the Circuit Court was removed upon declinatory exception into the Superior Court, and dismissed upon the merits by the latter Court. Upon appeal to the Court of Review, that Court declared that the action was within the competence of the Circuit Court. On appeal *de plano* to the Court of King's Bench:—*Held*, that the judgment of the Court of Review sending the record back to the Circuit Court was a final judgment, from which an appeal *de plano* would lie. *Village of St. Denis v. Benoit*, 7 Q. P. R. 318.

**5. Right of appeal—Interlocutory judgment—Refusal of interim injunction—Leave.**—A judgment which rejects a petition for an interlocutory injunction, demanded before the issue of the writ of summons, is an interlocutory judgment from which there may be an appeal *de plano* without leave of a Judge of the Court of King's Bench. *Wampole v. Lyons*, 7 Q. P. R. 339.

See CONSTITUTIONAL LAW, 9—CRIMINAL LAW, IV. 19.

#### XI. QUEBEC — APPEAL TO SUPERIOR COURT IN REVIEW.

**Right of appeal—Dismissal of petition for homologation of report—Expropriation—Municipal corporation.**—No appeal lies from a decision of a Judge of the Superior Court rejecting a petition of the corporation of the city of Montreal for homologation of a report of expropriation commissioners, under s. 439 of 62 V. c. 58, and, as a consequence, an inscription for review of such a decision will be rejected on motion. *City of Montreal v. Donovan*, Q. R. 27 S. C. 259.

#### XII. SUPREME COURT OF CANADA—APPEAL TO.

**1. Extension of time for giving notice of appeal—Intention to appeal—Special circumstances—Merits.** *London and Western Trusts Co. v. Lake Erie and Detroit River R. W. Co.*, 8 O. W. R. 31.

**2. Right of appeal—Successions—Security by beneficiary—Future rights—Interlocutory order.**—An application for the approval of security on an appeal to



the Supreme Court of Canada from an order directing that a beneficiary should furnish the security required by article 663 of the Civil Code of Lower Canada, was refused, on the ground that it was interlocutory, and could not affect the rights of the parties interested. *Kirkpatrick v. Birks*, 37 S. C. R. 512.

**3. Right of appeal—Annulment of proces-verbal—Servitude.]**—In a proceeding to set aside resolutions by a municipal corporation giving effect to a *proces verbal*, the Court followed *Toussignant v. County of Nicolet*, 32 S. C. R. 353, and quashed the appeal with costs. Art. 560, C. C., referred to. *Leroux v. Parish of Ste. Justine de Newton*, 37 S. C. R. 321.

**4. Right of appeal—Order on motion for new trial—Court below equally divided.]**—An appeal lies to the Supreme Court of Canada from an order of the Supreme Court of New Brunswick refusing, by reason of an equal division, to set aside a verdict and order a new trial. In this case a rule was obtained calling on the plaintiffs to shew cause why the verdict should not be set aside and a new trial had, and the formal order was that "the Court having taken time to consider, and being equally divided, the said rule drops, and the verdict entered for the plaintiffs on the trial stands." A motion to quash an appeal from this order was refused. *Bustin v. W. H. Thorne & Co., Ltd.*, 37 S. C. R. 532.

**5. Right of appeal—New trial—Discretion—Ontario appeals—60 & 61 V. c. 34.]**—Held, per FITZPATRICK, C.J., and DUFF, J., that s. 27 of R. S. C. c. 135 prohibits an appeal from a judgment granting, in the exercise of judicial discretion, a new trial in the action.—Per DAVIES, J.:—Under the rule in *Town of Aurora v. Village of Markham*, 32 S. C. R. 457, 22 Occ. N. 354, no appeal lies from a judgment of the Court of Appeal for Ontario on motion for a new trial, unless it comes within the cases mentioned in 60 & 61 V. c. 34, or special leave to appeal has been obtained. Per CURIAM:—Appeal from judgment of the Court of Appeal, 11 O. L. R. 171, 6 O. W. R. 633, quashed. *Canada Carriage Co. v. Lea*, 26 C. L. T. 847, 37 S. C. R. 672.

**6. Right of appeal—Declinatory exception—Interlocutory judgment—Review of judgment on exception—Practice.]**—The action was dismissed in the Superior Court upon declinatory exception. The Court of King's Bench reversed this decision, and remitted the cause for trial on the merits. On motion to quash a further appeal to the Supreme Court of Can-

ada:—Held, that the motion should be granted, on the ground that the objection to the jurisdiction of the Superior Court might be raised on a subsequent appeal from a judgment on the merits.—Per GIROUARD, J.:—The judgment of the Court of King's Bench was not a final judgment, and consequently no appeal could lie to the Supreme Court of Canada. *Willson v. Shawinigan Carbide Co.*, 26 C. L. T. 526, 37 S. C. R. 535.

**7. Right of appeal—Leave—Winding-up Act—Amount in controversy.]**—In proceedings under the Winding-up Act, an appeal lies to the Supreme Court of Canada only when the amount involved exceeds \$2,000:—Held, that an order for the winding-up of a company does not involve any amount, and no appeal lies from the judgment of a provincial court refusing to set it aside, and leave to appeal cannot be granted. Appeal quashed without costs. *Cushing Sulphite Fibre Co. v. Cushing*, 26 C. L. T. 455, 37 S. C. R. 427.

**8. Right of appeal—Leave—Winding-up Act—Final judgment—Amount in controversy.]**—By s. 76 of the Winding-up Act, an appeal can be taken to the Supreme Court of Canada by leave of a Judge of that Court, if the amount involved is \$2,000 or over. On application for leave to appeal from a judgment of the Supreme Court of New Brunswick setting aside an order of a Judge in the winding-up proceedings, which postponed a sale of lands of the insolvent company in a suit in equity for foreclosure of a mortgage, and directed the sale to proceed:—Held, that s. 76 of the Winding-up Act must be taken in connection with s. 28 of the Supreme Court Act, and by the latter an appeal can be taken only from a final judgment; and that the judgment in this case was not final: and leave to appeal could not be granted:—Held, also, that no pecuniary amount was involved in the proposed appeal, and leave should be refused on that ground also. Motion refused with costs. *In re Cushing Sulphite Fibre Co.*, 26 C. L. T. 190, 37 S. C. R. 173.

**9. Right of appeal—Constitutional question—No money value involved.]**—A case in which no money value is in controversy, but in which a judicial declaration is prayed for that under the B. N. A. Act the Dominion government has no power to appoint a commissioner for extradition, is one in which an appeal will lie from a judgment of the Court of King's Bench to the Supreme Court of Canada.—Such a judgment is not a judgment in a criminal matter governed by art. 750 of the Criminal Code, but is re-

dered by the Court in the exercise of its civil jurisdiction. *Gaynor v. Lafontaine*, Q. R. 14 K. B. 335.

See CHURCH—RAILWAY, II. 2, III. 2.

### XIII. YUKON TERRITORY — APPEAL TO TERRITORIAL COURT.

**1. To Court en Banc, Yukon**—Extension of time for—Mistake of solicitor—Long delay—Special circumstances—Forum for hearing application—"Court or a Judge"—"Court en Banc." *Munroe v. Morrison* (Y.T.), 4 W. L. R. 31.

**2. To Court en Banc, Yukon**—Notice—Time—Order refusing to set aside default judgment except on terms—Interlocutory or final order. *Langevin v. Herbert* (Y.T.), 4 W. L. R. 367.

### APPEARANCE.

See WRIT OF SUMMONS.

### APPRAISEMENT.

See INSURANCE, II. 5.

### APPROPRIATION OF PAYMENTS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 10—GUARANTY, 2—ILLEGAL DISTRESS—MORTGAGE, 4—PRINCIPAL AND SURETY, 3.

### AQUEDUCT.

See CONTRACT, III. 7—WATER AND WATERCOURSES, 2.

### ARBITRATION AND AWARD.

**1. Action for money demand**—Defence of payment of amount ascertained by award—Amendment of statement of claim—Allegation of invalidity of award—Demurrer—Procedure in attacking award—Interpretation of Rules of Court—Joinder of claim to set aside award with original demand—Equitable jurisdiction—Effect of Judicature Act—Time for attacking award—9 & 10 Wm. III. c. 15—Prayer for general relief. *Johannesson v. Galbraith* (Man.), 3 W. L. R. 275.

**2. Action to enforce award**—Uncertainty. *Messenger v. Hicks*, 2 E. L. R. 76.

**3. Defective award**—Motion to enlarge time. *Smith v. Zwicker*, 1 E. L. R. 70.

**4. Fees of arbitrators**—*Workmen's Compensation Act.*]—The schedule to the Arbitration Act does not apply to arbitrations under the Workmen's Compensation Act, and the arbitrator's fee must be dealt with according to a practice analogous to that prevailing prior to the Arbitration Act on a reference directed by the Court. *Chisholm v. Centre Star Mining Co.*, 12 B. C. R. 16, 3 W. L. R. 156.

**5. Injunction**—*Jurisdiction.*]—An injunction will not be granted to restrain a party from proceeding with an arbitration, where the result of the arbitration will be merely futile and of no injury to the party seeking the injunction.—An arbitration to determine the value of land of the plaintiff taken by the defendants will not be restrained because a condition precedent to the taking of the land may not have been complied with. *Duncan v. Town of Campbellton*, 26 C. L. T. 466, 3 N. B. Eq. 224.

**6. Lands taken or injuriously affected**—*Inclusion of other matters in submission*—*Appeal—Municipal Act.*]—Certain persons, having appointed arbitrators under the Municipal Act in respect to lands taken by the municipality in connection with their waterworks system, afterwards entered into an agreement under seal defining the scope of the arbitration, and included a claim for damages for breach of contract and other matter not within the Municipal Act. They did not provide in the agreement for an appeal under s. 14 of the Arbitration Act R. S. O. 1897 c. 62. The arbitrators in their award awarded one sum both for the claim "under the Acts and in respect of the matters referred to in the said submission."—*Held*, affirming the order of TEETZEL J., that, as the matters not under the Municipal Act could not be distinguished in the amount awarded from the questions referred under the Act, the award being one and indivisible in its present form, and as the agreement came to by the parties defining the scope of the arbitration did not provide for an appeal under the Arbitration Act, no appeal on the merits lay, or was possible. *In re Field-Marshall and Village of Beamsville*, 11 O. L. R. 472, 7 O. W. R. 276, 545.

**7. Motion to set aside award**—Mistake of arbitrators—Refusal to hear

evidence — Agreement of parties. *Re O'Brien and Trick*, 7 O. W. R. 317.

**8. Submission to arbitration** — Time for making award—Power of arbitrators to extend—Failure to exercise—Action for account—Defence of arbitration pending—No answer to action. *Ryan v. Patriarche*, 8 O. W. R. 811.

See APPEAL, I. 2—CONTRACT, VI. 3—COSTS, II. 1—DISCOVERY, I. 1—DITCHES AND WATERCOURSES ACT—INSURANCE, II. 5, 6—LANDLORD AND TENANT, 22—MASTER AND SERVANT, II. 13—MUNICIPAL CORPORATIONS, IV. V. 7, VIII. 2, XIV. 2, 7—RAILWAY, IX. 2, 6, 7, 8—SCHOOLS, 7—SOLICITOR, 6—TRIAL, III. 1—WATER AND WATERCOURSES, 19—WAY, I.

### ARCHITECT.

**1. Building house** — *Interference with lights—Liability — Servitude—Disposal of property by owner.*]—The architect employed by a land owner to design and superintend the construction of a house, on a vacant site not subdivided into building lots for sale, incurs no liability from the fact that an oblique view is given through a window, in the house designed by him, upon a part of the land sold by the owner to a third party, after the inception of the building. In this case, the proximate cause of the servitude is to be found, not in the plan devised by the architect, but in the disposal made by the owner of his property, in a manner to make one portion of it bear the relation of a servient tenement, to that on which the house is built. *Saint-Jean v. Strubbe*, Q. R. 27 S. C. 266.

**2. Fees for professional services** — Drawing plans—Supervision of buildings—Other services—Evidence — Costs. *Schwab v. Shragge* (Man.), 3 W. L. R. 463.

**3. Fees for professional services** — Preparation of plans and specifications — Contract — Limited price—Evidence. *Smith v. Czerwinski* (Man.), 4 W. L. R. 563.

**4. Plans—Payment for — Contract—Commission.]—The defendant requested the plaintiff, who was an architect, to prepare plans for a building to cost from \$1,500 to \$1,800. After inspecting the plans, the defendant objected that the building shewn would not give him sufficient room, and suggested changes, which he was told would increase the cost; he assented, and the plans as finally prepared were for a building which would**

cost \$25,000; the building was never in fact erected: — *Held*, that the plaintiff was entitled to be paid a percentage on the latter amount, and that, in the absence of evidence to fix the value independent of the special contract proved by the plaintiff, the sum of \$750 (3 per cent. on \$25,000) allowed by the trial Judge should not be reduced. *Chappell v. Nolan*, 38 N. S. R. 74.

**5. Work and material ordered for building** — Absence of authority from owners or contractors—Warranty of authority—Personal liability—Principal and agent. *Horwood v. Maclaren*, 8 O. W. R. 857.

See CONTRACT, II. 2, 5—MECHANICS' LIENS, 13 — NEGLIGENCE, 16—SPECIFIC PERFORMANCE, 1.

### ARREST.

**1. Absconding debtor**—Material to support application — Form of affidavit. *Bent v. Morine*, 2 E. L. R. 107.

**2. Capias—Affidavit—Debt—Place of payment.]—The affidavit for capias must shew that the debt for which the suit is brought was created or is made payable within the limits of the provinces of Quebec and Ontario. *D'Amico v. Galardo*, Q. R. 28 S. C. 399.**

**3. Capias — Affidavit—Fraud—Concealment — Sufficiency of allegations.]—An affidavit for a capias containing an allegation that without the benefit of the writ the plaintiff will be deprived of his remedy against the defendant, and in which the concealment imputed to the defendant is that by virtue of a contract with the plaintiff for the making of joists, and when the defendant was insolvent, in obtaining an advance of \$1,000 to pay the wages of his workmen, he had hidden and withdrawn that sum with the intention of defrauding the plaintiff, so that the latter was not able to procure delivery to him of the finished product, the workmen refusing to allow it to be taken away, is sufficient to meet the requirements of art 855, C. P. C. *King Brothers Limited v. Blais*, Q. R. 14 K. B. 601.**

**4. Capias — Affidavit — Insufficiency — Quashing writ.]—The insufficiency of the allegations in an affidavit for the issue of a capias is irremediable, because there is no way of amending the affidavit, and the issue of the writ cannot be retroactively validated; therefore, the omission to indicate in the affidavit the**



place where the debt was contracted is fatal and is ground for quashing the writ. *Keruzec v. Keruzec*, 8 Q. P. R. 36.

**5. Capias**—*Arrest out of Quebec.*]—The writ of *capias ad respondendum* is not executory outside the limits of the province: any such writ will be quashed at the instance of a defendant arrested under it in the province of Ontario. *Gravel v. Lizotte*, Q. R. 28 S. C. 338.

**6. Capias** — *Bail—Relief under Rule 1047 — Waiver — Discharge of Bail.*]—The defendant was arrested under an order in the nature of a *ca. re.*, and was released from close custody upon giving bail by the deposit of a sum of money with the sheriff:—*Held*, that he had not thereby waived his right to be relieved under Con. Rule 1047; and, it appearing, upon the material filed upon a motion under that Rule, that the order for arrest should not have been made, an order was made for the return to him of the sum deposited. *Adams v. Sutherland, Josh v. Sutherland*, 10 O. L. R. 645, 6 O. W. R. 434.

**7. Capias**—*Claim in action—Affidavit—Omissions.*] — A plaintiff may bring suit for the amount for which a capias has issued, and at the same time claim an additional sum for damages, inasmuch as the two demands are not incompatible nor contradictory.—The omission of the domicile of the deponent and the absence of the date when and the place where the affidavit was made, are fatal to the capias. *Burns v. Lee*, 8 Q. P. R. 27.

**8. Capias**—*County Court—Irrregularity—Summons to set aside—Title of King—Jurisdiction.*]—It is not necessary that a summons to set aside a writ in a County Court for irregularity should state the irregularity, not is it necessary that the grounds should be served with the summons.—A writ of capias in a County Court will not be set aside because the words "and of the British dominions beyond the seas" are omitted from the title of the King.—A County Court capias will not be set aside because it does not aver in the statement of the cause of action that it arose within the jurisdiction of the Court. *Rogers v. Dunbar*, 37 N. B. R. 33.

**9. Capias**—*Deposit of costs — Application for repayment.* *MacLulay v. Jacobson*, 2 E. L. R. 15.

**10. Capias** — *Execution out of province.*]—A capias issued by the Superior Court of Lower Canada cannot be executed in the province of Ontario, and will be annulled on exception to the form. *Gravel v. Lizotte*, 7 Q. P. R. 354.

**11. Capias**—*Intent to quit Ontario—Intent to defraud creditors—Evidence—Discharge from custody.* *Fleming v. McCutcheon*, 8 O. W. R. 368.

**12. Capias**—*Intent to quit Territory—Intent to defraud creditors—Discharge—Bail—Deposit of money—Bond—Practice.* *Grant v. Rimer (Y.T.)*, 3 W. L. R. 506.

**13. Capias** — *Simple arrest — Contestation — Trial—Procedure — Merits*] —Where in an action writs of capias and simple arrest have been issued after the return of the original process, and the defendant contests the action upon the merits, and at the same time contests the writs of arrest, the plaintiff may proceed first to trial upon the merits, and, after judgment in his favour, set the case down for hearing upon the contestations of the capias and arrest. *Cazal v. Matha*, Q. R. 28 S. C. 131.

**14. Disclosure**—*Breach of promise of marriage — Unliquidated damages—Debt—Assignment — Security—Defendant out on bail—59 V. c. 28 (N.B.)*]—The provisions of 59 V. c. 28, s. 7 (N. B.), allowing a debtor to make a disclosure of his affairs and authorizing his discharge under certain circumstances, are applicable in the case of a defendant held to bail by Judge's order in an action of breach of promise of marriage.—If the disclosure reveals a debt due to the person making the same, a demand for the assignment thereof must be made, and an opportunity afforded to the applicant for discharge to shew why the same should not be assigned or the nature of the security to be given to him by the plaintiff for his protection in the event of a failure to recover.—*Quære*, whether the provisions of s. 28 of the Act relating to the assignment of debts due to the defendant as a condition of his discharge have any application in cases where the defendant is not in actual custody. *Rex v. Carleton, Ex p. Akerley, In re Akerley v. Gaines*, 37 N. B. R. 13.

See ATTACHMENT OF PERSON—CRIMINAL LAW—EXTRADITION—FALSE ARREST AND IMPRISONMENT—JUDGMENT, V. 1—JUSTICE OF THE PEACE, 6, 7, 13—MALICIOUS PROSECUTION AND ARREST—PEREMPTION, 1—SHIP, 3, 21.

## ASSAULT.

**1. Right of action**—*Previous conviction — Payment of fine — Common assault — Criminal Code*]—No action of damages for assault lies in favour of the

party aggrieved against an assailant who has been convicted under s. 864 of the Criminal Code, and has paid the amount of the fine.—2. A summary conviction of assault causing bruises is one of common assault, under s. 864, and not of an assault occasioning bodily harm under s. 262. *Lavin v. Boyd*, Q. R. 27 S. C. 472.

**2. Trespass — Excess.** *Morash v. Geldert*, 2 E. L. R. 56.

**3. Trespass — Forcible removal of trespasser—Excess.]** — In an action for damages for unlawfully assaulting and beating the plaintiff, the defendant pleaded that at the time the acts complained of were committed the defendant was the owner of and engaged in carrying on a lobster factory, and that the plaintiff entered and created a disturbance, and refused to leave when requested, and that the defendant thereupon removed the plaintiff, using no more force than was necessary:—*Held*, that the defendant was justified in using such force as was necessary to effect the removal of the plaintiff from his premises, but as, by his own admission, he did more than this, the plaintiff was entitled to recover for the excess, and the verdict of the jury in the defendant's favour must be set aside. *Doucette v. Therio*, 38 N. S. R. 402.

See CRIMINAL LAW. III. 2, 3, 4.

## ASSESSMENT AND TAXES.

**1. Assessor, powers of — (Court of Revision and appellate tribunals, jurisdiction of—Valuation — Business or income tax—Assessment Act.)**—The jurisdiction of a Court of Revision and the Courts exercising appellate jurisdiction therefrom, is confined to the question of valuation, namely, whether or not the assessment is too high or too low. Whether the property is assessable or not is for the assessor alone to determine, from which there is no appeal. *Toronto R. W. Co. v. City of Toronto*, [1905] A. C. 809, followed.—There is, therefore, no jurisdiction in the appellate Courts to determine whether or not a business or income tax should be imposed.—A bridge over the Niagara river between this province and the United States was built by a bridge company for the passage over it of trains having connecting lines on either side of the river:—*Held*, that the rule of valuation to be applied is that provided by s. 43, s.-s. 2 (a), of the Assessment Act, 4 Edw. VII. c. 23 (O.), namely, that part of the structure within the province is to be valued as an integral part of the whole, and at its cash value

as the same would be appraised upon a sale to another company possessing similar powers, rights, and franchises, and subject to similar conditions and burdens, and incorporating the provisions and basis of the Assessment Act, set forth in s. 42, s.-s. 2. *Re International Bridge Co. and Village of Bridgeburg*, 12 O. L. R. 314, 7 O. W. R. 497.

**2. City of Halifax Assessment Act** — License fee payable by insurance companies—General words restricted to companies—Ejusdem generis — Mercantile company not included. *City of Halifax v. McLaughlin Carriage Co.*, 1 E. L. R. 58.

**3. City of Halifax charter — Sale of land after assessment—Vendor's personal liability for taxes.]** — Under the provisions of the Halifax city charter, s. 303, the annual assessment is to be rated on the owners of real and personal property by an equal dollar rate upon the value of real and personal property within the city. By s. 302, the annual assessment is to be prepared and delivered to the city collector not later than the 15th March in each year. The defendant was the owner of a lot of land which was assessed for the purpose of rates and taxes for the year 1903-1904, and on the 15th March the book of general assessment was delivered to the collector of rates and taxes in the form prescribed by law. Several weeks later the defendant conveyed the lot of land so assessed to a purchaser, who went into possession:—*Held*, that, in addition to the lien on property for taxes, there is also a personal responsibility, and the mere fact of the defendant parting with the land by conveyance, after it had been duly assessed, could not in any way affect the liability imposed upon the owner when once the property had been properly assessed in his name. *City of Halifax v. Wallace*, 38 N. S. R. 564, 1 E. L. R. 18.

**4. Club—"Business tax."]** — A club incorporated for social purposes only—the members having no proprietary interest, meals and liquors being furnished to members and their guests—occupying land, is liable to assessment for a "business tax" under the Assessment Act, 4 Edw. VII. c. 23, s. 10 (e), in addition to the assessment of the club premises, although having no shareholders and paying no dividends, and depending for its revenue mainly on the entrance fees and subscriptions of members. *Rideau Club v. City of Ottawa*, 12 O. L. R. 275, 8 O. W. R. 106.

**5. Contestation of roll — Quebec Act**, 52 V. c. 79, ss. 120, 144, 231 — *Civil Code*, arts. 2227, 2232, 2236—Con-

*struction — Action to recover assessed amounts—Assessment due on filing of the roll.*]—Under s. 231 of the city of Montreal charter, 1889, 52 V. c. 79, the amount of an assessment becomes due and recoverable on the filing of the roll of assessment in the office of the city treasurer. — In an action by the city to recover after the period of prescription enacted by s. 120, calculated from the date of filing, had elapsed, it appeared that the respondent's predecessor had been a party to proceedings had for its annulment:—Held, that the period was not interrupted thereby within the meaning of art. 2227 of the Civil Code, for there had been no acknowledgment of liability. (2) That there had been no impossibility to sue within the meaning of art. 2232, for the right of action was not by the above Act suspended during such proceedings. (3) That the debt in suit was not dependent on a condition within the meaning of art. 2236: though s. 144 of the Act limited the time within which the roll might be annulled, it did not make the date of its coming into force conditional on the roll not being either attacked or annulled.—Judgment in 25 Occ. N. 3. 35 S. C. R. 223, affirmed. *City of Montreal v. Cantin*, [1906] A. C. 241, Q. R. 15 K. B. 103.

**6. County school fund—Liability of incorporated towns to contribute—***3 Edw. VII. c. 6, s. 7—Special and general statutes—Implied repeal.*]—Prior to the incorporation of the town of D. the inhabitants of the town and their property were liable, under the provisions of the Education Act, to contribute their proportion of the county school fund, but under provisions contained in the Act incorporating the town, it was held exempted from making such contribution, and thereafter received and disbursed the government grant, and also its own rates, without contributing to the county fund or receiving any share thereof. Subsequently, by Acts of 1903, c. 6, s. 7, it was enacted as follows: "The clerk of the municipality of every county or district shall annually add to the amount required for county purposes a sum sufficient . . . to yield an amount equal to 35c. for every inhabitant . . . of the municipality, and of all incorporated towns which before incorporation territorially formed part of such county or district."—Then followed provisions for the collection and division of the amount between the municipality and incorporated towns, in the same proportion as the county fund, and a provision, "notwithstanding" the provisions of any statute of Nova Scotia, that every incorporated town should annually, on or before a fixed date, pay to the

treasurer of the municipality of the county or district of which it before incorporation territorially formed a part, its proportionate part of the said sum:—*Held*, that the language of this Act referred directly to the Act incorporating towns, including the town of D., and its effect was to displace the implication from expressions in the Act of incorporation under which the town had been held exempted from contribution to the county fund. And that the maxim *generalia specialibus non derogant* was not applicable, the Act incorporating the town being general in its character, while the Act in question was a special one containing special terms and dealing with a special subject, viz., the contribution to be made by incorporated towns to the county school fund.—*Semble*, there is a difference between rendering inoperative implications placed upon expressions contained in an Act and repealing them. *County of Halifax v. Town of Dartmouth*, 38 N. S. R. 1. Affirmed by Supreme Court of Canada, *Town of Dartmouth v. County of Halifax*, 37 S. C. R. 514.

**7. Exemptions — "Catholic freeholder"—Secular corporation.]—The expression "Catholic freeholder," in a statute permitting the levying of a tax, does not apply to a corporation formed for secular purposes. *Syndics of the Parish of St. Paul de Montreal v. Compagnie des Terrains de la Banlieue de Montreal*, Q. R. 28 S. C. 493.**

**8. Exemptions — Discrimination —** Judgment based on ground not argued. *Carleton Woollen Co. v. Town of Woodstock*, 2 E. L. R. 137.

**9. Exemptions — Street railway — Land leased from Crown — Agreement with municipality — Construction — Storage battery—Real or personal property—Ejusdem generis rule — Fixture. *Ottawa Electric Co. v. City of Ottawa*, 7 O. W. R. 481.**

**10. Income assessment — Banks— Deduction for outgoings — Method of computing—British Columbia Assessment Act.]—By the Assessment Act, B. C., 1905, c. 2, it is provided that banks shall be taxed upon their actual gross income derived from business transacted within the province, subject to certain deductions which are set out in form 1 of the Act. Form 1 provides, *inter alia*, a deduction on account of outgoings or necessary expenses incurred and actually paid by the bank in the production of income. The Bank of Hamilton, operating two branches in British Columbia, were allowed as a deduction a certain sum which was ascertained by deducting four per**

cent. on the average of the weekly sums which in the books of the head office were debited to these branches. In ascertaining the profits made by the different branches, the practice of the head office was to charge against each branch this four per cent. The evidence did not shew whether this sum (debited weekly against the branches in the books of the head office) in fact corresponded with the amount of money employed by the bank in their banking business in British Columbia in obtaining income. The charge of four per cent. was made up of two items: three per cent. was charged as representing the interest paid to depositors in Ontario on moneys borrowed from them by the bank, and one per cent. was a charge representing the general expenses of the bank in connection with deposit accounts, including, as appeared from the affidavit of the general manager, a certain allowance made for the loss arising from the fact that a considerable sum of money on which interest was paid by the bank remained unproductive. The principal question argued on the appeal was whether these deductions should have been allowed by the Court of Revision:—*Held*, that, had there been proper evidence before the Court of Revision that the moneys debited by head office to the British Columbia agencies were moneys on which the head office paid depositors in Ontario three per cent., and that these moneys had actually been employed in the British Columbia business, then the three per cent. should have been deducted from the gross income as an outgoing in the production of income, but that there was not sufficient evidence of these facts before the Court of Revision to warrant the allowance of this deduction:—*Held*, also, that the deduction of one per cent. was rightly not allowed by the Court of Revision, as it included elements which did not properly enter into the computation of the statutory deductions. *In re Bank of Hamilton*, 12 B. C. R. 207.

**11. Income assessment—Dividends on shares in Ottawa Electric Railway Company—Agreements between company and city corporation — Exemptions — Assessment Act, 1904—Business assessment.]**—By an agreement dated the 28th June, 1893, between the corporation of the city of Ottawa and the two companies which were amalgamated under the name of the Ottawa Electric Railway Company, by statutes which confirmed the agreement, it was provided, *inter alia*, that "the corporation shall grant to the said companies exemption from taxation and all other municipal rates . . . on the income of the companies earned from the working of the said railway:"—*Held*, that the plaintiff's in-

come from dividends upon shares of the capital stock of the Ottawa Electric Railway Company was not, by reason of the agreement in part above recited, nor by reason of an earlier agreement, exempt from municipal taxation:—*Held*, also, that the Ottawa Electric Railway Company is not a company which would, but for the agreements mentioned, be liable to be assessed for income under the provisions of the Assessment Act, 1904; and therefore s. 5, s.s. 17, does not apply to exempt dividends or income from the stock. — The Assessment Act does not confer upon the shareholders of a company which is not liable to income assessment, but is liable to business assessment, an exemption from assessment upon their dividends from stock in the company, except as contained in s. 10, s.s. 7. Judgment of TEETZEL, J., affirmed. *Goodwin v. City of Ottawa*, 12 O. L. R. 236, 7 O. W. R. 204, 8 O. W. R. 77, 541.

**12. Income assessment — Exemption — Superannuated official of Dominion.]** — The annual income allowed under the Superannuation Act, R. S. C. 1886 c. 18, to an official of the Dominion who has been superannuated and is no longer in the active service of the Dominion, is not exempt from municipal taxation. — *Leprohon v. Corporation of Ottawa*, 2 A. R. 522, distinguished. — Judgment of the County Court of Carleton reversed. *Bucke v. City of London*, 10 O. L. R. 628, 6 O. W. R. 406.

**13. Levy of Taxes — Seizure of property—Notice—Condition precedent—Statutes—Remedy by action — Addition of percentage—Evidence—Proceedings before committees of council — Municipal corporations.]** — The deliberations of a board or committee of a municipal council, in the absence of ratification by the council, are inadmissible as evidence against the municipal corporation which they represent.—The special notice mentioned in arts. 961, C. M., and 4550, R. S. Q., and s. 544 (2) of 52 V. c. 80 (Q.), is not required as a condition precedent to the levy of municipal taxes by way of seizure of movables or immovables. The ordinary remedy by action is open without its being specially given.—The expression "when proceedings are taken" used in s. 552 of 52 V. c. 80, refers to a seizure of movables or immovables for levying taxes: and does not apply to the remedy by action. In exercising the latter the corporation cannot demand the addition of 10 per cent. provided by the section. *Morgan v. City of Sorel*, Q. R. 15 K. B. 247.

**14. Mineral lands — Principle of assessment — Buildings and plant — Scheme of Assessment Act, 1904—Valua-**



tion — Clerical error. *Canadian Oil Fields Co. v. Town of Oil Springs*, 8 O. W. R. 480.

**15. Railway**—Assessment on buildings—Construction of Assessment Ordinance—"Lands"—Valuation of buildings—Appeal—Costs. *Re Canadian Northern R. W. Co. and Omemee School District* (N.W.T.), 4 W. L. R. 547.

**16. Tax Sale**—Action to set aside—Arrears — Notice — Assessment roll—Distress — Evidence — Onus—Parties — Costs — Locatee — Status as plaintiff. *Fisher v. Parry Sound Lumber Co.*, 7 O. W. R. 55.

**17. Tax Sale** — Deed by Provincial Treasurer—Registry laws—Purchaser in good faith — Trustee — Fraud and misrepresentation—Crown patent—Evidence — Parties—Solicitor—Costs — Discretion — Appeal. *Beatty v. McConnell*, 7 O. W. R. 11, 8 O. W. R. 916.

**18. Tax sale**—Invalidity—Tax deed —Recitals—Onus—Prescription — Municipal Code.]—1. The sale of immovables for taxes not assessed upon them, or for an amount in excess of such taxes, is null and void.—The recitals in a deed of sale, under arts. 1008 and 1009, M.C., do not afford a presumption *juris et de jure* of a valid sale, and evidence of its nullity is admissible, e.g., to shew that the taxes for which it was made were not due, and that the formalities required by law were not complied with.—The burden of proof of the legality of the sale is upon the purchaser when it is challenged or impugned by the original owner, or by those whose title is derived from his.—A deed of sale for taxes which is void as stated firstly above, is not a title (*juste titre*) that can avail as a ground for prescription by 10 years, nor does the prescription of 2 years of art. 1015, M.C., apply to it. *Cameron v. Lee*, Q. R. 27 S. C. 535.

**19. Tax sale** — Municipal Ordinance — Land Titles Act — Transfer — Conclusiveness — Operation of statute.] — Under ss. 201 and 202 of the Municipal Ordinance (C. O. 1898 c. 70), a transfer of land by the secretary-treasurer of a municipality, on a sale for taxes, is conclusive after one year, and the sale can only be questioned on grounds specified in s. 202.—The Courts are bound to give effect to the unequivocal language of a statute.—*O'Brien v. Cogswell*, 17 S. C. R. 420, distinguished. — Ordinance c. 10 of 1900 does not affect the proviso in s. 202 of the Municipal Ordinance. *Re Donnelly Tax Sale*, 6 Terr. L. R. 1.

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**20. Tax sale**—Proceeding by municipal corporation — Registered owner — Claimant—Status—Unregistered title — Decree—Nullity.] — One who, by title registered in the registry office for real rights of the district in which an immovable is situated, appears to be the owner of it, is regarded as being in possession *animo domini*, within the meaning of art. 699, C. P. C., especially when the immovable is wild land upon which no ostensible act of possession has been done by any person. Therefore, where such immovable is seized and sold for taxes charged against it, in a suit, by the municipal corporation against the person who appears to be the owner as mentioned, the decree is valid, and a third person who asserts ownership by virtue of a title preferable to that of the defendant, has no status to intervene and nullify the decree as against the plaintiff corporation. — The right of ownership of an immovable by virtue of an unregistered title is one of those which may be extinguished by sale under a decree. *Town of Outremont v. Cabana*, Q. R. 14 K. B. 366.

**21. Tax sale** — Regularity—Municipality questioning—Estoppel—Subsequent sale by municipality to municipality — Vesting certificate—Proof of regularity of assessment and taxes in arrear — "Effect"—Evidential value of tax sale deed—Statutes—Absence of legal assessment or levy — Assessment roll—Signature—Certificate of assessor—Description of land—Patent from Crown — Conveyance by committee of patentee—Proof of identity. *Alloway v. Rural Municipality of St. Andrews* (Man.), 3 W. L. R. 13.

See APPEAL, V. 8 — CERTIORARI, 1 — DISTRESS—LIMITATION OF ACTIONS, I. 7 — MUNICIPAL CORPORATIONS, II., VIII. 1, 2, XIII.—SCHOOLS—STATUTES, 7 — VENUE, 4—WILL, I. 32.

## ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

## ASSIGNMENT OF CHOSE IN ACTION.

See CHOSE IN ACTION, ASSIGNMENT OF.

## ASSIGNMENT OF CLAIM FOR DAMAGES.

See DAMAGES, 1.

**ASSIGNMENT OF DOWER.**

See DOWER, 1.

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**ASSIGNMENT OF INSURANCE POLICY.**

See INSURANCE.

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**ASSIGNMENT OF MORTGAGE.**

See MORTGAGE, 2.

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**ASSIGNMENTS AND PREFERENCES.**

See BANKRUPTCY AND INSOLVENCY.

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**ATTACHMENT OF DEBTS.****I. GENERALLY—WHAT DEBTS ATTACHABLE.****II. PRACTICE AND PROCEDURE IN GARNISHMENT.**

See BANKRUPTCY AND INSOLVENCY, 20—COMPANY, IV. 3—EXECUTORS AND ADMINISTRATORS, 12—JUDGMENT, III. 3—OPPOSITION, 7—VENDOR AND PURCHASER, I. 8.

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**I. GENERALLY—WHAT DEBTS ATTACHABLE.**

**1. Company—Liability of purchaser of assets to indemnify subscriber against calls—Subject of garnishment—Purchase by one company of stock in another—Illegality—Objection not raised at trial—Estoppel.**—1. The purchaser of the assets of a company incorporated under the Manitoba Joint Stock Companies Act, R. S. M. 1902 c. 30, who agrees to assume the liabilities of the company, is bound to indemnify the company against their liability for payment of future calls on shares of stock held by them in a fire insurance company, which were only partly paid up at the time of the sale, although no mention of such liability was made at the time, the purchaser being aware thereof; and such liability is attachable at the suit of the fire insurance company under Rules 759 and 761 of the King's Bench Act, for the purpose of realizing on a judgment obtained for the amount of unpaid arrears of subsequent calls on the shares.—2. *Per*

DUBUC, C.J.—An objection based on s. 68 of the Joint Stock Companies Act, that no company incorporated under that Act can use any of its funds in the purchase of stock in any other corporation unless expressly authorized by a by-law confirmed at a general meeting, and that there was no evidence of any such by-law having been passed, cannot be given effect to on the hearing of an appeal when it was not raised at the trial.—*Proctor v. Parker*, 12 Man. L. R. 528, and *Hughes v. Chambers*, 14 Man. L. R. 163, followed.—*Per* PERDUE, J., dissenting.—Although not raised at the trial, such objection should be given effect to on this appeal. Cases cited distinguished on the ground that here the evidence all went to shew that no such by-law had ever been passed, and if the objection had been raised at the trial the plaintiffs could not have given any evidence to overcome it.—3. *Per* DUBUC, C.J.—The statute does not prohibit a joint stock company from holding stock in another corporation; it provides only that its funds shall not be used for such purpose unless expressly authorized by by-law confirmed at a general meeting; and, if it were shewn that such shares had been acquired otherwise than by using any of the funds of the company, the holding would be legal.—4. *Per* PERDUE, J.—The recovery of the judgment by the plaintiffs against the company did not estop the garnishee from setting up the defence arising out of s. 68 of the Joint Stock Companies Act. *Victoria Montreal Fire Ins. Co. v. Strome and Whyte Co.*, 15 Man. L. R. 645.

**2. Judgment in action for debt or liquidated demand**—Claim for proceeds of sales by agent—Claim for goods sold and delivered—Rule 384. *Stimson v. Hamilton* (N.W.T.), 3 W. L. R. 72.

**3. Salary of police magistrate**—Public officer—Appointment and termination on resolution of county council—Public policy. *Lee v. Ellis*, 8 O. W. R. 346.

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**II. PRACTICE AND PROCEDURE IN GARNISHMENT.**

**1. Affidavit—Insufficiency—Waiver.**—*Held*, that the affidavit of an advocate, which on its face shewed that he had no personal knowledge of the facts, and which did not contain a positive statement of an indebtedness by the defendant to the plaintiff, is not a sufficient affidavit upon which to issue a garnishee summons under Rule 384, and a garnishee summons so issued was set aside. (2) That

a garnishee summons so issued cannot be treated as a mere irregularity so as to be waived under Rule 539 by taking a fresh step. *Rumley v. Saxauer*, 6 Terr. L. R. 63.

**2. Declaration of garnishee—Alimentary allowance—Married woman—Contestation in forma pauperis—Authorization.]**—The Court may authorize a married woman to contest in forma pauperis the declaration of the garnishee, when the latter has declared that he has in his hands moneys due for an alimentary allowance. *Clermont v. Charest*, 7 Q. P. R. 468.

**3. Declaration of garnishee—Default—Costs.]**—A garnishee in default for a declaration, who desires to make his declaration by virtue of art. 691, cl. 3, C. P., is only obliged to pay the disbursements occasioned by his default, and the attorney of the plaintiff cannot recover from him any fee. *Guilbault v. Dallaire*, 8 Q. P. R. 96.

**4. Division Court—Liability of garnishees to primary debtor—Evidence of.** *McLeod v. Clark*, 8 O. W. R. 403.

**5. Insufficient time allowed after service—Prejudice—Extension—Exception to form.]**—Where in an attachment of debts the time allowed to the defendant after service is not sufficient, but the defendant is not prejudiced thereby, he must ask the Court for an extension of the time, if he requires it, and not proceed by way of exception to the form. *Martin v. Hébert*, 8 Q. P. R. 42.

**6. Jurisdiction of County Courts, B.C.—Claim of judgment debtor against garnishee beyond competence of County Court—Prohibition.]**—On proceedings under the Attachment of Debts Act in the County Court to attach a debt due on a judgment obtained in the Supreme Court, an order absolute attaching the debt was made. On an application for a writ of prohibition to the County Court Judge, prohibiting him from dealing with Supreme Court judgment:—*Held*, that where the claim sought to be attached is not one upon which the County Court would have jurisdiction to adjudicate in a suit brought to enforce it, the machinery of the Attachment of Debts Act cannot be applied. *Belyea v. Williams*, 12 B. C. R. 226, 4 W. L. R. 457.

**7. Lacombe Act—Circuit Court—Superior Court.]**—Article 1147a, C. P., prohibits the issue of any garnishing summons, in a general way, against a defendant who has complied with its provisions, and there is no ground for distinguishing between garnishing sum-

mons issued from the Circuit Court and those issued from the Superior Court. *Mace v. Gardner*, 8 Q. P. R. 98.

**8. Lacombe Act—Opposition—Article 1147a, C. P. C.—Circuit Courts—Superior Court.]**—Article 1147a, C. P. C. (the Lacombe Act), applies only to *saisies-arrêts* in the Circuit Courts, and cannot be set up in opposition to a *saisie-arrêt* in execution of a judgment of the Superior Court. *Larochelle v. Lavoie*, Q. R. 27 S. C. 534.

**9. Lacombe Act—Wages—Deposit—Superior Court—Circuit Court.]**—The deposit at the record office of the Circuit Court of a sworn declaration, and the salary of the defendant, renders the latter immune from any subsequent attachment of his wages, whether such attachment issue from the Circuit Court or from any other Court. *Levinoff v. Fournier*, 8 Q. P. R. 54.

**10. Lacombe Act—Wages—Deposit—Superior Court—Circuit Court.]**—In an attachment of a debt before judgment in the Superior Court, the defendant cannot plead that he comes under the Lacombe Act in the Circuit Court, and that he regularly deposits the part of his salary which is garnishable; such an allegation will be struck out upon inscription in law. *Brunet v. Bastien*, 8 Q. P. R. 88.

**11. Order attaching debts—Powers of deputy district registrar of Supreme Court—Interpretation Act—Attachment of Debts Act, 1904—Amount attached.]**—In an action in the Supreme Court for an account of certain rents and profits, the plaintiff obtained an order attaching all debts, obligations, and liabilities payable or accruing due from the garnishee to the defendant, to answer a judgment to be recovered by the plaintiff against the defendant up to the amount of \$6,245. The order was made and issued by the deputy district registrar at Vancouver, acting under the provisions of s. 3 of the Attachment of Debts Act, 1904. The defendant applied to MORRISON, J., in Chambers, to set aside this order, but the summons was dismissed, and the defendant appealed:—*Held*, by the full Court, that as the term "district registrar" is expressly defined by the Attachment of Debts Act, 1904, to mean district registrar of the Supreme Court, therefore district registrars are *personæ designatæ*, and it was not intended to confer on their deputies the power to make attaching orders; that the provisions of the Interpretation Act do not apply, as a general interpretation statute cannot be invoked to control the plain intentment of a special statute. — *Per*

IRVING, J. — The Attachment of Debts Act, 1904, contemplates the attachment of a definite, ascertained amount, and a mortgagor suing for an account of moneys received by a mortgagee in possession cannot make the affidavit required by the statute as to the "actual amount of the debt." *Richards v. Wood*, 12 B. C. R. 182.

**12. Shares in company — Validity of service upon company—Place of service.]**—Where at the time of the issue and service of the garnishing summons the garnishees (an incorporated company) had property in the province of Quebec, and had there an agent and an office where their principal books were kept: — *Held*, that service was validly made there for the purpose of declaring that the garnishment of shares of the defendant in the garnishee company was valid. *Skinner Manufacturing Co. v. Vineberg*, 8 Q. P. R. 107.

## ATTACHMENT OF GOODS.

**1. Absconding debtor—Company — Service of writ.** *Halifax Hotel Co. v. Canadian Fire Engine Co.*, 2 E. L. R. 36.

**2. Absconding debtor—Proceeds of sale—Distribution—Creditors entitled to share—County Courts Act, ss. 200-206—Application to attachment proceedings — Trader—County Court appeal—Final or interlocutory order.** *Robinson v. Graham* (Man.), 3 W. L. R. 135.

**3. Defendant about to leave province—Intent to defraud—Foreign defendant.]** — The mere fact of a person domiciled in a foreign country leaving the limits of this country does not indicate of itself an intention to defraud, even although he may own debts within this country. Attachment before judgment quashed. *Lemieux v. Le Cirque Sells & Downs*, 7 Q. P. R. 456.

**4. Exemptions—Goods necessary in trade.]** — When a horse, carriage, and harness are the only ones of their several kinds which the defendant, who is a carter, has for earning his livelihood, they will be exempt from attachment. *Butler v. Prevost*, 7 Q. P. R. 465.

See COSTS, III. 11.

## ATTACHMENT OF INTEREST IN MINES.

**1. Registration of attachment in Mines Office sufficient — Seizure**

by sheriff not essential — Unregistered equitable interest not an answer—Diligence a condition of setting aside proceedings. *Bank of Montreal v. Wallace*, 1 E. L. R. 228.

**2. Unregistered transfer before attachment.** *Clish v. Baltimore-Nova Scotia Mining Co.*, 1 E. L. R. 235.

## ATTACHMENT OF PERSON.

**Non-payment of costs—Disclosure —Notice—Signature—Intituling—Service —Debtor's equitable interest in personal property — Order for discharge.]** — A person in custody under a writ of attachment issued out of the Supreme Court for contempt in not obeying an order to pay costs, is entitled to relief under c. 130 of C. S. N. B. 1903, respecting arrest, imprisonment, and examination of debtors.—A notice of disclosure purporting to be signed by the applicant is sufficient without proof of the signature.—An order for discharge will not be quashed on the ground that the notice of the application to disclose was not intituled in the cause, or that the proceedings and order were intituled in the wrong cause, if it sufficiently appear in the body of the notice, proceedings, and order, in what proceeding the application and order were made.—Service of the notice of disclosure on the wife at the husband's place of abode, he then being within the province, is good, and no order perfecting the service is required.—The officer taking the examination has authority to order an equitable interest in personal property to be held for the benefit of the creditor, and the disclosure of such an interest is no bar to a discharge.—If a debtor makes such a disclosure of his affairs as fulfils the requirements of the Act, a creditor who allows the proceedings to go by default can not object that the disclosure was not a full one. *Re v. Straton, Ex p. Patterson*, 37 N. B. R. 376; *Larson v. Patterson*, 1 E. L. R. 376.

## ATTORNEY.

**Admission of woman.]**—At common law a woman could not be admitted to practise as an attorney, and her disability has not been removed either by C. S. N. B. 1903 c. 68, by rule of Court, or by the regulations of the Barristers' Society. *In re French*, 37 N. B. R. 359.

See ADVOCATE—AFFIDAVIT, 1—COSTS—SOLICITOR—TRIAL, I. 7.



**ATTORNEY-GENERAL.**

See COSTS, VIII. 1—CROWN, 7 — MUNICIPAL CORPORATIONS, VI.—PARTIES, II. 5—PLEADING, IX. 5—SCIRE FACIAS—WATER AND WATERCOURSES, 7 —WAY, II. 3.

**ATTORNMENT.**

See MORTGAGE, 3.

**AUCTION.**

See LIMITATION OF ACTIONS, I. 3 — SCHOOLS, 13.

**AUCTIONEERS.**

See HAWKERS AND PEDLARS—MUNICIPAL CORPORATIONS, VII. 5.

**AUDIT.**

See ACCOUNT, 4—ESTOPPEL, 1.

**AUDIT ACT.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2.

**AUTREFOIS ACQUIT.**

See CRIMINAL LAW, III. 28.

**AUTREFOIS CONVICT.**

See CRIMINAL LAW, IV. 19.

**AWARD.**

See ARBITRATION AND AWARD.

**BAIL.**

See ARREST, 6, 12, 14—CRIMINAL LAW, IV. 3.

**BAILIFFS.**

**Removal** — *Jurisdiction of Superior Court.*] — Bailiffs, notwithstanding the by-law of their corporation, continue to be officers of the Court, subject to its jurisdiction, and liable to be removed from their position by the Court or a Judge thereof. *Beaulieu v. Decelles*, 7 Q. P. R. 323.

**BAILMENT.**

**Gratuitous bailee**—Loss or theft of bank notes—Liability—Negligence—Notes contained in registered dead letter—Notice—Inquiry. *Cosentino v. Dominion Express Co.* (Man.), 3 W. L. R. 391, 4 W. L. R. 498.

See HIRE OF CHATTELS—NEGLIGENCE, 17—NEW TRIAL, 3—PLEADING, III. 3.

**BALLOTS.**

See MUNICIPAL CORPORATIONS, IX. 9—MUNICIPAL ELECTIONS, 3, 4 — PARLIAMENTARY ELECTIONS.

**BANKRUPTCY AND INSOLVENCY.**

**1. Agreement in fraud of creditors**—*Judgment declaring void* — *Action by one creditor*—*Benefit of all*—*Distribution of assets* — *Collocation of creditors' claims*—*Contestation*—*Status of contestant.*] — A judgment declaring void an agreement (in this case a stipulation for dower and other property in favour of the wife in a contract of marriage) made in fraud of his creditors by an insolvent, to the profit of a person having knowledge of the insolvency, although rendered in a suit instituted by only one of his creditors, is for the benefit of all the others, who are regarded as being represented by the creditor suing.—A creditor collocated for his *pro rata* share in a report on distribution has an interest in seeing that the other creditors are collocated each for his share in the moneys to be distributed, and has, therefore, a status to contest the collocation of a third person upon a claim not well founded in law, such collocation having the effect, by retarding the payment of the other creditors, of reducing the chances of the contestant to have his own claim paid out of the future-acquired property of the debtor. *Chevalier v. Martel*, Q. R. 27 S. C. 356.

**2. Assignment by insolvent of all personal property to secure future maintenance of wife**—Knowledge of transferee of insolvency. *Forbes v. Dingman*, 1 E. L. R. 435.

**3. Assignment for benefit of creditors**—Account of assets—Concealment—Presumption.]—A debtor who makes an assignment of his property and deposits his schedule is bound, in case of contestation by a creditor, to account for the assets which he had in his possession in the year preceding the assignment. His inability to do so is equivalent to proof of the concealment aimed at in art. 888, C. P. C. *Clément v. La Banque Nationale*, Q. R. 14 K. B. 493.

**4. Assignment for benefit of creditors**—Action by assignee to set aside transaction with creditor as a preference—Creditor's want of knowledge of insolvency—Imputed notice—Absence of fraudulent intent—Novation—Acceptance by creditor of third person as debtor in lieu of insolvent—Sale of assets by insolvent to same person—Manitoba Assignments Act—Payment—Covenant—Release—Surety. *Newton v. Lilly* (Man.), 3 W. L. R. 537.

**5. Assignment for benefit of creditors**—Claim to rank on estate by secured creditors—Valuing security—Claim for balance—Manitoba Assignments Act—Duty of assignee—Realization of securities—Balance—Revaluation. *Bank of Ottawa v. Newton* (Man.), 3 W. L. R. 422.

**6. Assignment for benefit of creditors**—Creditor valuing security and claiming to rank for balance of debt—Absence of election by assignee—Time—Delay—Acquiescence—Subsequent realization by creditor from part of security of more than amount of valuation of the whole—Rights of creditor—Revaluation—Assignments Act—Transfer of balance of security—Right to rank on estate for balance originally asserted. *Bank of Ottawa v. Newton* (Man.), 4 W. L. R. 508.

**7. Assignment for benefit of creditors**—Motion for removal of assignee—Interim injunction against acting—Order appointing additional assignee to sell assets of estate—Terms—Reference—Costs. *Brock v. Cline*, 8 O. W. R. 144.

**8. Assignment for benefit of creditors**—Place of making—Domicile of assignor—Principal place of business.]—When an insolvent assigns his property at the record office of the district in which he has his office and his dwelling

place, such assignment is valid, even when the factory which was the principal cause of his failure in business is situated in another district. *Henderson v. Harbec*, 8 Q. P. R. 73.

**9. Assignment for benefit of creditors**—Preference of assignee—Action to Set aside—Delay—Fraud—Account.]—In an equitable action to set aside a deed of assignment containing a preference in favour of the assignee, as fraudulent and void against creditors under the Statute of Elizabeth, the action was not commenced until nearly eight years after the making of the deed, and was not brought to trial until nearly fifteen years after the date of the assignment, no explanation being given of the cause of delay, and the assignee having died in the meantime:—*Held*, that the Court, in view of the long delay, unexplained, must regard the proceedings with suspicion, and would not lend its aid to the action without some clear and reasonable explanation:—*Held*, also, that, under the circumstances stated, the assignee being dead, the assignor would not be heard to say that the transaction, as between him and the assignee, was a fraud, and a scheme to defeat other creditors:—*Held*, that the plaintiff, not being a party to the deed of assignment, was not entitled to an accounting for what was done under it. *Peppet v. McDonald*, 39 N. S. R. 540, 1 E. L. R. 82.

**10. Assignment for benefit of creditors**—Preferred claim—Lien on goods for advances—Receipt—Order on consignees—Acceptance—Bills of Sale Act—Payment. *Howe v. Reeve* (B. C.), 3 W. L. R. 555.

**11. Assignment for benefit of creditors**—Right of creditor to rank on estate—Owner or chattel mortgagee of insolvent's business—Evidence—Representations—Conduct—Estoppel. *Barthelmes v. Condie*, 8 O. W. R. 806.

**12. Assignment for benefit of creditors**—Status of assignee to attack bills of sale made by insolvent—Estoppel—Laches and acquiescence—Execution creditors—Interpleader. *Lennox v. Alaska Mercantile Co.* (Y.T.), 4 W. L. R. 333.

**13. Confession of judgment**—Proof of insolvency—Notice or knowledge—Statute of Elizabeth—Consideration—Presumption—Onus—Costs.]—In an action to set aside a confession of judgment for the sum of \$1,545, given by a father to his son, on the ground that it was a preference within the meaning of the Assignments Act, R. S. N. S. 1900 c. 145, and given to defeat or delay credi-

tors, the evidence shewed that the judgment debtor owned a house and land valued at from \$1,000 to \$1,300, another piece of land worth about \$400, and, in addition, a piece of land the value of which was not ascertained. He had, besides, some personal property, the value of which was not proved. His liabilities, in addition to the amount for which the confession of judgment was given, were a disputed claim of \$200, and a note for \$75, not then matured:—*Held*, that these facts were not sufficient to constitute proof of insolvency, and, further, that the Act requires that the party taking judgment by confession should have notice of the insolvency at the time, and, while in certain cases this might be inferred, there was no evidence in this case from which such an inference could be drawn.—A creditor under the Statute of Elizabeth, attacking another's judgment, cannot succeed merely by shewing that the judgment was one by confession, and that in such a case no consideration is to be presumed, but the burden is upon him to shew that there was no debt due.—Assuming that the judgment by confession must be presumed to be without consideration, the party attacking it must still shew that by it, the judgment, the debtor was subtracting from his assets so much of his property that there was not enough left to pay the claims of other creditors.—The appeal was allowed with costs, but, as it appeared that there were many facts not in evidence, the plaintiff was allowed a new trial, costs to be costs in the cause. *Comeau v. White*, 3 N. S. R. 553, 1 E. L. R. 98.

**14. Curator of insolvent estate—***Revendication—Authorization of Judge.*]  
—No authorization of a Judge is necessary in order to proceed in an action in revendication against the curator of an insolvent estate, and a petition to that effect will be dismissed with costs. *In re Desrochers and Aubertin*, 8 Q. P. R. 125.

**15. Demand of assignment—Right of creditor—Holder of bill for collection.**]  
—The holder for collection only of a due bill of exchange of \$200 or upwards, is a creditor of the acceptor, within the meaning of arts. 853 and 854, C. C. P., and has a right to make a demand of abandonment of property upon him. *Diba v. Smith*, Q. R. 27 S. C. 446.

**16. Distribution of insolvent's estate—(Contestation of claims—Interest of unpaid creditor.)**—An unpaid creditor has at all times an interest in preventing his debtor's assets from being diverted to pay illegitimate or unlawful claims. When therefore in the distribution of moneys of a debtor by the prothonotary,

a party making an unlawful claim is collocated, a creditor to whom an amount is allotted in the same report as if such a claim had not been made, has nevertheless the right to contest the latter, inasmuch as a reduction in the dividend allotted to the other creditors must have the effect of impairing the contestant's chances of payment out of other or future assets of the debtor. Judgment in Q. R. 27 S. C. 356, affirmed. *Chevalier v. Bessette*, Q. R. 15 K. B. 206.

**17. Distribution of insolvent's estate—Landlord's privilege—Statutes—Retroactivity.**]  
—Where insolvent tenants judicially abandoned their property for the benefit of their creditors, and statute law (61 V. c. 46, Q.), at the date of the abandonment restricted the lessor's preference to two years' rent, ranking them as ordinary creditors for the balance, while no such restriction was enacted by the law as it stood at the date of the leases:—*Held*, that the existing statute applied to all liquidations which arose after its enactment, and governed the lessor's privilege unless expressly excepted therefrom: *Ross v. Beaudry*, Q. R. 14 K. B. 544 (Privy Council).

**18. Insolvent — Imprisonment for fraud — Right to support in prison.**]  
—A person imprisoned by virtue of arts. 833 and 834, C. P., has a right to maintenance and support during his imprisonment; an insolvent (in this case) imprisoned for fraud has no such right; in his case the imprisonment is a penalty, not a means of execution. *Desbiens v. Desmarteau*, 8 Q. P. R. 114.

**19. Insolvent estate — Appointment of curator — Depositions — Signature by attorneys — Sworn before justice of the peace.**]  
—At the time of the appointment of a curator to an insolvent estate, depositions made and signed by firms represented by attorneys are irregular and void; and so are such depositions when made before a justice of the peace, there being no statute authorizing a justice to take affidavits. *Brossard v. Ouimet*, 7 Q. P. R. 471.

**20. Preference—Attachment of debts — Insurance—Loss — Assignment before service of attaching order—Right to attack assignment—Assignments and Preferences Act not limited to traders.** *McKinnon v. Coffin*, 2 E. L. R. 176.

**21. Preference — Bill of sale—Presumption of invalidity—Pressure.** *Edgett v. Steeves*, 2 E. L. R. 131.

**22. Preference — Bill of sale — Renewal — After-acquired property — Evidence of defendants—Examination under**

*Collection Act—New trial.*—On the trial of an action to set aside a bill of sale, as made by an insolvent with intent to hinder and delay creditors, evidence was given to shew that the bill of sale in question was given in substitution for a bill of sale executed some two years previously, from which a provision as to after-acquired property was alleged to have been omitted, although it was understood and agreed that such provision should be included. Evidence was given on the other hand to shew that the written memorandum of instructions for the original bill of sale contained no reference to after-acquired property; that neither the solicitor by whom it was drawn nor a witness who was present at the time, and knew of the terms of the negotiations, made any mention of it; and that on an occasion when both the defendants in this action gave evidence before a commissioner under the Collection Act touching the affairs of the defendant by whom the bill of sale was made, no such arrangement was suggested. —The trial Judge having given judgment for the defendants, and the Court being of opinion that the precarious character of the evidence given by the defendants at the trial had not been sufficiently considered, a new trial was ordered with costs. —*Semble*, as the Collection Act requires the commissioner to file the evidence taken before him, such evidence must be taken in writing, and is the best evidence as to what was said during the inquiry. *Farlinger v. Thompson*, 37 N. S. R. 513.

**23. Preference**—Chattel mortgage—Actual advance by third person—Money applied on debt due by insolvent—Creditor's knowledge of insolvency—Absence of knowledge by third person. *Allan v. McLean*, 8 O. W. R. 223, 761.

**24. Preference**—Conveyances of land by insolvent to creditors within 60 days of assignment for creditors—Evidence—Onus—Setting aside—Security valid in part—Costs. *Falls v. Gibb*, *Falls v. Young*, 8 O. W. R. 397.

**25. Preference**—Mortgage—Statutory presumption—Rebuttal—Transaction before 1897—Circumstances rebutting intent to prefer—Registry laws—Assignment for creditors—Priorities.]—At the revision of the Ontario statutes in 1897, the words "*prima facie*" were inserted after the word "presumed," where it occurs in sub-secs. 3 and 4 of sec. 2 of ch. 147, and the doubt whether the presumption was rebuttable was thereby set at rest; but even under the language of sub-sec. 2 (b) of sec. 2 of the Act of 1887, i.e., without the words "*prima facie*," the presumption was rebuttable;

and in the case of a mortgage of land to secure a debt, made on the 15th October, 1896, to the defendants, followed on the 21st October, 1896, by an assignment by the mortgagor to the plaintiff for the benefit of creditors, the defendants were entitled to shew that there was no intent to prefer. *Lawson v. McGeoch*, 20 A. R. 464, followed.—*Held*, also, upon the evidence, that the presumption of intent to prefer was rebutted.—*Held*, also, that the plaintiff, as assignee for the benefit of creditors, occupied no higher position than his assignor, and could not be regarded as a subsequent purchaser for valuable consideration, within the meaning of the Registry Act, so as to avail himself of its provisions with regard to the registration of the assignment before the mortgage. *Craig v. McKay*, 12 O. L. R. 121, 7 O. W. R. 507.

**26. Preference**—Transfer of goods by insolvent to creditor—Presumption—Rebuttal—Absence of fraudulent intent—Actual advance of money—Judgment—Defendant not appearing. *Baldocchi v. Spada*, 7 O. W. R. 325, 8 O. W. R. 705.

**27. Preferential security**—Previous promise—Confession of judgment—Surety's right to take. *McLeod v. Wightman*, 1 E. L. R. 146, 260.

**28. Preferential transfer of cheque**—Deposit with private banker—Application by banker upon overdue note—Absence of pre-arrangement and of intent to prefer.]—On the 5th September, 1904, a merchant, being then insolvent, sold his stock-in-trade at 50 cents on the dollar, and received in payment the purchaser's cheque on the defendants' private bank for \$1,172.27, payable to his own order, which he took to that bank, where he had an account, and deposited it to his own credit. The defendants knew that the sale was about to be made, and had lent the purchaser the money to make the purchase, and knew that the money was to be deposited in their bank by the insolvent, and, in anticipation of this, had charged up against the insolvent's account (without the latter's knowledge) an overdue note for \$1,000 and \$40 interest thereon. The deposit of the purchaser's cheque with the defendants was attacked by this action (brought within 60 days thereafter) as a preferential transfer of a bill or security to a creditor, within R. S. O. 1897 c. 147, s. 2:—*Held*, STREET, J., dissenting, that, there being no evidence of any pre-arrangement nor of any intent to prefer, the transaction was not within the scope of the Act.—Judgment of FALCONBRIDGE, C. J. K. B., affirmed. *Robinson v. McGillivray*, 12 O. L. R. 91, 7 O. W. R. 438, 8 O. W. R. 602.

**29. Preferred claim of landlord—***Purchase of rights of insolvent tenant—Collocation by privilege — Goods on premises—Dividend sheet—(Contestation—Conditional order.)*—The lessor who purchases the rights under the lease of his insolvent lessee, without prejudice to any claim for rental to which he may be legally entitled, has a right to be collocated by privilege out of the proceeds of the movable property garnishing the leased premises, for a proportion of rental for the current year corresponding to the part of it elapsed at the date of his purchase.—2. When on the contestation of a dividend sheet prepared by the curator to abandoned property, by a creditor who claims and has the right to be collocated by privilege out of special proceeds or a special fund, it does not appear whether the curator has in hands an amount sufficient to cover the claim, the Court will maintain the contestation, nevertheless, and make a conditional order accordingly. *Re Macpherson and Symonds*, Q. R. 29 S. C. 119.

**30. Sale of book debts by curator—***Delivery of proofs of debts—Default—Remedy—Costs.*—A sale of debts imports the obligation of delivering to the purchaser evidences upon which they rest. Consequently, the curator of an assignment of property, who sells the debts without guaranty, and at the risk of the purchaser, is bound to hand over to the latter the notes of the debtors, if there are any, and the accounts in detail in the case of sales of goods. In default of his doing so, the purchaser will have, against him, the remedy of an action for recovery back or reduction in the price paid, as the case may be, and the curator will be ordered to pay the costs incurred up to the time of the production of these evidences. *Thibaudeau v. Paradis*, Q. R. 28 S. C. 475.

See BANKS AND BANKING, 4—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 26 — COLLECTION ACT — COMPANY, III. — COSTS, IV. 6 — COURTS, IV. — FRAUDULENT CONVEYANCE — MORTGAGE, 18—OPPOSITION—PARTIES, I. 12—PLEADING, VIII. 1, IX. 11—SALE OF GOODS, III. 1, VI. 6—SEQUESTRATION.

## BANKS AND BANKING.

**1. Cheque—**Indorsement to order of plaintiff — Forgery of plaintiff's name — Payment by bank on forged indorsement — Possession of cheque—Action to recover cheque or amount — Failure because of non-presentation and non-indorsement by plaintiff. *Smith v. Traders Bank of Canada*, 7 O. W. R. 791.

**2. Forgery of cheque—**Deposit by forger in another bank—Presentation by bank through clearing house—Payment by drawee bank—Action to recover amount paid from second bank—Negligence — Equities—Legal rights. *Union Bank of Canada v. Dominion Bank* (Man.), 4 W. L. R. 407.

**3. Lien on wheat —**Following proceeds of sales—Moneys paid to creditor with notice of lien. *Union Bank v. Spinney*, 1 E. L. R. 277.

**4. Overdraft—***Proof of—Third party—Bill of exchange — Surrender—Insolvency of acceptor—Collateral security—Credit.*—A claim by a bank against a customer for an overdraft originally evidenced by cheques, etc., may be proved against a third party contesting it, by the parol testimony of the customer, corroborated by his acknowledgment in writing of the correctness of the balance shewn in his bank account, and his receipt for his cheques returned to him monthly according to custom, both given at the date of such surrender.—A surrender of a draft, by the bank holding it, to the acceptor, with the word *paid* stamped on it, is a complete discharge of the drawer, and it cannot afterwards be used by the bank in support of a claim against the latter, because the acceptor has since become insolvent.—A bank is not bound to credit a customer, who has become insolvent and upon whose estate it has a claim, with the cash surrender value of a policy of life insurance on the life of a third party, which had been transferred to it by the customer, as collateral security. *Tessier v. La Banque Nationale*, Q. R. 28 S. C. 140.

**5. President of Bank—***Duties of—Returns to government—False statements—Action by shareholder against president.*—It is not a duty cast on the president of a bank to watch the conduct of its cashier and inferior officers, nor to verify the exactness of the calculations of its auditors or of the entries in the books, nor to interfere with the employees who are put in a position of trust for the express purpose of attending to details of management. He is therefore not liable for loss arising from acts of gross mismanagement on their part, of which he has no knowledge, and his signature of returns or statements required by the charter or the Bank Act, prepared and submitted by them, when he has no reason to suspect that they are inaccurate or false, does not amount to the making or approval of *wilfully false statements*, etc., mentioned in s. 99 of the Bank Act, 1890. Judgment in Q. R. 27 S. C. 307, affirmed. *Préfontaine v. Grenier*, Q. R. 15 K. B. 143.



See ASSESSMENT AND TAXES, 10—  
BANKRUPTCY AND INSOLVENCY, 28 —  
BILLS OF EXCHANGE AND PROMISSORY  
NOTES—COMPANY, III. 16, 18, 28—GIFT,  
1—INTERPLEADER, 3, 4—JUDGMENT, IV.  
12—MORTGAGE, 4 — PRINCIPAL AND  
AGENT, 14 — WAREHOUSE RECEIPTS —  
WILL, I. 2.

### BARRISTER.

See ADVOCATE—ATTORNEY — SOLICI-  
TOR—MUNICIPAL CORPORATIONS, VII. 2.

### BAWDY HOUSE.

See CRIMINAL LAW, II. 4, 5, IV. 9—  
VENDOR AND PURCHASER, I. 4.

### BEEES.

See ANIMALS.

### BENEFIT SOCIETY.

**1. Police benefit fund—Pension —**  
*Right to—Forum—Police commissioners*  
*—Injury in the execution of duty.]—*By  
rule 32 of the rules and regulations of a  
police benefit fund, it was provided that  
where a member "in the execution of  
duty" received such injury as "in the  
opinion of the police commissioners"  
permanently incapacitated him from ser-  
vice in the police force, he should receive  
a pension as therein provided. The  
plaintiff, a policeman, while vaulting over  
a wooden horse in a gymnasium, this be-  
ing part of a manual exercise prescribed,  
received an injury whereby he alleged he  
was permanently incapacitated from fur-  
ther service in the force, and so entitled  
to such pension, and brought an action  
therefor:—*Held*, that the injury was one  
sustained by the policeman in the execu-  
tion of duty, but whether the permanent  
incapacity was the result of such injury  
was a matter for the consideration of the  
police commissioners, and the action was  
not maintainable. *Gummerson v. Toronto*  
*Police Benefit Fund*, 11 O. L. R. 194, 5  
O. W. R. 581, 6 O. W. R. 517.

**2. Police pension society—Judicial**  
*duties of directors—Rights of members—*  
*Claim under the rules by policeman*  
*obliged to resign—Procedure on inquiry.]—*  
The rules of the respondent police pen-  
sion society provided that every appli-  
cation for a pension should be fully gone  
into by the board of directors, and in  
particular that any member entitled  
thereto, who is dismissed from the police  
force or is obliged to resign, shall have  
his case considered by the board and his  
right thereto determined by a majority.

—On an application for a pension by the  
appellant, who had been obliged to re-  
sign, the board, without any judicial in-  
quiry into the circumstances, resolved to  
refuse the claim, "seeing that he was  
obliged to tender his resignation:—"  
*Held*, in an action by the appellant in  
effect to compel a due administration of  
the pension fund, that this resolution was  
void and of no effect. The tender of  
resignation gave him the right to appeal  
to the board, and to have his claim as  
affected thereby duly considered and de-  
termined. It did not by itself forfeit  
rights acquired by length of service and  
regular contribution to the pension fund.  
Case remitted to the Superior Court, with  
declarations directed to secure to the ap-  
pellant a due consideration and determi-  
nation thereof by a differently constituted  
board. *La Pointe v. L'Association de*  
*Bienfaisance et de Retraite de la Police*  
*de Montreal*, [1906] A. C. 535.

**3. Rights of member—**Action for  
declaration of rights—Domestic tribunal  
—Failure to resort to—Submission to  
jurisdiction—Refusal of Court to enter-  
tain action—Costs. *Zilliar v. Independent*  
*Order of Foresters*, 8 O. W. R. 631.

See CLUB — INSURANCE, III.—RAIL-  
WAY, VIII. 4.

### BENEVOLENT SOCIETIES ACT.

See CLUB, 2.

### BEQUEST.

See WILL.

### BETTING HOUSE.

See CRIMINAL LAW, III. 17, 18.

### BICYCLISTS.

See NEGLIGENCE.

### BILLS OF EXCHANGE AND PRO- MISSORY NOTES.

I. BILLS OF EXCHANGE.

II. CHEQUES.

III. PROMISSORY NOTES.

See BANKS AND BANKING — BANK-  
RUPTCY AND INSOLVENCY, 15—COMPANY,  
II. 6, 8, 9.

## I. BILLS OF EXCHANGE.

**1. Action by transferee—Previous action by drawer—Notice—Stay of proceedings—Offer to suffer judgment.]—**An action by the transferee of an overdue bill, upon which an action has been already brought by the transferor, wherein an offer to suffer judgment has been made and accepted, was stayed on an application to the equitable jurisdiction of the Court, the transferee having knowledge of the pendency of the first action.—An application to compel the plaintiffs to sign judgment on their acceptance of the defendant's offer to suffer judgment in the first action was refused. *Kennedy Co. v. Vaughan, Standard Bank of Canada v. Vaughan*, 37 N. B. R. 112.

**2. Discount by mortgage company—Ultra vires—Breach of trust—Dishonour of bill—Action against persons negotiating—Duty to return trust funds:—***Canada Permanent Mortgage Corporation v. Briggs*, 7 O. W. R. 443.

**3. Limitation of actions—Loan to railway company through general manager—Payment of interest—Estoppel.]—**In 1893 E. N., one of the plaintiffs, and mother of her co-plaintiff, at the request of F., her brother, who was the chief executive officer of the defendants' railway, and had the management of their financial matters, lent to the company \$1,600, giving him her cheque therefor, payable to his order, which he indorsed over to the company, and it was applied to their purposes, but, through some error in bookkeeping, F. was credited with the loan in the company's books. E. N. received as security for the loan a bill of exchange, drawn, according to the company's usual custom, by F., payable to himself, and accepted, under F.'s instructions, by the company's secretary, which F. indorsed over to E. N. The bill was renewed from time to time, interest being paid by the company's cheques, drawn payable to F., and indorsed over to E. N., until 1895, when she, having transferred the bill to her co-plaintiff, the interest thereafter was paid to him. On the 31st March, 1899, the amount standing to F.'s credit in the company's books, including this loan, was transferred on the books to a firm, of which F. was a member, without the knowledge of the plaintiffs. The interest thereafter was paid in the same manner as before, but in reality it was paid by F. personally, of which the plaintiffs were not aware. The payment of interest continued until 1900. In an action brought in 1905:—*Held*, that the plaintiffs were entitled to recover; that the debt was from its inception, and continued to be, that of the

company, and not of F., and that the company were estopped from contending that the payments of interest were not made by them, and that such payments prevented the Statute of Limitations from running against the plaintiffs.—The principle of the decision in *Re Tucker, Tucker v. Tucker*, [1894] 3 Ch. 429, applied. *Nickle v. Kingston and Pembroke R. W. Co.*, 12 O. L. R. 349, 8 O. W. R. 158.

**4. Return of bill to drawer by payee—**Indorsement by payee not essential. *Nova Scotia Carriage Co. v. Lockhart*, 1 E. L. R. 76.

See WRIT OF SUMMONS, 15.

## II. CHEQUES.

**1. Cheque payable to order —***Forged indorsement — Collection by third party through his bank—Payment over—Liability to refund—Principal and agent—Banks and banking.]—*The defendant McE., having a cheque on New York payable to his order, of which he claimed to be the owner, indorsed and handed it to the defendant H., who had done business for him, to collect and pay the amount over to him. H., believing McE. to be the owner and entitled to receive the money, handed it to the plaintiffs to be collected, telling their manager that he saw McE. indorse it and that he knew him; but when the manager offered to cash it at once if H. would indorse it, he declined, stating he knew nothing of it, and it might not be paid. For the purpose of collection H. signed his name as witness to the indorsement, writing beneath his signature "without any recourse to me whatever." The plaintiffs collected the money and credited the proceeds to H., who accounted for them to McE. The New York bank subsequently demanded the money back, alleging McE.'s indorsement to be a forgery, and the plaintiffs paid back the amount received and brought action against H. and McE.:—*Held*, that H., having acted honestly, was not liable in an action for deceit; but that the facts constituted a contract of warranty by him that he was entitled, as agent for the rightful owner of the cheque, to request the plaintiffs to collect it and pay the proceeds to him as such agent when collected, and that if the indorsement was forged, he was liable to repay the amount.—*Collen v. Wright*, 8 E. & B. 647, followed. *Bank of Ottawa v. Harty*, 12 O. L. R. 218, 7 O. W. R. 869.

**2. Forged cheques —***Crown — Forgeries by clerk in government department — Payment by bank — Negligence — Pass-*

*book—Duty of customer to check accounts—Settlement of accounts—Audit Act—Estoppel—Laches—Deposit of cheques in other banks—Liability over—Duty of knowing customer's signature—Alteration in position—Mistake—Liability as between two innocent parties—R. S. C. 1886 c. 29, s. 30.]—A clerk in one of the departments of the Dominion government forged several cheques upon the bank account kept by the department with the defendants, in the manner set out in the judgment, and deposited the forged cheques to his own credit with other banks (third parties). The cheques went through the clearing house, and were paid by the defendants. The forgeries were not discovered for some months; the clerk who executed them was the person intrusted with the duty of checking the bank account and examining the pass-book. In an action on behalf of the Crown to recover the amount of the forged cheques, which had been charged by the defendants against the department's accounts, the defendants contended that the right to recover was barred by the omission or neglect by officers of the government of duties which the ordinary customer owes to his bank:—*Held*, that, even if there had been a breach of duty or negligence or omission on the part of the plaintiff, it would not avail the defendant bank, for the Crown is not bound by estoppel nor responsible for the negligence or laches of its servants.—As to the claim against the third party banks, *per* MOSS, C.J.O.:—Where in the ordinary course of dealing, there comes through one bank to another a cheque purporting to bear the signature of a customer of the latter, which accepts it, the implication is that it was so dealt with in reliance upon knowledge of the customer's signature, and not upon any supposed representation or warranty of its genuineness by the bank presenting it.—*Per* MACLAREN, J.A.:—The third party banks were justified in assuming that the defendant bank could best determine whether the signatures were genuine or not, and it was a fair inference that the defendant bank would know from bank usage that the third party banks would rely on such knowledge and take the fact of payment by the defendant bank as equivalent to a representation that the cheques were genuine, and would be likely to act upon it. The defendant bank might, therefore, properly be held liable on the ground of estoppel. The third party banks could not be held to have warranted the genuineness of the forged cheques merely by demanding payment of them without indorsing them; and having placed them to the credit of the forger before presenting them to the defendant bank for payment, they presented them as holders for*

value.—The effect of receipt from a bank of a pass-book and vouchers, and their retention without comment, by a customer, considered.—Judgment of ANGLIN, J. 10 O. L. R. 117, affirmed. *Res v. Bank of Montreal*, 11 O. L. R. 595, 7 O. W. R. 638.

See BANKRUPTCY AND INSOLVENCY, 28 — TRUSTS AND TRUSTEES, 8 — VENDOR AND PURCHASER, I. 32, 34.

### III. PROMISSORY NOTES.

**1, Accommodation makers—Sureties—Renewal—Consideration—Evidence—Promise of holders as to non-liability—Failure to obtain signature of principal debtor as co-maker.** *Murphy v. Bryden*, 7 O. W. R. 250.

**2, Action by holder—Fraud—Notice.]—**The holder of a promissory note who, at the time of its transfer, had actual knowledge that it was originally obtained by false representations and without consideration, has no action to recover the amount from the maker. *Guimond v. Batalon*, Q. R. 29 S. C. 8.

**3. Action on—Defence—Foreign Companies Ordinance—Note in favour of foreign company doing business in contravention of Ordinance—Notice to indorsee.]—**The Foreign Companies Ordinance, 1903 (c. 14 of 1903, 1st session), provides (s. 3), that no foreign company having gain for its object, or a part of its object, shall carry on any part of its business in the Territories, unless it is duly registered under the Ordinance, and imposes a penalty for breach of this provision; it further provides (s. 10) that any foreign company required by the Ordinance to become registered shall not while unregistered be capable of maintaining an action or other proceeding in any Court in respect of any contract made in whole or in part in the Territories, in the course of or in connection with business carried on without registration, contrary to the provisions of s. 3:—*Held*, that an indorsee with notice of a promissory note made to a foreign company in the course of and in connection with business carried on in contravention of the above provisions, could not recover.—The plaintiff was the indorsee of a promissory note made by the defendants in favour of the Sawyer and Massey Co., Ltd., to secure the price of certain threshing machinery. The defendants, with other defences, set up by the 3rd paragraph of their defence that the note in question was given to an unregistered foreign company engaged in selling machinery for gain within the



Territories by resident agents, of which facts the plaintiff had notice when he became the holder of the note, and that they would rely upon the provisions of the Foreign Companies Ordinance.—On argument of the question of law thus raised, the facts above set out were admitted: — *Held*, a good defence in law. *Ireland v. Andrews*, 6 Terr. L. R. 66.

**4. Action on**—Defence—Non fecit—Consideration—Purchase price of horse—Finding as to signatures—Knowledge of nature of document signed—Agreement admittedly signed—Reference to notes—Holder in due course. *Dart v. Quaid*, 8 O. W. R. 662.

**5. Action on**—Defences—Absence of consideration—Plaintiff not *bona fide* holder for value—Collateral contract—Oral evidence—New trial. *Clarke v. Union Stock Underwriting Co. of Peterborough*, 8 O. W. R. 757.

**6. Action on**—Lien notes—Construction and operation between original parties—Not equivalent to promissory notes—Leave to amend—Terms—Costs. *New Hamburg Manufacturing Co. v. Weisbrod (N.W.T.)*, 4 W. L. R. 125.

**7. Action on**—Stay—Bringing in indorser *en garantie*.]—A party becoming holder of a note after maturity, is subject to all the equities between the original parties to the note, and the defendant, sued as the maker of the note, may, by dilatory exception, have delay to call in warranty the indorser as his *garant*, to take up his *fait et cause*. *Levinoff v. Richard*, 8 Q. P. R. 72.

**8. Action on** — Stay — Bringing in prior indorser *en garantie*.]—The indorser of a promissory note may stay the action of the holder by dilatory exception in order to bring in in warranty a prior indorser of the note. *Leclair v. Auerbach*, 5 Q. P. R. 66.

**9. Alteration after signature of maker**—Insertion of interest clause—Material alteration—Avoidance of instrument—Subsequent conduct of maker—Estoppel—Ratification. *Jones v. Reid*, 7 O. W. R. 131.

**10. Collateral security**—Bank—Discharge—Evidence—Commercial matter—Oral testimony—Appropriation of payments—Indorsed note—Onerous debt.]—A promissory note signed in favour of a bank as collateral security for the payment of a cheque accepted by the bank is subject to the ordinary rules relating to security, and will be held to be paid and discharged by the reimbursement to the

bank of the amount of the cheque.—The circumstances with regard to the signing of the note and the subsequent reimbursement being commercial matters, oral evidence thereof is admissible.—The indorsement of a note by third persons makes it a "mere onerous" debt of the maker, within the meaning of art. 1161, C. C. Accordingly, the holder must appropriate to this note, in preference to others signed by the maker alone, moneys which he receives for the account of the maker. *Banque d'Hochelaga v. Macduff*, Q. R. 14 K. B. 390.

**11. Consideration** — Condition — Finding of trial Judge—Review by appellate Court.]—The defendant gave his promissory note to the plaintiff for \$100. in part payment of a larger sum which he agreed to pay for the transfer of the interest of F. in the Bedford Electric Co., upon which the plaintiff held an option. At the time the note was given the plaintiff signed an agreement in which he undertook to transfer the interest bargained for to the defendant upon payment of the balance of the purchase money as agreed.—An action on the note was defended, among other grounds, on the ground that it was made subject to a condition, alleged to be contained in the agreement signed by the plaintiff, which had not been fulfilled. — The trial Judge having found as a fact that the condition relied upon was not contained in the agreement when it was signed by the plaintiff, the Court refused to disturb his finding:—Held, that, as the plaintiff at the time he agreed to transfer the interest of F., was entitled to receive a portion of the consideration in cash, and, instead, gave the defendant time for the payment, taking his note for the amount, this constituted good consideration for the note. *Soulis v. McNeil*, 37 N. S. R. 525.

**12. Consideration** — Note given for balance of previous judgment—Duress—Note given to avoid imprisonment as judgment debtor—Collection Act—Order for payment against Dominion civil servant. *Smith v. Frame*, 2 E. L. R. 63, 203.

**13. Consideration**—Release of claim afterwards found to be of no value. *Naugle v. Hirtle*, 2 E. L. R. 51.

**14. Deposit receipt**—Action on as note—Payable after notice—Demand for immediate payment.]—A writing, signed by the defendant, admitting the receipt of a sum of money, and agreeing to be responsible for the same with interest at the rate of 7 per cent. per annum, upon production of the receipt and after three months' notice, may be recovered upon as a promissory note.—A demand for imme-

date payment made more than three months before the commencement of the action is sufficient proof of the notice called for by the receipt. *Babineau v. La-Forest*, 37 N. B. R. 156, 37 S. C. R. 521.

**15. Extension of time for payment—Release of co-maker—Surety—Notice—Binding agreement.]—D.**, on being sued on certain promissory notes to which he was a party, defended the action, setting up an arrangement between himself and the fuel company that he was to be a surety merely for them to the plaintiff; and that, as the plaintiff was aware of this at the time he accepted the notes, he, D., was relieved by the plaintiff giving the fuel company an extension of time:—*Held*, that, in order for D. to escape his liability on this ground, he must shew that there was a binding agreement arrived at between his creditor and himself for valuable consideration, and that, in the circumstances, there was here no such agreement. *Stone v. Rossland Ice and Fuel Co.*, 12 B. C. R. 66, 3 W. L. R. 55.

**16. Forgery—Renewal—Indorser—Liability—Bank.]—A** promissory note given in payment, or renewal, of notes of the maker bearing indorsements forged by him, to the bank which discounted and holds the latter paper and is aware of the forgery on it, is valid, and, as a consequence, the indorser of such a note is liable to the bank for the amount, more particularly if, at the time he indorsed it, he was not aware of the forgery and fraud in question. *La Banque Nationale v. Drolet*, Q. R. 28 S. C. 146.

**17. Forgery of makers' names—Indorsement in name of firm—Liability of non-authorizing partner—Discount by bank—Notice or knowledge of manager—Circumstances giving rise to suspicion—Findings of jury—Disregard of one—Rule 615—Judgment of Court.** *Crown Bank v. Brash*, 8 O. W. R. 400, 483.

**18. Fraud in procuring signatures of makers—Holder for value—Suspicious circumstances—Failure to make inquiry—Findings of jury—Judge's charge.** *Gillard v. McKinnon*, 8 O. W. R. 311.

**19. Illegal consideration—Onus—Findings—Appeal.]—In** an action by the indorsee of a promissory note against the defendants as makers, the defences relied on were that the note was made for the accommodation of the plaintiff, and that it was given in connection with a smuggling transaction, and for other illegal purposes. The plaintiff's evidence was unsatisfactory to the trial Judge,

and there was a failure on his part to produce the books of account shewing how the consideration for the note was made up. There was evidence to support the plea of illegality, and the Judge, holding that, under these circumstances the burden of proving consideration was upon the plaintiff, dismissed the action with costs. — On appeal there was an equal division of opinion, and the appeal was dismissed without costs. *Ross v. Gannon*, 39 N. S. R. 65, 1 E. L. R. 239.

**20. Indorsement by third party without indorsement by payee—High Court of Justice—Following precedents.]—The** defendant became the indorser of two promissory notes without the payees having indorsed the same, being so indorsed by the defendant in pursuance of an agreement with the payees for valuable consideration that he should indorse them and become liable thereon:—*Held*, that the defendant was liable.—*Robinson v. Mann*, 31 S. C. R. 484, followed.—*Steele v. McKinlay*, 5 App. Cas. 754, and *Jenkins v. Coomber*, [1898] 2 Q. B. 168, not followed.—It is the duty of the Courts of the province to follow the decision of the highest Court in Canada, being the latest decision on the subject, without questioning whether or not it is in accordance with previous cases. *Slater v. Laboree*, 10 O. L. R. 648, 6 O. W. R. 628.

**21. Joint and several note—Release of co-maker—Reservation of rights—Knowledge and consent—Subsequent deed—Ratification.]—One** of the five makers of a joint and several promissory note was absolutely released by the holder, by an instrument under seal, from liability upon the note, and there was no reservation of rights against the other makers, but the holder sought to recover against one of them, the defendant:—*Held*, upon the construction of the release and a subsequent instrument under seal, to which the maker who had been released was not a party, that the rights of the holder against the defendant had been effectively preserved. — Decision of a Divisional Court, 8 O. L. R. 261, 3 O. W. R. 758, reversed.—*Per Moss, C.J.O.*:—The whole arrangement of which the release formed part was come to and carried out with the knowledge and consent of the defendant, and that knowledge and consent were sufficient to prevent the release of his co-maker operating as a discharge of his liability.—*Per OSLER, J.A.*:—Even if the release did in law operate from the moment of its execution as a discharge of the defendant, there was nothing to prevent the latter, after its execution, from acknowledging and ratifying, by a proper instrument, his continuing liability to

pay, just as a surety may do who has been discharged by time given to his principal or by the release of a co-surety. Co-contractors and co-debtors stand in these respects in the same position as co-sureties. The release of one operates in general as a release of all, but the legal operation of such a release may be restrained by the express terms of the instrument, or the co-debtors may reaffirm and ratify their liability notwithstanding the release. *Bogart v. Robertson*, 11 O. L. R. 295, 6 O. W. R. 896.

**22. Shares** — Purchase induced by misrepresentation — Right to rescind — Counterclaim for damages—Measure of damages. *Gould v. Gillies*, 1 E. L. R. 440.

**23. Signatures procured by representation that another would be obtained**—Failure to obtain — Absence of repudiation—Adoption—Waiver—Consideration — Indorsee — Holder in due course for value without notice. *First National Bank of Minneapolis v. McLean* (Man.), 3 W. L. R. 227.

**24. Surety**—Agreement to accept another surety — Conflict of evidence — Drawing inferences—Misdirection. *Rockwell v. Wood*, 1 E. L. R. 247.

**25. Surety**—Indorser—Notice of dishonour—Giving time to maker—Consideration. *Fleming v. McLeod*, 2 E. L. R. 180.

**26. Void consideration** — *Fraudulent preference* — *Bankruptcy and insolvency*.]—A promissory note in favour of a creditor and inspector of an abandoned estate, to procure his assent to the sale of the abandoned assets to the maker, is fraudulent, null, and void, and no action will lie to recover on it. *Evans & Sons Limited v. Tracey*, Q. R. 29 S. C. 97.

See CONTRACT, IV. 1—COVENANT, 1—EVIDENCE, I. 4, 8—FRAUDULENT CONVEYANCE, 8—GIFT, 3—INSURANCE, III. 6—JUDGMENT, IV. 2, 10 — LANDLORD AND TENANT, 9—LIMITATION OF ACTIONS, II. 2—MECHANICS' LIENS, 3, 6—PARTIES, I. 3—PLEADING, IX. 6 — PRINCIPAL AND SURETY, 3, 5—SALE OF GOODS, V. 6—WAREHOUSE RECEIPTS.

## BILLS OF SALE AND CHATTEL MORTGAGES.

**1. Bill of sale** — Evidence — Copy certified by registrar of deeds in foreign country—Secondary evidence of contents of original—Evidence of sale in foreign

country—Application of foreign law—Delivery and change of possession—Fraudulent intent — Consideration — Untrue statement in bill—Interpleader. *Hennest v. Malchese* (N.W.T.), 3 W. L. R. 171.

**2. Bill of sale**—Non-compliance with Bills of Sale Ordinance—Insufficient description of goods — Invalidity — Actual and continued change of possession—Bargainor remaining in apparent possession. *Sraigher v. Rotaru* (N.W.T.), 3 W. L. R. 486.

**3. Bill of sale**—*Staying sale*—*Payment into Court*—*Amount*.]—In a suit by the mortgagor to set aside a bill of sale, an interim injunction order to restrain a sale by the mortgagee was granted, upon condition of the mortgagor paying into Court the amount due the mortgagee.—The bill of sale was collateral security for promissory notes, some of which had been indorsed over for value:—*Held*, that the amount to be paid into Court should not be reduced by the amount of such notes. *Petropoulos v. F. E. Williams Co.*, 26 C. L. T. 468, 3 N. B. Eq. 267.

**4. Bill of sale**—*Want of registration* — *Validity as against fraudulent sale with notice*.]—A bill of sale of a horse, given to secure a balance due on the purchase price, although unregistered, cannot be defeated by a fraudulent sale to a third party with notice.—In an action for the alleged wrongful taking and detention of a horse, the defendants relied on an unregistered bill of sale given to the defendant B. by the owner, M., in trust to sell the horse, retain a balance due on the purchase price, and pay the balance to M.:—*Held*, that the bill of sale so given, although unregistered, was not defeated by a fraudulent sale to the plaintiff, who was not a *bona fide* purchaser for value and who had notice of the claim. *McLeod v. Doucette*, 38 N. S. R. 151.

**5. Chattel mortgage**—Ownership of goods—Estoppel—Fraudulent intent of true owner—Actual advance by mortgagee—Absence of knowledge. *Lee v. Nisbet*, 7 O. W. R. 149.

\* See BANKRUPTCY AND INSOLVENCY—CHOSE IN ACTION, ASSIGNMENT OF, 3—COLLECTION ACT, 2—CONVERSION, 1—ILLEGAL DISTRESS—INFANT, 2—INTERPLEADER, 2—LANDLORD AND TENANT, 3—SALE OF GOODS, II. 1, 2, 4, 5, VI. 6.

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**BOND.**

Condition for payment of instalments to obligee for life and after his decease as he might direct—No direction by obligee. *Kennedy v. McDonald*, 2 E. L. R. 83.

See ARREST, 12—COMPANY, IV. 2, 7—CONTRACT, III. 13—EXECUTORS AND ADMINISTRATORS, 9—LIQUOR LICENSES, 14—MUNICIPAL ELECTIONS, 12—PLEDGE, 1—PRINCIPAL AND SURETY — RAILWAY, III.

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**BOUNDARY LINE ROAD.**

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**BREACH OF PROMISE OF MARRIAGE.**

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**BRIBERY.**

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**BRIDGE.**

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**BRITISH NORTH AMERICA ACT.**

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**BROKER.**

1. Agreement to carry stocks on margin — Wrongful sale — Measure of damages. *Vanbuskirk v. Smith*, 1 E. L. R. 383.

2. Buying grain on margin for customer — Gambling transaction — Gaming Act—Illegal contract—Recovery of money deposited with broker—Costs. *Donald v. Edwards-Woods Co.* (N.W.T.), 4 W. L. R. 128.

3. Carrying stock on margin—Advances by broker—Sale of shares without notice—Measure of damages.]—Held, on the evidence, that the plaintiffs, having admittedly paid money for the defendant at his request, had the usual right of action at law on the common counts for money paid.—The defendant, not having sought to redeem his shares nor made any tender of the amount due by him, could not say that the plaintiffs would not have restored his shares, which might have been bought in the market for a lower price than they were sold for and credited to him.—Even if the plaintiffs were wrong-doers or had committed a breach of their contract, the defendant was not entitled in the circumstances of this case to damages greater in amount than the price which the shares realized. — Judgment of a Divisional Court, 9 O. L. R. 631, affirmed. *Ames v. Sutherland*, 11 O. L. R. 417, 7 O. W. R. 116. Affirmed in *Sutherland v. Securities Holding Co.*, 37 S. C. R. 694.

4. Contract with customer — Purchase of stock on margin—Implied proviso for re-sale on default — Rules of Stock Exchange.]—A party who orders a purchase of stock through a broker under the rules of the Stock Exchange, implicitly consents to its resale without notice in case of his failure to maintain the margin agreed upon. Any agreement at variance with the rule must be expressly proved and will not be inferred from conduct in previous transactions. *Laguer v. Belleau*, Q. R. 14 K. B. 219.

**5. Purchase of shares on margin**  
 —*Hypothecation by broker—Conversion*  
 —*Bought note — Account — Interest*  
 —*Commission.*] — The judgment of the majority of a Divisional Court, 10 O. L. R. 159, affirmed on appeal. *A. E. Ames & Co. v. Conmee*, 12 O. L. R. 435, 8 O. W. R. 337.

See CRIMINAL LAW, III. 41 — JUDGMENT, II. 1—PLEADING, VIII. 2.

## **BUILDERS AND WORKMEN'S ACT, MANITOBA.**

See MECHANICS' LIENS, 15.

## **BUILDING.**

**Grant of usufruct of land while building thereon endures** — *Gradual replacing of parts.*] — The usufruct of land for the period of time that a house built upon it shall "subsist and last," comes to an end when, by works of repair and construction, the house is virtually replaced by another. This substitution may be said to have taken place when several parts of the building, without which it would not exist, have been replaced by new ones. *Beaudry v. Chouinière*, Q. R. 28 S. C. 1.

See ARCHITECT — ASSESSMENT AND TAXES, 14, 15—CHURCH—DEED, 8, 14—FACTORIES ACT — FIXTURES — INJUNCTION, 8—LANDLORD AND TENANT, 22, 23—LIMITATION OF ACTIONS, I. 10—MANDAMUS, 2—MECHANICS' LIENS — NEGLIGENCE, 16—REGISTRY LAWS, 2—SPECIFIC PERFORMANCE, 1 — VENDOR AND PURCHASER, II. 1, 2, 3—WASTE.

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## **CABS.**

See MUNICIPAL CORPORATIONS, X. 1.

## **CALLS.**

See COMPANY.

## **CANADA TEMPERANCE ACT.**

**1. Adoption by county**—*City formed out of part of area covered — "County."*] — Where the provisions of the second part of the Canada Temperance Act have been brought into force by one of the counties of the province, the subsequent passing of an Act by the provincial legislature providing for the incorporation of a new city out of part of the area comprised in the county, has not the effect of withdrawing the city from the operation of the Canada Temperance Act.—The word "county," for the purposes of the Act, simply means a geographical area, and there is no reason for construing it in such a way as to effect a reduction of the area when a city is carved out of it. *Rex v. McMullen*, 38 N. S. R. 129.

**2. Conviction**—Bias of magistrate—Refusal of magistrate to give evidence—Variance between conviction and commitment—Curative sections—Costs. *Rex v. Johnson*, 1 E. L. R. 95.

**3. Conviction** — Defendant fined larger amount than minimum named in the Act. *Rex v. Kay, Ex p. Cormier*, 2 E. L. R. 164.

**4. Conviction** — *Evidence—Analyst — Agreement of counsel*]—G., L., and C. were convicted for keeping liquor for sale



contrary to the Canada Temperance Act. Orders nisi to quash the convictions were granted on the ground that improper evidence was admitted, without which there was no evidence that the beer sold was intoxicating. The evidence objected to was the certificate of one P., an analyst, of the percentage of absolute alcohol in the beer sold. Affidavits of the prosecutor, his counsel, and the magistrate, were read on the return of the orders, stating that on the trial of a prior complaint against one T., P., a chemist and analyst, gave evidence, and it was agreed between the counsel for the prosecution and the counsel for the accused that his evidence might be used in the cases against the accused. In affidavits in reply the accused denied the alleged agreement, and no reference was made to it in the magistrate's return:—*Held*, that there being some evidence to justify the conviction, the orders under the decision in *Ex p. Daley*, 27 N. B. R. 129, must be discharged.—*Per* LANDRY, J., diss.; that the agreement having been denied, and not having been referred to in the return, the Court should treat it as not existing; that, if it existed, there was nothing in the affidavits or the return to shew what the evidence of the analyst in the case against T. was, and, therefore, no evidence upon which to base the convictions against the accused, and the orders should be made absolute. *Rex v. Kay, Ex p. Gallant, Ex p. Legere, Ex p. Cormier*, 37 N. B. R. 72.

**5. Conviction—Fine — Imprisonment**—[*Criminal Code*, s. 872.]—A conviction made against the defendant for an offence against the Canada Temperance Act was sought to be quashed because the stipendiary magistrate by whom the same was made ordered that the defendant, in default of paying the fine and costs in the conviction mentioned, should be imprisoned in the common gaol, etc., for the term of three months, unless the several sums in said conviction mentioned were sooner paid:—*Held*, following *The Queen v. Horton*, 31 N. S. R. 217, 3 Can. Crim. Cas. 84, that the term of imprisonment being imposed by way of punishment, and not as a term of imprisonment to be inflicted in default of payment of the penalty, the provision for enforcing payment of the pecuniary penalty was to be found in the Criminal Code of Canada, s. 872, as amended in 1894 and 1900, and the application to quash must be dismissed with costs. *Rex v. Blank*, 38 N. S. R. 337.

**6. Conviction** — Imprisonment with hard labour in default of payment of fine. *Rex v. Clark*, 2 E. L. R. 67.

**7. Conviction** — Imprisonment without option of fine. *Rex v. Kay, Ex p. McDougall, Ex p. Legere, Ex p. Hebert*, 2 E. L. R. 163.

**8. Conviction** — Magistrate disqualified by receipt of fines—Prisoner's right to inspect documents—Variance between warrant and conviction—Proof of date of information. *Rex v. Donovan*, 2 E. L. R. 214.

**9. Conviction — Stipendiary magistrate—Jurisdiction — Statutes — Amendment.**]—The defendant was convicted at Canning, in the county of Kings, of an offence against the Canada Temperance Act alleged to have been committed at Aldershot, in that county. The stipendiary magistrate who made the conviction was appointed under the authority of R. S. C. c. 33, in which it was provided that "one or more stipendiary magistrates may be appointed by the Governor in council, for each county in the province, to hold office during pleasure." Subsequent to the appointment, and before the making of the conviction, the Act respecting the appointment of stipendiary magistrates was amended by the Acts of 1905 c. 11, by striking out the word "county" and substituting therefor the word "municipality." No new appointment was made for the municipality of Kings under the amending Act, and the boundaries of the municipality were the same as those of the county:—*Held*, WEATHERBE, C.J., dissenting, that the stipendiary magistrate before whom the matter was heard had not lost jurisdiction to act, and that the application for a certiorari and to set aside the conviction made by him must be dismissed. *Rex v. Townshend* (No. 1), 39 N. S. R. 172.

**10. Information — Amendment — Adjournment.**]—On the trial of a person for an offence against the Canada Temperance Act, the information may be amended or altered, and any other offence under the Act substituted, and the trial continued to conviction without an adjournment, if the defendant is present and does not allege that he is misled and does not ask for an adjournment. *Rex v. Byron, Ex p. P. Batson*, 37 N. B. R. 386; *Rex v. P. Batson*, 1 E. L. R. 363.

**11. Repeal**—Enforcing prior convictions—Magistrate suspending execution of sentence. *In re Lynch*, 1 E. L. R. 134.

**12. Search warrant — Issue before prosecution — Information—Form of—**

**Causes of suspicion—Amended Act.]—**On motion for a writ of certiorari to remove into the Supreme Court a record of search warrant made by two justices of the peace authorizing and requiring the constables to whom the warrant was directed to enter the premises of the defendant and there search for intoxicating liquor, and also an order for the destruction of liquor made by the same justices three days later:—*Held*, WEATHERBE, C.J., dissenting, that under the provisions of the Canada Temperance Act, ss. 108, 109, as amended by the statutes of Canada, 1888, c. 34, the warrant to search for liquor unlawfully kept for sale may preclude the prosecution for the penalty for unlawfully keeping for sale.—2. That it is not necessary under the amended Act to set out causes of suspicion or particulars of the offence in the information upon which the warrant is issued, such particulars not being ascertainable until after the goods are seized.—3. That the sense of the enactment in this respect being at variance with the form given in the statute, the direction in the form is not to be followed. If otherwise, the direction was sufficiently complied with, there being an allegation that liquor was unlawfully kept for sale, and the place being sufficiently indicated. *Re v. Townshend* (No. 2), 39 N. S. R. 189.

**13. Second offence—Conviction for—Proof of previous conviction.]—**A certificate that the defendant had been convicted for keeping intoxicating liquor for sale contrary to the Canada Temperance Act was held sufficient proof under the Act of a previous offence upon which to base a second conviction for keeping for sale, though it did not appear from the certificate, and was not otherwise proved, that such previous conviction was for a first offence. *Re v. Byron, Ex p. Batson*, 37 N. B. R. 83.

**14. Third offence—Conviction for—Prohibition Act—Proof of previous convictions.** *In re Higgins*, 2 E. L. R. 179.

**15. Third offence—Conviction for—Proof of previous convictions—Certificates—Evidence—Identity of accused.]—**In the absence of an admission by the accused of the fact of previous convictions, certificates of such previous convictions are, under s. 115 of the Canada Temperance Act, sufficient proof of such convictions, and it is not necessary that evidence apart from such convictions should be given of the identity of the accused with the person formerly convicted, where he was present at the trial and did not raise the question of identity. *Re v.*

*Byron, Ex p. O. A. Batson*, 37 N. B. R. 383; *Re v. O. A. Batson*, 1 E. L. R. 364.

**16. Third offence—Conviction for—Recitals of former convictions—Certificates of former convictions.** *Re v. Woodlock*, 1 E. L. R. 160.

**17. Third offence—Conviction for—Recitals of former convictions—Dates of informations not given—Amendment of charge at hearing—Adjournment—Waiver.** *Re v. Clark*, 2 E. L. R. 127.

See JUSTICE OF THE PEACE, 6, 14—STIPENDIARY MAGISTRATE.

## CANADIAN PACIFIC RAILWAY COMPANY.

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## CANAL.

See CROWN, 6, 9, 10, 12 — WATER AND WATERCOURSES, 1.

## CANAL BRIDGE.

See CROWN, 1.

## CANDIDATE.

See PARLIAMENTARY ELECTIONS.

## CAPIAS.

See ARREST—PEREMPTION, 1.

## CARRIERS.

**1. Breach of contract to carry safely—Negligence—Injury to passenger—Hotel keeper—Conveyance of guest to and from station—Duty to guests—Hire of omnibus—Contract—Independent contractor—Damages—Costs.** *Barker v. Pollock* (N.W.T.), 4 W. L. R. 327.

**2. Contract to carry passenger to United States—Act of Congress requiring payment of poll tax—Liability of car-**

*rier—Right to collect from passenger—Unlawful detention—Breach of contract.]*—The defendants sold the plaintiff a ticket from Toronto to Buffalo, U.S., and return, by the terms of which he was entitled to travel by the defendants' line of steamers from Toronto to Lewiston, U.S., and thence to Buffalo by rail, and to return within five days over the same route. The plaintiff embarked on one of the defendants' steamers, but before reaching Lewiston he was told by an officer of the United States government that he was liable on entering the United States to pay a head tax of \$2, and was directed to pay it to the purser of the boat, and at the same time told that he would be entitled to a refund if he returned to Canada within 48 hours. He offered \$2 to the purser, asking for a receipt; the purser refused to give a receipt; the plaintiff did not pay the \$2, and on attempting to leave the boat at Lewiston he was stopped by the purser, who asked to see his ticket, and upon getting it retained it, and he was taken back to Toronto. The purser was acting under instructions from the defendants. An Act of the United States Congress provides that a duty of \$2 shall be levied on every passenger not a citizen of the United States or of the Dominion of Canada, etc., who shall come by vessel from any foreign port to any port within the United States, and that the duty shall be paid by the owner of the vessel:—*Held*, that if the plaintiff were within the class of persons covered by the Act, the defendants, and not he, were liable to pay the \$2, and the purser had no right to demand it from the plaintiff, and make its payment a condition of his being allowed to land, nor had he any right to retain possession of the plaintiff's ticket, and by so doing broke the defendants' contract to carry the plaintiff to Lewiston. The defendants might, by a few words printed upon their ticket, have made their contract with the plaintiff subject to this payment, if the plaintiff fell within the Act, but, in the absence of such a provision, the defendants were alone liable. *Jones v. Niagara Navigation Co.*, 12 O. L. R. 481, 8 O. W. R. 342.

**3. Damage to goods — Successive carriers—Presumption — Company—Admissions of servants.]**—The consignee of goods (in this case 200 cases of oranges) transported by two successive carriers, has no remedy against the latter one for the damaged state in which they are delivered unless he establishes neglect or default on his part. The proof that 50 cases out of 200 were damaged at the time they were handed over by the first carrier to the second carrier creates a strong pre-

sumption that they were all damaged, and frees the second carrier from responsibility.—Carrier companies are not bound by the admissions and promises of their employees, unless it is proved that the latter had authority to make them. *Côté v. Grand Trunk R. W. Co.*, Q. R. 28 S. C. 529.

**4. Dangers of navigation — Seaworthiness of vessel — Loss of cargo—Right to freight.** *Scott v. Orillia Export Lumber Co.*, 7 O. W. R. 857.

**5. Non-delivery and conversion of goods—Termination of transitus—Conditional refusal of consignee to accept—Place of refusal—Setting aside findings of jury — Dispensing with new trial—Con. Rule 615—Judgment.]**—Trees consigned by the plaintiffs to one C. at Aylmer, Quebec, were delivered by a railway company, by mistake, at Aylmer, Ontario. The defendants, pursuant to a message received from the railway company, "Ship by express C.'s trees to Aylmer, Quebec," carried the trees as far as Ottawa, and were about to send them on by waggon to Aylmer, Quebec, when C., who was the only person known in the transaction by the defendants, appeared at Ottawa and said to the defendants' agent that he would not accept the trees until he saw one F. There were no further communications between the defendants and C. The defendants held the goods and sought out the consignors and notified them of C.'s refusal:—*Held*, in an action by the consignors for damages for non-delivery and conversion of the trees, that the defendants' contract was not one to deliver the goods to C. at Aylmer and not elsewhere, and his refusal to accept, even if not absolute, was such as dispensed with any further action on the part of the defendants till they had a message from C. that he was ready and willing to receive; and this never having come, the defendants acted reasonably in holding the goods and notifying the consignors, and were not liable for the loss.—The findings of the jury not having supplied material for a final disposition of the case, the Court, acting under Con. Rule 615, instead of directing a new trial, set aside the findings and gave judgment on the whole case for the defendants, deeming that if the proper questions had been put to the jury they could have been answered in only one way.—Judgment of the County Court of Wentworth reversed. *Smith v. Canadian Express Co.*, 12 O. L. R. 84, 7 O. W. R. 403.

See CROWN, 5—RAILWAY, IV.—SHIP, 1, 2, 4, 20—STREET RAILWAYS, II.



**CATTLE.**

See RAILWAY, I. — REVENUE, 1—TRESPASS TO LAND, 2.

**CAUTION.**

See PLEADING, IX. 5—REGISTRY LAWS, 7.

**CAVEAT.**

See PLEADING, VIII. 7 — TRUSTS AND TRUSTEES, 13.

**CEMETERY.**

**Family burial ground—Land-locked plot—Reservation in deed — Interference with graves—Right of descendants to restrain—Abandonment—Possessory title—Access to plot—Way of necessity.]—**Persons having an estate or interest in a plot of ground set apart and used as a family burying ground, in which the bodies of ancestors and relatives are interred, may maintain an action to restrain destruction of, injury to, or interference with the graves or the grave-stones or monuments upon or over them. — *Moreland v. Richardson*, 22 Beav. 596, and 24 Beav. 33. followed. — Part of a farm was set apart as a family burial plot in or about the year 1827, and in 1838 a parcel of the farm was conveyed to the defendant's predecessor in title, "save and except about one quarter of an acre of said lands used as a burying ground." In 1890 one of the family erected on the plot, or what he supposed to be the plot, a monument to two of his ancestors, and surrounded the supposed plot with a hedge:—*Held*, upon the evidence, affirming the judgment of TEETZEL, J., that there was a burying ground in respect of which the reservation was made in the deed of 1838; that there was not an abandonment; that the hedge planted in 1890 enclosed a portion at any rate of the original plot; that neither the defendant nor any of his predecessors in title had acquired a possessory or other title to the plot; and that the plaintiffs had shewn a sufficient interest in or title to the plot to enable them to maintain the action.—The plot being a land-locked piece of ground, reserved out of a grant of the surrounding property, there was an implied way of necessity to and from

it, limited to the purposes for which the plot was expressed to be reserved. *May v. Belson*, 10 O. L. R. 686, 6 O. W. R. 462.

**CERTIORARI.**

**1. Assessment—Prescription—Delay of Judge — Jurisdiction — Statutes — Time.]** — Where a statute authorizing commissioners to assess lands provided that no writ of certiorari to review the assessment should be granted after the expiration of 6 months from the initiation of the commissioners' proceedings:—*Held*, affirming the judgment appealed from, *In re Trecothic Marsh*, 38 N. S. R. 23, GIBOUARD, J., dissenting, that an order for the issue of a writ of certiorari made after the expiration of the prescribed time was void, notwithstanding that it was applied for and judgment on the application reserved before the time had expired.—*Per* TASCHEREAU, C.J.C.:—Where jurisdiction has been taken away by statute, the maxim *actus curiæ neminem gravabit* cannot be applied, after the expiration of the times prescribed, so as to validate an order either by ante-dating it or entering it *nunc pro tunc*; in the present case the order for certiorari could issue, as the impeachment of the proceedings of the inferior tribunal was sought upon the ground of want of jurisdiction, but the appellants were not entitled to it on the merits.—*Per* GIBOUARD, J., dissenting:—In the circumstances, the order in this case should be treated as having been made on the date when judgment on the application was reserved by the Judge. Upon the merits the appeal should be allowed, as the commissioners had no jurisdiction in the absence of proper notice as required by s. 22 of the Marsh Act, R. S. N. S. 1900 c. 66. *Dominion Cotton Mills Co. v. Trecothic Marsh Commissioners*, *In re Trecothic Marsh*, 26 C. L. T. 185, 37 S. C. R. 79.

**2. Motion for—Intituling of proceedings—Crown Rules—Name of informant.** *Ex p. Harris* (N.W.T.), 4 W. L. R. 530.

**3. Order Nisi in Chambers to quash conviction —** Motion to make absolute not opposed — Order absolute granted as of course. *Rea v. Sweeney and Bourque*, *Ex p. Cormier*, 2 E. L. R. 161.

See COURTS, III.—CRIMINAL LAW, II. 5. IV. 18—HABEAS CORPUS, 2—INFANT, 3—JUSTICE OF THE PEACE, 1, 12—LIQUOR LICENSES, 4, 13 — POLICE MAGISTRATE, 2.

## CHAMPERTY AND MAINTENANCE.

**Damages for wrongfully maintaining action — Liability—Proof of special damage.]—**Upon proof of special damage, an action for unlawful maintenance lies, notwithstanding that the action maintained was unsuccessful: — *Held*, on the evidence, *HUNTER, C.J.*, dissenting, that the plaintiff had suffered no damage.—Decision of *DUFF, J.*, 3 W. L. R. 303. reversed. *Newswander v. Giegerich*, 12 B. C. R. 272.

## CHARGE ON LAND.

See COVENANT, 1—DITCHES AND WATERCOURSES ACT, 2—DOWER, 2 — ESTOPPEL, 2—MORTGAGE — MUNICIPAL CORPORATIONS, V. 6 — VENDOR AND PURCHASER, I. 6—WILL, I. 6, 7, 32.

## CHARITIES.

See WILL, 1.

## CHARLOTTETOWN CITY COURT.

See APPEAL, VIII.

## CHARTERPARTY.

See SHIP, 1, 2, 4, 20.

## CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES—SALE OF GOODS, II. 1, 4, 5.

## CHEQUES.

See BANKS AND BANKING — BILLS OF EXCHANGE AND PROMISSORY NOTES, II. — TRUSTS AND TRUSTEES, 8 — VENDOR AND PURCHASER, I. 32, 34.

## CHOSE IN ACTION, ASSIGNMENT OF.

**1. Agreement to purchase logs—**Assignment thereof by vendor to creditor—Advances by purchaser to vendor thereafter. *Union Bank v. Dickie*, 1 E. L. R. 264.

**2. Company—**Resolution of directors assigning indebtedness — Boom company — Claim for driving logs—Necessity of alleging delivery in boom limits. *Lynch v. William Richards & Co.*, 2 E. L. R. 141.

**3. Equitable assignment—**Fund in hands of chattel mortgagees—Written order by mortgagor—Mistake as to balance due—Assignment by mortgagors — Rival claimants of fund—Interpleader application—Dismissal—Subsequent interpleader action—Disposal of fund—Costs. *Elgie v. Edgar*, 8 O. W. R. 944.

**4. Right of assignee to sue—**Claim for price of goods sold—Evidence—Inferences—Invoices — Credits—Foreign commission—Status of commissioner. *Miller v. Williams (Y.T.)*, 3 W. L. R. 264.

**5. Transfer of hypothecary claim —**Signification — Acceptance—Tender by personal debtor.]—When the transfer of an hypothecary claim has been duly registered, and signification of it has been made, with delivery of a copy bearing a certificate of its registration to the possessor (*détenteur*) of the hypothecated property, a tender by the personal debtor to the transferee of a part of the claim as the balance due is a sufficient acceptance by such personal debtor of the transfer under art. 1571, C. C., and relieves the transferee from the obligation to serve the transfer upon him. *Daoust v. Daoust*, Q. R. 28 S. C. 356.

**6. Voluntary assignment of fund to wife of assignor —**Informality—Validity of equitable assignment—Subsequent assignment for value — Priority—Notice to holders of fund—Executors—Oral notice to one. *McMurchie v. Thompson*, 8 O. W. R. 637.

See DAMAGES, 1.

## CHRISTIAN SCIENTISTS.

See STATUTES, 3.

## CHURCH.

**Title to land and building—**Ambiguous description of grantee—"Greek Catholic Church"—Evidence—Construction of deed — Reversal of concurrent findings.] — Where Crown lands were granted "in trust for the purposes of the congregation of the Greek Catholic

Church at Limestone Lake," N. W. T., and it appeared that this description was ambiguous and might mean either the Greek Orthodox Church or the Greek Church in communion with the Church of Rome, it was held that the construction of the grant should be determined by the facts and circumstances antecedent to and attending the issue of the grant, and that, in view of the evidence adduced, the words did not mean a church united with the Roman Catholic Church and subject to the jurisdiction of the Pope.—Judgment in *Zacklynski v. Kerchinski*, 1 W. L. R. 32, reversed, TASCHEREAU, C.J.C., and GIBOUARD, J., dissenting, on the ground that the concurrent findings of the Courts below upon matters of fact ought not to be disturbed. *Polushie v. Zacklynski*, 37 S. C. R. 177.

See WILL, I. 17.

## CIRCUIT COURT, QUEBEC.

See APPEAL, X.—COURTS, VII.

## CIVIL SERVANT.

See ASSESSMENT AND TAXES, 12—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 12.

## CLASS SUIT.

See COSTS, VIII. 2.

## CLERK OF EXECUTIVE COUNCIL.

See MANDAMUS, 1.

## CLOSE OF PLEADINGS.

See PLEADING, II.

## CLUB.

**1. Injunction—Expulsion of member of association—Right of property—Jurisdiction of Court.]**—To give jurisdiction to the Court to interfere by way of in-

junction to restrain the expulsion of a member of a club or association, it must appear that he has some right of property therein.—The right to use the club or association rooms, property and effects, on payment of a subscription, without any right to participate in the assets, if distribution ensued, is merely a personal one. The only remedy in such case, if the expulsion is wrongful or injurious, is by an action for damages.—Where, therefore, an injunction was granted restraining a hockey association from expelling one of its members, whereby he would be debarred from playing in a specified game, there being no allegation or proof of his having paid any subscription, or that he had any right of property in the association, the injunction was set aside and the action therefor dismissed with costs. *Rowe v. Hewitt*, 12 O. L. R. 13, 7 O. W. R. 543.

**2. Public Inquiries Act — Benevolent Societies Act—Commission of inquiry—Jurisdiction — Powers of Lieutenant-Governor in council.]**—The corporation of the city of Vancouver petitioned the Lieutenant-Governor in council, alleging that certain societies incorporated under the provisions of the Benevolent Societies Act, were abusing their corporate powers and applying them to purposes other than those authorized by the statute, and praying that, under the powers thereby conferred, these societies be dissolved. The Lieutenant-Governor in council appointed a commissioner, under the authority of s. 4 of the Public Inquiries Act, to inquire into the facts bearing upon the allegations contained in and the prayer of the petition:—*Held*, that the power of the Lieutenant-Governor in council to dissolve societies created under the provisions of the Benevolent Societies Act, though not for any public purpose, is one of the powers of government exercisable by the executive, and the investigation of the facts leading to a conclusion on the question whether that power shall be exercised, as well as the determination to exercise it, and the executive act in which the determination culminates, are all matters connected with the good government of the province, within the meaning of s. 4 of the Public Inquiries Act. *Re Railway Porters' Club*, 11 B. C. R. 308, 2 W. L. R. 162.

See ASSESSMENT AND TAXES, 4—CRIMINAL LAW, III. 18.

## COAL MINES ACT.

See MINES AND MINERALS.

**COLLATERAL SECURITIES.**

See **BANKS AND BANKING**, 4—**BILLS OF EXCHANGE AND PROMISSORY NOTES**, III. 10—**COVENANT**, 1—**MORTGAGE**, 4, 20—**PLEDGE**, 2—**PRINCIPAL AND SURETY**, 3—**SALE OF GOODS**, II. 5—**WAREHOUSE RECEIPTS**.

**COLLECTION ACT.**

**1. Appeal from examiner's ruling**—No power to extend time after statutory period has elapsed. *McLure v. Parker*, 1 E. L. R. 270.

**2. Compulsory assignment by debtor to creditor**—*Bills of Sale Act*—*Affidavit of bona fides*—*Rights of creditor*—*Fraudulent conveyance*—*Sheriff levying under execution*.]—The assignment made by a debtor under the provisions of the Collection Act, R. S. N. S. 1900 c. 182, s. 28, is to be regarded as part of the legal process provided by the statute to enable the creditor to enforce payment of his debt, and essentially differs from, and is in no way analogous to, a voluntary assignment, and is not subject to the provisions of the Bills of Sale Act requiring an affidavit of *bona fides*, or other requirements of the Act.—The assignee in such case does not take his rights under the assignor, so as to be bound or affected by his fraudulent act, but as a judgment creditor enforcing his statutable remedy, and he may in that capacity attack any previous fraudulent conveyance made by his assignor.—The assignment so obtained confers upon the judgment creditor an absolute title to the property assigned in trust to satisfy his judgment, and, in the next place, to hold the balance for the benefit of those beneficially entitled thereto. — An assignee under the Act, who has taken possession under his assignment, is entitled to recover against the sheriff levying under executions placed in his hands subsequently to the date of the assignment. *Farlinger v. Ingraham*, 38 N. S. R. 467, 1 E. L. R. 1.

See **BANKRUPTCY AND INSOLVENCY**, 22—**BILLS OF EXCHANGE AND PROMISSORY NOTES**, III. 12—**MALICIOUS PROSECUTION AND ARREST**, 2.

**COLLEGE OF PHYSICIANS AND SURGEONS.**

See **MEDICAL PRACTITIONER**, 1, 4.

**COLLISION.**

See **SHIP**.

**COLLOCATION.**

See **JUDICIAL SALE OF LAND**, 2.

**COMMISSION.**

See **ARCHITECT—BROKER**, 5—**CROWN**, 3—**PRINCIPAL AND AGENT—SOLICITOR**, 2—**TRUSTS AND TRUSTEES**, 14—**VENDOR AND PURCHASER**, I. 37, II. 4.

**COMMISSION OF INQUIRY.**

See **CLUB**, 2.

**COMMUNITY.**

See **HUSBAND AND WIFE**, III.

**COMPANY.**

- I. DIRECTORS.
- II. SHARES AND SHAREHOLDERS.
- III. WINDING-UP.
- IV. MISCELLANEOUS.

See **ASSESSMENT AND TAXES**, 7—**ATTACHMENT OF DEBTS**, I. 1, II. 12—**ATTACHMENT OF GOODS**, 1—**BILLS OF EXCHANGE AND PROMISSORY NOTES**, I. 2, III. 3, 22—**CARRIERS**, 3—**CHOSE IN ACTION**, ASSIGNMENT OF, 2—**CONSPIRACY**, 2—**CONSTITUTIONAL LAW**, 8—**CONTRACT**, III. 13, 14, VIII. 4—**COSTS**, V. 5, 8, 11—**CRIMINAL LAW**, III. 6, 18, V. 1—**DISCOVERY**, I., IV.—**EVIDENCE**, I. 4, III. 2—**FRAUD AND MISREPRESENTATION**, 2—**INSURANCE—JUDGMENT**, IV. 2—**MASTER AND SERVANT**, I. 3, 6, II. 1, 2, 3—**MORTGAGE**, 20—**MUNICIPAL CORPORATIONS**, XIII. 1—**PARTIES**, II. 1, III. 2—**PLEADING**, III. 1, VIII. 14, 17, 18—**PRINCIPAL AND SURETY**, 4—**RAILWAY—TRUSTS AND TRUSTEES**, 13—**VENDOR AND PURCHASER**, I. 26—**VENUE**, 1—**WATER AND WATER-COURSES**, 4—**WRIT OF SUMMONS**, 11, 12, 25.

**I. DIRECTORS.**

**1. Filling vacancies in board—Quorum—Special meeting of shareholders.**

*ers.*—The by-laws of a company, incorporated under the Ontario Companies Act, provided that there should be seven directors, four of whom should be a quorum. Four of the directors ceased to be qualified, having sold and transferred their stock:—*Held*, that the remaining directors had not the power, under s. 43 of the Act, to fill the vacancies, notwithstanding that by s. 40 the board might consist of only three members.—*Held*, also, that the vacancies could only be properly filled by a meeting of the shareholders duly called for that purpose. Decision of MACMAHON, J., affirmed. *Sovereign Mitt, Glove, and Robe Co. v. Whitside*, 12 O. L. R. 638, 8 O. W. R. 279, 582.

**2. Managing director—Authority—Ratification — Negligence — Costs — Fraud.**—The plaintiffs in equity, though successful as to part of their claim, were deprived of the general costs of the suit, on the ground that unfounded charges of fraud were made as to the other part, and were ordered to pay the costs applicable to the charges of fraud.—The managing director of a company, without the authority but with the knowledge of all his company's directors except one, erected, at a cost of \$17,000, a fuel house for the storage of mill wood and a conveyor for the purpose of moving the mill wood from his mill to the company's pulp mill to be used for fuel and pulp. The fuel house and conveyor became of no use to the company by reason of the discontinuance of the use of mill wood:—*Held*, that there was no such gross negligence on the part of the managing director as made him liable for the expense of erecting the fuel house and conveyor. *Cushing Sulphite Fibre Co. v. Cushing*, 37 N. B. R. 313.

**3. Meetings of—Invalidity—Protest—Withdrawal of director—Assent to mortgage—Seal.** *Harris v. English Canadian Co. (R.C.)*, 3 W. L. R. 5.

**4. Prospectus — Misrepresentations—Action for money paid for shares—Reserve fund — Capital — Onus.**—The plaintiff sought to recover payments made to the defendants and damages on account of statements alleged to be false and fraudulent contained in a prospectus issued by the directors of the defendants on the faith of which the plaintiff was induced to subscribe and pay for a number of a new issue of preference shares. One of the principal matters complained of was a statement to the effect that undrawn profits or assets of the company to a large amount had been appropriated to a "reserve fund,"

whereas, as the plaintiff alleged, the defendants never had any reserve or sinking fund. The evidence shewed that profits, which were supposed to have been earned, instead of being distributed in dividends, were transferred to an account referred to and known as the "reserve account:—*Held*, that the words "reserve fund," as used in the prospectus, did not necessarily mean a reserve fund which was invested, but the important thing was the reserving of the amount out of property available for distribution in dividends, and appropriating it in the books of the company to meet contingencies, which was shewn in this case to have been done. And that, even if the plaintiff understood the fund to be invested, this, in the case of a manufacturing company, would not be a material representation which would influence the conduct of the plaintiff in taking shares.—*Held*, also, it appearing that the directors employed competent managers, upon whom they were dependent for information, and that their auditor used due care in the performance of his duties, that the directors were not responsible for a representation in regard to the cost of materials, affecting the profits, which was not discovered to be mistaken until some time after the prospectus had been issued.—*Held*, also, as to a representation in the prospectus regarding the appropriation of profits earned in payment of dividends on common and preferred stock, that the expression "appropriated" did not mean "paid," but that the sum mentioned was appropriated or devoted to a particular purpose and might be payable later.—The prospectus contained a representation that the proceeds of the issue of stock would be applied, among other things, to replacing "working capital" already expended in the erection of a mill, known as "Cowie's mill:—*Held*, that the words "working capital" were not a technical expression or likely to mislead the plaintiff, it being usual to speak of money used in the business of a company, whether borrowed on debentures or raised by the sale of shares, as "capital."—*Held*, also, as to the application of moneys to other purposes than those mentioned in the prospectus, that the burden was on the plaintiff to shew that the directors, at the time the prospectus was framed, intended that the proceeds of the new shares should be so applied, or that, on proper inquiry, they would have learned that the money could not be applied in the way stated, and were reckless. *Kennedy v. Acadia Pulp and Paper Mills Co.*, 38 N. S. R. 291.

**5. Purchase of mineral claim by directors of mining company —**



*Rights of shareholders — Fraudulent scheme — Meetings of directors.] — As fiduciary donees of their power, the directors of a company are bound to exercise them bona fide for the purposes for which they were conferred; and generally the corporate body to which they owe this duty is entitled, in the case of a breach of it, to invoke the remedial action of the Court.—A director acting in a certain way, with the primary object of deriving an improper personal advantage, financial or otherwise, cannot save himself by shewing that his action was also of benefit to the company. If the circumstances are such that his actions are equivocal, and open to two constructions, he must, seeing that he is in a fiduciary capacity, be prepared to shew beyond all reasonable doubt the single-mindedness of his intentions.—The purchase by the directors of a mining company of a mineral claim was set aside on the ground of fraud, upon actions brought by shareholders. Duty of directors as to calling meetings. *Madden v. Dimond*, *Rudolph v. Macey*, 12 B. C. R. 80, 3 W. L. R. 49, 52.*

**6. Resolution — 1 Edw. VII. c. 67 (Q.)—Construction—Powers of company—Purchase—Effect of resolution by an insufficient quorum.] — Held,** that under the Quebec Act 1 Edw. VII. c. 67, the appellant company were empowered to acquire and hold for the purpose of their business real or immovable estate not exceeding a specified sum in yearly value in any part of the province except the judicial district of Quebec; and that, acting bona fide, they were the sole judges of what was required for that purpose.—Where a purchase, *intra vires* of the above Act, had been effected by the company under a resolution of the directors at a meeting on the 17th July, 1901, which authorized the completion thereof, subject to an option of reconveying within a specified time:—*Held*, that, after the lapse of the specified time, the purchase was absolute, and that the company, which had furnished the vendor with a copy of the resolution as one which had been duly and regularly passed, could not avoid it by shewing that it had been passed by an insufficient quorum.—Judgments in Q. R. 25 S. C. 473, 14 K. R. 108, affirmed. *Montreal and St. Lawrence Light and Power Co. v. Robert*, [1906] A. C. 196, Q. R. 15 K. B. 137.

**7. Sale of assets by directors to managing director—Action to set aside—Direction to hold meeting of shareholders to ratify or disapprove sale.** *Ellis v. Norwich Broom and Brush Co.*, 8 O. W. R. 25.

**8. Unauthorized expenditure — Liability of innocent directors.] — The directors of a limited company, without authority from the shareholders, passed a resolution providing that, in consideration of a firm, of which two directors were members, carrying on business of a similar character, continuing the same until the company could take it over, the company indemnified it from all loss occasioned thereby. K. and F., two members of the firm, refused their assent to the terms of this resolution and declared their intention, of which the majority of the directors were made aware, to retire from the firm. F. subsequently wrote to the president and another director reiterating her intention to retire, and declaring that she would not be responsible for any further liability. The company afterwards took over the business of the firm, paying therefor \$30,000, and receiving assets worth \$12,000, and having eventually gone into liquidation, the liquidator brought an action to recover from the members of the firm the difference. The Court of Appeal (*Wade v. Pakenham*, 5 O. W. R. 736), held that K. and F. were not liable, though their partners were:—*Held*, reversing that decision, that K. and F., having received the benefit of the money paid by the company, were also liable to repay the loss. *Wade v. Kendrick*, 26 C. L. T. 124, 37 S. C. R. 32.**

See FRAUD AND MISREPRESENTATION, 2 —INJUNCTION, 9.

## II. SHARES AND SHAREHOLDERS.

**1. Action by assignee of company to recover value of shares subscribed for—Conditional subscription—Allotment—Notice—Written offer—Conduct — Estoppel — Director.** *Bank of Hamilton v. Johnston*, 7 O. W. R. 111.

**2. Agreement to take shares—Rescission—Misrepresentation — Laches.** *Gourley v. Chandler*, 433; *Saunders v. Chandler*, 1 E. L. R. 433.

**3. Call—Action to invalidate—Resolution—Forfeiture of shares for non-payment of calls—Fraud and collusion—Payment for shares—Irregularities—Meetings of shareholders—Notice of call—Meeting of directors — Ratification—Costs.** *Paul v. Kobold* (N.W.T.), 3 W. L. R. 407.

**4. Issue of certificate—Payment by promissory note — Estoppel — Action to cancel shares—Status of shareholder as plaintiff—By-law of directors—Acquies-**

cence by plaintiff. *O'Sullivan v. Donovan*, 7 O. W. R. 78.

**5. Promise of organizer to allot shares—Action to enforce—Failure of consideration—Fraud—Breach of trust.]**—L., being the manager and part owner of a mining company which was in financial difficulties and owing him some \$1,600 on account of salary, agreed with H. that the latter should acquire the outstanding debts of the company, obtain judgment, sell the property at sheriff's sale, and organize a new company, in which H. was to have a controlling interest. L. was to refrain from taking any steps towards winding up the company, and, in consideration therefor, he was to be given in the new company a proportionate amount of fully paid-up and non-assessable shares to those held by him in the old company. He also agreed not to reveal this understanding to certain of the shareholders:—*Held*, MORRISON, J., dissenting, that, if any consideration passed, it was an illegal consideration, a fraud on certain of the shareholders, and a breach of trust.—A man who occupies the position of superintendent or manager of a mining company is not engaged to facilitate the remedies of creditors, but to protect the interests of the company. *Lasell v. Thistle Gold Co. and Hannah*, 11 B. C. R. 466, 3 W. L. R. 149. See post 10.

**6. Subscription—Construction of, as application—Notice of withdrawal before allotment—Agent of company—Authority to receive notice—Promissory note for price of shares—Action on.** *Kruger v. Harwood* (Man.), 4 W. L. R. 401.

**7. Subscription—Increase of capital stock—Agreement to take shares before issue of supplementary letters patent—No necessity for allotment—Company having no shares to sell.** *Port Hope Brewing and Malting Co. v. Cavanagh*, 8 O. W. R. 985.

**8. Subscription—Issue of certificate—Payment by promissory note—Estoppel—Action to cancel shares—Status of shareholder as plaintiff—Right of action—Payment of promissory note pendente lite—End of cause of action—Costs—Summary application.** *O'Sullivan v. Donovan*, 8 O. W. R. 319.

**9. Subscription—Promissory note given for price—Misrepresentation—Condition—Absence of allotment—Acceptance of plaintiff as shareholder—Estoppel—Recovery on note.** *Fischer v. Borland Carriage Co.*, 8 O. W. R. 579.

**10. Transfer of shares — Illegal consideration—Fraud — Officers of company—Breach of trust.]**—With a view to overcoming the financial difficulties of a mining company and securing control of its property, the manager entered into a secret arrangement with the respondent, whereby the latter was to acquire the liabilities, obtain judgment thereon, bring the property to sale under execution, and purchase it for a new company to be organized, in which the respondent was to have a large interest. The manager, who was a creditor of the company, was to have his debt secured and to receive an allotment of shares in the new company proportionate to those held by him in the insolvent company, and he agreed that he would not reveal this understanding to the other shareholders:—*Held*, affirming the judgment appealed from, *Lasell v. Thistle Gold Co. and Hannah*, 11 B. C. R. 406, 3 W. L. R. 149 (ante 5). SEDGEWICK, J., dissenting, that the agreement could not be enforced, as the consideration was illegal and a breach of trust by which the other shareholders were defrauded. *Lasell v. Hannah*, 26 C. L. T. 384, 37 S. C. R. 324.

See CONTRACT, III. 14, X. 8—Costs, V. 17—WILL, I. 22.

### III. WINDING-UP.

**1. Action against company in liquidation—Leave of Court—Action begun without—Dismissal.]**—A company in liquidation continues to have a legal existence, and in order to exercise against its rights anterior to the liquidation, the action must be brought against the company itself, and not against the liquidator.—By virtue of the Winding-up Act, no action may be begun against a company in liquidation without the permission of the Court first obtained; and an action begun without such permission will be dismissed. *Leonard v. Owens*, 8 Q. P. R. 3.

**2. Action begun before winding-up order—Leave to proceed—Special circumstances.** *Titterington v. Distributors Co.*, 8 O. W. R. 328.

**3. Action by liquidator in his own name without leave—General authority to take proceedings.** *Stavert v. Lovett*, 1 E. L. R. 233.

**4. Application for leave to add company as a party to an action against directors for misfeasance in office.** *Re Farmers' Loan and Savings Co., Ex p. Toogood*, 8 O. W. R. 12.

**5. Calling meeting to approve of arrangement with bondholders.** *In re Port Hood Coal Co.*, 1 E. L. R. 81.

**6. Confirmation of scheme of re-arrangement — Opposition by shareholders.** *In re Port Hood Coal Co.*, 1 E. L. R. 199.

**7. Contributory — Application for shares — Withdrawal—Absence of allotment and notice — Notice of call.]—**An agent of the company canvassed the respondents to subscribe for shares and took them to the company's office, where they signed and handed to the manager an application, not under seal, by which they subscribed for 25 shares of the common stock of the company, at the par value of \$100 per share, for which they agreed to pay upon the delivery of the regular stock certificate. In the stock ledger of the company, under the names of the respondents and the heading "common stock," of the same date as the application, an entry was made, "Allotted bought Dr. 25 shares, amount \$2,500, balance 25 shares. Dr. \$2,500." On the same day the respondents gave the canvassing agent a cheque for \$100 on account of the payment for the shares, but on the following morning they determined to withdraw from the application, and stopped payment of the cheque, which had been already presented and payment refused for want of funds. On the same day they told the agent that they would have nothing more to do with the stock they had applied for, but they gave no written or other notice of withdrawal. The company's minute book contained no note or entry nor was any evidence given of any resolution of the directors allotting stock to the respondents or directing notice of allotment to be sent to them, and a formal notice of allotment was not sent. No attempt was made to enforce payment of their cheque, and they received no further communication on the subject of the shares until three months later, when the company's manager sent them notice of a call and demanded payment. There were two subsequent calls, of which notices were also sent to the respondents, and all three were authorized by resolutions of the directors:—*Held*, that neither of the respondents ever became a shareholder of the company, and that they were therefore properly struck off the list of contributories in a winding-up.—*Per OSLER, J.A.*, that there had been no allotment or appropriation of specific shares to the respondents; the entry of their names in the stock ledger was not conclusive; the resolutions authorizing the calls, dealing with stock which had been already al-

lotted, could not be regarded as equivalent to an allotment; the fact that notices of calls were sent to the respondents amounted to nothing if the stock had not been already allotted to them by the directors.—*Quære, per OSLER, J.A.*, whether notice of a call can be regarded as equivalent to notice of allotment—*Semble*, also, *per OSLER, J.A.*, that, on the evidence, the respondents, as they had a right to do, withdrew their application, and that this came to the notice of the company on the day after the application was signed, which would be another answer to the liquidator's demand.—*Per MEREDITH, J.A.*:—The real question is not whether there was or was not a formal allotment of stock, but is whether there was a concluded bargain for the sale of the shares; the onus of proof of the company's binding acceptance of the offer to buy was upon the liquidator, and that was not clearly proved. Upon the whole evidence it ought to be found that there was no acceptance binding upon the company, at the time of the withdrawal of the offer to buy.—*Order of Falconbridge, C.J.K. B.*, affirmed. *Re Canadian Tin Plate Decorating Co., Mortons' Case*, 12 O. L. R. 594, 8 O. W. R. 531.

**8. Contributory — Bonus shares — Transfer of, before winding-up—Winding-up Act—Director—Breach of Trust—Compensation.]—***Held*, that a former holder of bonus shares, which he had before winding-up transferred to persons entitled to hold them as fully paid up, is not liable to be placed on the list of contributories in respect to them, unless subjected to such liability by the Act under which the company was created or some Act relating thereto. — *Semble*, however, that such a shareholder, if a director, commits a breach of trust in being a party to the allotment of the shares as fully paid up, as well as in putting them off on his transferees to the prejudice of the company as fully paid-up shares; and such a case is a proper one for an order under s. 83 of the Winding-up Act for contribution by him by way of compensation in respect of such breach of trust. *In re Warton Beet Sugar Co., Freeman's Case*, 12 O. L. R. 149, 7 O. W. R. 613.

**9. Contributory — Defence—Fraud — Liquidator representing creditors.]—**Subscribers for shares in a company, although they may maintain actions against the company to cancel their subscriptions, upon the ground of fraud, have not the same right against the liquidator of the company under a winding-up order, seeking to have them placed upon the list of contributories, for he



is then acting not in the exercise of the rights of the company, but representing its creditors. *Brownlee v. Hyde*, Q. R. 15 K. B. 221.

**10. Contributory** — Director— Entries in register—Resolution of directors—Attempt to get rid of liability. *Re Cement Stone and Building Co., Egan's Case*, 8 O. W. R. 260, 320.

**11. Contributory**—Petitioner for incorporation—Subscription for shares—Memorandum of association—Director and president of company. *Re Cement Stone and Building Co., McBean's Case*, 8 O. W. R. 264.

**12. Contributory**—Preference shares—Common shares—By-law—Directors—Allotment of shares—Delegation—Terms—Ratification—Acceptance — Estoppel.]—The shareholders of the company passed a resolution in favour of the creation of preference stock, with a direction to the directors to pass a by-law, which the directors failed to do:—*Held*, that sec. 22 of the Ontario Companies Act not having been complied with, there was no valid creation of preference stock, and G., a person who had signed an application for 16 shares of preference stock, could not be held liable as a contributory in respect of these shares, there being no acquiescence, delay, or conduct on his part to estop him from alleging and shewing that, at the time when he made his application, and thenceforth until the liquidation proceedings, the company were not in a position to give him that for which he applied.—G. also applied in writing for 8 shares of the common stock, and undertook to accept the same or any less amount, paying therefor \$60 per share according to the terms named in the prospectus. But, in lieu of those terms, it was arranged between G. and an agent of the company that he should give a promissory note at twelve months for the whole amount, which was done. The application was never brought before or dealt with by the directors, but the secretary notified G. that the directors had allotted him the shares in accordance with his application. They had not, however, passed a by-law or otherwise ordained, as required by s. 26; they had merely passed a resolution that "the secretary be instructed to allot all stock as applications are passed in:—"*Held*, that the directors could not delegate their duty to a subordinate officer, and there never was any valid acceptance of G.'s application, and he was, therefore, not liable as a contributory in respect of the 8 shares.—*Held*, also, upon the evidence, that, at

the time of G.'s application, the company held no shares of the common stock which they could validly allot to him.—In the case of R., another person charged as a contributory:—*Held*, that it was covered by the decision in G.'s case, the additional circumstances set out in the report making no difference.—In the case of H., another person charged as a contributory, the allotment of shares was professed to be made by the secretary, and the notice thereof was given in the same manner, and under the same circumstances and authority as in the other cases. But at the time of H.'s application there were shares of the common stock which could have been allotted. H. gave his promissory note for the price of shares for which he applied, and afterwards made payments thereon, and he attended meetings of shareholders and moved resolutions thereat. He had no notice, however, until after the liquidation, of any irregularities in the creation of the preference stock, and was not aware of the irregularities in connection with the allotment of shares:—*Held*, that, as there was no contract in fact, both by reason of there being no preferred stock in existence and the want of allotment, making payments in ignorance of these facts was not a conclusive act, and the attendance and conduct at the meetings was not such an active participation in the affairs and business as to debar any question as to the status of an alleged shareholder. If there was any holding of himself out as a shareholder by H., it was not under circumstances which could affect creditors or create any change of position to their prejudice.—Orders of Anglin, J., affirmed. *Re Pakenham Pork Packing Co., Galloway's Case, Rodman's Case, Higginbotham's Case*, 12 O. L. R. 100, 7 O. W. R. 658.

**13. Contributory**—Subscription for shares—Contract under seal—Offer—Acceptance—Allotment—Notice.]—The respondent by a writing under seal dated the 29th July, 1903, subscribed for one share in the capital stock of the company, and agreed to pay \$100 for it, 10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months thereafter, and the balance as the directors might deem advisable. It was arranged that the company should draw upon the respondent for the amount payable on application. On the next day, and before anything had been done by the company, the respondent wrote to the company, cancelling his subscription. The company drew on the respondent for the 10 per cent., but he refused to accept the draft, and, being pressed by the

company by letter of the 16th September, 1903, to accept the draft, again declined to do so. On the 8th September, 1903, a resolution was passed by the directors "that the stock now subscribed be allotted and notice sent to each subscriber that we are drawing on them for their second payment." The company did not draw on the respondent for the second payment, and he was not notified of the allotment, but his name was recorded in the book required by s. 71 of the Ontario Companies Act to be kept by the company as a shareholder holding one share. He was not afterwards in any way treated or dealt with as a shareholder. In a proceeding for the winding-up of the company, it was sought to make him liable as a contributory:—*Held*, following *Nelson Coke and Gas Co. v. Pellatt*, 4 O. L. R. 481, that the instrument signed by the respondent was not a mere offer which he could withdraw before acceptance; but that the company never accepted or intended to accept him as a shareholder unless the down payment of 10 per cent. was made, and, after the refusal to make that payment, they made it evident that they had not accepted him; and, even if they had accepted him, it was not shewn that the acceptance was communicated to him; and he was not, therefore, liable as a contributory. *Re Provincial Grocers Limited, Calderwood's Case*, 10 O. L. R. 705, 6 O. W. R. 744.

**14. Contributory** — Subscriptions for shares—Payment—Transfer of property: *Re Wakefield Mica Co., Chubbuck's and Holland's Cases*, 7 O. W. R. 108.

**15. Contributory**—Subscriptions for shares—Payment—Transfer of property—Defective organization of company. *Re Wakefield Mica Co., King's and Johnson's Cases*, 7 O. W. R. 104.

**16. Creditors** — Preferred claim — Trust—Moneys collected and deposited in a bank. *Re International Mercantile Agency, Limited*, 7 O. W. R. 795.

**17. Debenture-holder** — Preferred shareholder. *In re Touquoy Gold Mining Co.*, 1 E. L. R. 142.

**18. Fire Insurance**—Policy—Interest of bank—Bank Act—Oral agreement—Advances.]—Where a company is being wound up under the New Brunswick Winding-up Act, a bank are entitled to an order for the payment to them of the proceeds of policies of fire insurance effected by the company on their property, and made payable, in case of loss,

to the bank, as interest may appear, under a verbal agreement between the bank and the company that the policies should be so effected as security for advances which the bank from time to time might make, the bank having no interest in the property insured.—Such a transaction is not prohibited by s. 64 of the Bank Act, 1890. *In re Shediak Boot and Shoe Co.*, 37 N. B. R. 98.

**19. Interest on creditors' claims**—Right to, after winding-up proceedings begun. *Re Union Fire Ins. Co.*, 8 O. W. R. 9.

**20. Liquidator** — Appointment of—Notice to creditors and others—Necessity for.]—The appointment of a liquidator under the Winding-up Act, R. S. C. c. 129, without a previous notice to the creditors, contributories, shareholders, or members of the company, in the manner and form prescribed by the Court, is null and void. The power given to the Court by s. 11 of 52 V. c. 32, to dispense with notices, etc., does not extend to that required for the appointment of a liquidator under s. 20 of the former Act. *Stimson v. North-West Cattle Co.*, Q. R. 14 K. B. 279.

**21. Liquidator**—Powers of—Remission of debt.]—The liquidator of an insolvent company has no power to remit debts due by debtors of an insolvent company, except upon a compromise. *In re Laurie Engine Co. and Mackie*, 7 Q. P. R. 431.

**22. Liquidator** — Remuneration and costs—Taxation—Creditors—Security for costs—Dividend sheet.]—The remuneration and costs of the liquidator and his advocates acting under the Winding-up Act will be taxed adversely at the instance of interested parties or their attorneys, if creditors object to the dividend sheet as prepared.—Clause 7 of s. 67 of the Winding-up Act, requiring security for costs, does not apply to an objection made by a creditor to the amount of the costs of the liquidator and his advocates, nor to the homologation of a dividend sheet based upon such amounts. *Re Laurie Engine Co. and Mackie*, 8 Q. P. R. 59.

**23. Mortgage of assets**—Debenture holders — Priority as against creditors claims and liquidator's commission and disbursements. *In re Touquoy Gold Mining Co.*, 2 E. L. R. 39.

**24. Order**—Form of—Appeal—Grounds—Notice — Petitioner — Status—Bondholder—Secured creditor — Insolvency—

*Proof of—Discretion.*—An order made under the Winding-up Act, R. S. C. c. 129, directing the winding-up of a company, instead of the business of a company, is good.—The Court refused to dismiss an appeal taken under s. 74 of the Act, where an order had been made settling and allowing the appeal, on the ground that the appellants had not complied with the practice governing in similar cases of appeal by serving or filing a notice of the grounds of appeal.—A company issued bonds payable to bearer, the payment of which was secured by a trust mortgage, by which the company purported to assign certain of its property to trustees, in trust, for the benefit of the bondholders, and covenanted with the trustees for the payment of the principal and interest of the bonds to the bondholders:—*Held, per BARKER, McLEOD, and GREGORY, JJ.*, that the holder of some of the bonds, the interest on which was overdue was entitled to petition for the winding-up of the company.—*Held, per TUCK, C.J., and HANINGTON, J.*, that the bonds and trust mortgage must be read together, and that under the terms of the trust mortgage a bondholder was not a creditor within the meaning of the Act, and was not entitled to petition for a winding-up order.—*Per TUCK, C.J., BARKER, McLEOD, and GREGORY, JJ.*, that a secured creditor can make a demand under s. 6, and petition for the winding-up of the company, and is not bound to value in his petition his security under s. 62; that where a demand is made under s. 6, and the time for payment has elapsed, and the demand has not been complied with, and no reason is given why payment is not made, the company must be deemed insolvent within the meaning of the Act; that where the Judge has exercised his discretion under s. 19 and refused to regard the request of a majority of the creditors and shareholders opposed to the petition, who did not offer or propose to continue business, but intended to allow the trust mortgage to be foreclosed, it should not be reviewed on appeal.—*Per HANINGTON, J.*, that the refusal to regard the wishes of all the unsecured creditors and the great majority of the secured creditors and shareholders was not a reasonable exercise of judicial discretion under s. 19, and the appeal should be allowed on that ground; that the petitioner's claim being amply secured, he had no right to petition and force the company into liquidation. *In re Cushing Sulphite Fibre Co.*, 37 N. B. R. 254.

**25. Order — Practice — Variation—**  
*Mistake—Leave to appeal.*—A company,

against which a winding-up order had been made, obtained, at the instance of the large majority of its shareholders and holders of its bonds, an order in an action by it against C. granting leave to appeal to the Supreme Court of Canada from a judgment of the Supreme Court of this province, confirming a judgment of the Supreme Court in Equity, and intrusting the conduct of the appeal to the company's solicitors. Subsequently the liquidators of the company moved to vary the order by adding a direction that the case on appeal should not be settled until an appeal to the Supreme Court of Canada from the judgment of the Supreme Court of this province refusing to set aside the winding-up order was determined, and that the company's solicitors on the company's appeal in the action against C. should act therein only on instructions of the liquidators, or their solicitor:—*Held*, that, as there was no error or omission in the order resulting from mistake or inadvertence, and the order expressed the intention of the Judge who made it, the motion should be refused. Principles upon which applications by shareholders of a company in liquidation for leave to appeal are to be dealt with, considered. *In re Cushing Sulphite Fibre Co.*, 26 C. L. T. 467, 2 N. B. Eq. 231.

**26. Petition — Service on Assignee for creditors—Agent of company.**—Service of a petition for a winding-up order on an assignee for creditors of a company is not service upon the company, as required by s. 8 of the Winding-up Act, R. S. C. 1886 c. 129, such assignee not being an agent of the company for the purposes of such service within Con. Rule 159, at any rate when the president and directors are readily accessible, and have given no express authority to the assignee to accept such service. *In re Rodney Casket Co.*, 12 O. L. R. 409, 8 O. W. R. 293.

**27. Petition of creditors—**Status of petitioners—Indebtedness of company—Ultra vires—Assignment of claims to make up statutory amount—Building society having no capital stock—Non-applicability of Winding-up Act—Costs. *Re People's Loan and Deposit Co.*, 7 O. W. R. 253.

**28. Sale of goods before winding-up order—**Draft for price discounted with bank—Acceptance of goods refused and draft dishonoured — Goods taken possession of by bank. *In re Sheldiac Boot and Shoe Co.*, 2 E. L. R. 166.

**29. Writ of execution—**Seizure by sheriff of goods of company—Fees and

possession money. *Re Oshawa Heat, Light and Power Co., Ex p. Sheriff of Ontario*, 8 O. W. R. 415.

See APPEAL, XII. 7, 8—Costs, III. 3—DISMISSAL OF ACTION, 5.

#### IV. MISCELLANEOUS.

**1. Amalgamation—Restraint against selling out—Agreement—Forfeiture—Laches—Waiver—Notice.**—In 1889 the city of Toronto entered into similar agreements with the defendant companies, by which they authorized these companies to lay down and operate underground wires and appliances for the distribution and supply of electricity, and gave them other privileges in connection with their business. By these agreements the defendants were forbidden to lease to, amalgamate with, or sell out to any other company, without the consent of the plaintiffs; and if they did so, all rights granted thereby were to cease and determine. In 1896 the Incandescent Co. sold out all their assets and the shareholders transferred their shares to the Electric Light Co.:—*Held*, that the Toronto Electric Light Co. had not in purchasing fallen within the prohibition clause, for to hold to the contrary would be to add the word "buy" to that clause.—*Held*, also, that what had been done was not an amalgamation of the two companies, inasmuch as the purchase was for cash and for cash only, and the Incandescent Light Co. acquired no interest whatever in the assets and affairs or otherwise of the other company.—*Held*, further, that inasmuch as the actions were not commenced till April, 1902, the plaintiffs had by their long delay in bringing suit and also by their conduct after the alleged breach and before the action lost their right to complain. The plaintiffs had by their conduct waived the alleged forfeiture, the evidence clearly shewing that they had knowledge throughout of the facts upon which the right to claim a forfeiture rested, and it was not necessary to prove actual notice.—*Held*, lastly, that notice to the city engineer was in the circumstances of this case sufficient, although the evidence shewed much more than that, and warranted the conclusion that knowledge of the absorption of the one company by the other was common and general throughout the city and might safely be imputed to the city council as a whole, especially as no civic official had denied such an inference. *City of Toronto v. Toronto Electric Light Co., City of Toronto v. In-*

*candescent Light Co. of Toronto and Toronto Electric Light Co.*, 10 O. L. R. 621, 6 O. W. R. 443.

**2. Bonds—Coupons—Sale of assets—Rate of interest—Mortgage to secure bond issue—Acceleration clause.** *Eastern Trust Co. v. Cushing Sulphite Co.*, 2 E. L. R. 93.

**3. Foreign Companies Ordinance**—Action by foreign mining company against manager—Absence of license to carry on business—Mining license from Secretary of State for Canada—Cross-action by manager against company—Moneys expended for company—Concealment—Accounts rendered—Estoppel—Absence of prejudice—Counterclaim—Shortage in accounts—Costs—Cross-action brought to obtain order attaching debts. *McDonald v. Klondike Government Concession, Limited, Klondike Government Concession, Limited, v. McDonald (Y.T.)*, 4 W. L. R. 151.

**4. Judgment against for wages**—Execution returned *nulla bona*—Action against directors—Manitoba Joint Stock Companies Act, s. 33—Penal or remedial—Directors not properly qualified as absolute holders of shares—*De facto* directors—Right to recover against—Estoppel. *Macdonald v. Drake, (Man.)*, 4 W. L. R. 434.

**5. Loan company—Sale of assets to another company—Ratification by shareholders and assent by Lieutenant-Governor in council—Rights of holder of terminating shares—Substitution of permanent shares—Absence of schedule—Effect of—Creditor or shareholder—Right of withdrawal—Loan Corporations Act.**—The E. loan company, incorporated under the Loan Corporations Act, R. S. O. 1897 c. 205, were by s. 10 thereof empowered to raise a fund or stock by means of "terminating shares." A number of such shares were in 1901 and 1902 issued by the company to the plaintiff, or had been assigned to him, called "prepaid terminating shares," on each of which he paid \$50, and on which he was to receive a semi-annual dividend, not exceeding 6 per cent., out of the profits available therefor, and the balance of the profits after payment of expenses was to be applied on the stock until the maturity value thereof was reached, as stated in the report, the owners of such stock having the right of withdrawal after 3 years by giving 30 days' notice in writing to the company, on the conditions mentioned in the report. The plaintiff was also the holder of dividend-bearing terminating stock certificates fully paid, issued under



the by-laws of the E. company, which were by the certificates repayable at a date subsequent to the date of the agreement for the sale of the assets of the E. company. In 1903 the E. company entered into an agreement with the S. company, incorporated under the same Act, for the sale to the latter company of all its assets, subject to ratification by the shareholders of the respective companies, which was subsequently procured, the agreement, as required by the Act, being filed with the corporation's registrar, and assented to by the Lieutenant-Governor in council, and the certificate of the Attorney-General issued certifying the same, but no schedule of the names of the shareholders of the E. company was attached to the agreement, as required by the statute. Permanent stock was then issued by the S. company in lieu of the stock held by the shareholders of the E. company. The plaintiff, on being notified of the meeting of the shareholders of the E. company, wrote protesting against the sale, stating that he would withdraw his money from the company before the merging took place, and subsequently he again wrote that he positively refused to allow his certificates to be delivered up in exchange for the substituted stock. Two dividend cheques on the new stock were sent and received by the plaintiff, one of which he cashed. The plaintiff alleged that the transaction between him and the E. company was, in fact, a loan; and he brought an action to have it declared that he was a creditor of the E. company and entitled to be repaid the amount so paid by him; and, before commencing the action, he tendered back to the company the amount of the cashed dividend cheque together with the unused one:—*Held*, that, under the circumstances, the sale was valid and binding, and was not affected by the fact that the schedule was not attached to the agreement, and that the plaintiff was a shareholder in the E. company and not a creditor in respect of either class of shares, and was bound by the terms of the agreement of sale.—*Judgment of Meredith, J., reversed. Lennon v. Empire Loan and Savings Co.*, 12 O. L. R. 560, 8 O. W. R. 162.

**6. Money advanced to company**—Authority of president—Negotiations for formation of new company—Failure of consideration—Recovery of money advanced. *Evenden v. Standard Art Manufacturing Co.*, 8 O. W. R. 392.

**7. Mortgage to secure bonds**—Liberty to carry on business—Pledge of

material and debts to secure advances—Validity of—Approval of shareholders—*R. S. O. 1897 c. 191, ss. 46, 49.*—The plaintiffs, being trustees for the bondholders of the defendant company under a mortgage of all their real estate and assets, containing a trust in the words "upon trust that the trustees shall permit the company to continue and carry on the undertaking and business of the company . . . as the directors may deem expedient (and the company may pledge or mortgage the stock-in-trade finished or unfinished, and the raw material therefor, but may not pledge the real property, fixtures, machinery, or plant, or any part thereof)," brought action to recover certain material, manufactured and unmanufactured, pledged, and certain debts due the company, transferred, to a bank for advances made:—*Held*, in the circumstances of this case, that the directors of the company, notwithstanding the mortgage, had the right to pledge the material to the bank, and that without a two-thirds vote of the shareholders of the company, required by the Ontario Joint Stock Companies Act, s. 49; and that the transfer of the debts to the bank was a necessary power in the directors in order to carry on the business under s. 46, and that both securities were valid in the hands of the bank.—*Merchants Bank of Canada v. Hancock*, 6 O. R. 285, *Macdougall v. Gardiner*, 1 Ch. D. 13, and *Burland v. Earle*, 18 Times L. R. 41, followed. *Trusts and Guarantee Co. v. Abbott Mitchell Iron and Steel Co. of Ontario*, 11 O. L. R. 403, 7 O. W. R. 889.

**8. Parties to action**—Authority to use name—Solicitor—Meeting of shareholders—Security for costs. *Woodruff Co. v. Colwell*, 8 O. W. R. 302, 314, 493.

**9. Telephone company**—Sale of assets and franchise—Contract for use of lines of vendor company—No right to prevent sale. *New Cumberland Telephone Co. v. Central Telephone Co. and New Brunswick Telephone Co.*, 2 E. L. R. 101.

**10. Trading company**—Contract—Consideration—Partly executed contract—Absence of seal—Authority of president—Absence of by-law or resolution—Ratification—Extra-provincial corporation—Absence of license to do business in Ontario—Pleading—Allowance of time to procure license. *National Malleable Castings Co. v. Smith's Falls Malleable Castings Co.*, 7 O. W. R. 436.

**COMPENSATION.**

See CROWN—MASTER AND SERVANT, II.  
— MUNICIPAL CORPORATIONS, II.,  
IV. 4, V. 2 — PATENT FOR INVEN-  
TION, 1—RAILWAY, IX. — SALE OF  
GOODS, V. 1 — VENDOR AND PUR-  
CHASER, I. 14—WATER AND WATER-  
COURSES, 7, 15.

**COMPROMISE.**

See TRUSTS AND TRUSTEES, 5.

**CONDITIONAL APPEARANCE.**

See WRIT OF SUMMONS.

**CONDITIONAL SALE.**

See SALE OF GOODS, II.

**CONDONATION.**

See HUSBAND AND WIFE, I. 3, 7.

**CONFESSION.**

See CRIMINAL LAW, I. — JUDGMENT,  
III. 2.

**CONFESSION OF JUDGMENT.**

See BANKRUPTCY AND INSOLVENCY, 13,  
27—BILLS OF EXCHANGE AND PRO-  
MISSORY NOTES, I. 1.

**CONFLICT OF LAWS.**

**Foreign law — Proof of—Onus.]—**  
The onus of establishing that a rule of  
law on a given subject different from that  
in force in this province, prevails in a  
foreign country, is upon the party who  
relies on it. In default of proof of its  
existence, the law of this province will  
be applied. *Gogo v. Kouri*, Q. R. 29 S.  
C. 47.

**CONSENT.**

See EVIDENCE, I. 2, 9—PARTIES, II. 2, 5,  
6—TRIAL, IV. 2.

**CONSOLIDATION OF ACTIONS.**

**1. Action en garantie — Principal  
action—Jury—Prejudice.]—**A defendant  
in warranty, not adjudged to intervene  
in the principal action, and who denies  
his responsibility to the plaintiff in war-  
ranty, is not a party to the principal ac-  
tion, according to the terms of art. 291,  
C. P., and a motion on the part of the  
plaintiff in warranty demanding the con-  
solidation of the two issues so that they  
may be tried together by a jury will be  
dismissed. Such a demand should not be  
granted unless it is evident that no pre-  
judice will result from it to any of the  
parties. *Dillon v. Canadian Import Co.*,  
8 Q. P. R. 123.

**2. Practice—Discretion—Appeal.]—**  
The consolidation of actions provided for  
in art. 291, C. C. P., is entirely a mat-  
ter for the exercise of judicial discretion,  
which will not be interfered with by an  
appellate Court, except in a case of  
manifest injury or error. *North Ameri-  
can Life Ins. Co. v. Lamotte*, Q. R. 14  
K. B. 334.

See SHIP, 11.

**CONSPIRACY.**

**1. Combination—Injury to business  
—Restraint of trade—Rights of indivi-  
duals.]—**The plaintiff and defendants  
were members of a corporation known as  
"The Winnipeg Grain and Produce Ex-  
change," and dealt in grain both on their  
own account and for others on commis-  
sion. The defendants and other members  
of the Exchange, having come to the con-  
clusion that the plaintiff was using his  
position as a member to assist other deal-  
ers not members to carry on dealings in  
grain with members in violation of the  
rules of the Exchange as to commission,  
agreed amongst themselves that they  
would neither sell to nor buy grain from  
the plaintiff; and the defendants after-  
wards carried out this agreement, there-  
by causing loss and damage to the plain-  
tiff in his business as a grain dealer. The  
defendants in so combining were not actu-  
ated by any malicious feeling towards the  
plaintiff, but solely by the desire to serve  
the business interests of themselves and  
the members of the Exchange generally,  
and in the protection of the market cre-  
ated under the rules of the Exchange.  
They had not attempted to coerce the  
plaintiff by violence or threats or to in-  
duce him or others to break any contract,  
nor had they tried to induce others to re-  
frain from dealing with the plaintiff:—  
*Held*, that the acts of the defendants were

no more than a lawful exercise of their rights, and that there was no conspiracy to do any illegal act or for any illegal object or to use any means that would be unlawful if used by an individual, and that, in the absence of any evidence of malicious or improper motive, the combination and the pursuit of its object did not affect any legal right of the plaintiff or operate to do him any legal injury. A combination such as the defendants had entered into, although resulting in damage to some person or persons, is actionable only in cases where its object is unlawful, or where, if lawful, such object is attained by unlawful means. *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25, and *Allen v. Flood*, [1898] A. C. 1, followed. *Gibbins v. Metcalfe*, 15 Man. L. R. 560, 1 W. L. R. 139.

**2. Trade competition** — Procuring incorporation of company to compete with plaintiffs—Inducing plaintiffs' servants to leave employment—Using information obtained in plaintiffs' employment—Appropriation of plaintiffs' documents and chattels—Master and servant—Breach of confidence—Injunction — Damages. *Copeland-Chatterton Co. v. Business Systems Limited*, 8 O. W. R. 888.

See CONTRACT, VII. 2 — CRIMINAL LAW, III. 6, 7, 8, 9—FRAUDULENT CONVEYANCE, 1—PARTIES, I. 5—PLEADING, VIII. 14, IX. 1, 6 — PROHIBITION, 3—TRADE UNION.

## CONSTABLE.

See MALICIOUS PROSECUTION AND ARREST, 1.

## CONSTITUTIONAL LAW.

**1. Alien Labour Act** — *Deportation of immigrants—Intra vires.*]—*Held*, that s. 6 of the Dominion statute 60 & 61 V. c. 11, as amended by 1 Edw. VII. c. 13, s. 13, is intra vires of the Dominion Parliament.—The Crown undoubtedly possessed the power to expel an alien from the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Government, which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power. — Judgment of ANGLIN, J., *Re Cain, Re Gilhula*, 10 O. L. R. 469, 6 O. W. R. 124, reversed. *Attorney-General for the Dominion of Canada v. Cain, Attorney-General for the Dominion of Canada v. Gilhula*, [1906] A. C. 542.

**2. Animals Contagious Diseases Act, 1903** — *Intra vires.* *Brooks v. Moore* (B.C.), 4 W. L. R. 110.

**3. British Columbia Liquor License Act—Brewer—Dominion license.**] —A brewer, although holding a license under the Dominion Inland Revenue Act to carry on business as such, may not sell beer within the province unless he has first obtained a license under the Provincial Liquor License Act. *Rex v. Neiderstadt*, 11 B. C. R. 347, 2 W. L. R. 272.

**4. Controverted Elections Ordinance, N. W. T.** — Application to first election of members of the new legislative assembly of the province of Saskatchewan—Law of Parliament—Dismissal of petition on summary application. *Re Prince Albert City Provincial Election, Strachan v. Lamont* (N.W.T.), 3 W. L. R. 571, 4 W. L. R. 411.

**5. Criminal Code, s. 534** — *Intra vires* — Civil action for same cause as criminal prosecution—Motion to stay action. *Monypenny v. Goodman*, 7 O. W. R. 209.

**6. Criminal procedure** — *Summoning grand and petit jurors—Constitution of Courts—Ontario Legislature—Dominion Parliament—Criminal Code—Jurors Act.*]—A provincial legislature has power to determine the number of grand jurors to serve at courts of oyer and terminer and general sessions, this being a matter relating to the constitution of the courts; but the selection and summoning of jurors, including talesmen, and fixing the number of grand jurors by whom a bill may be found, relate to procedure in criminal matters, in respect of which the Dominion Parliament alone has power to legislate. The Dominion Parliament can exercise its power by adopting the provincial law, and has done so by s. 662 of the Criminal Code. *The Queen v. Cox*, 31 N. S. R. 311, 2 Can. Crim. Cas. 207, approved. *Rex v. Walton*, 12 O. L. R. 1, 7 O. W. R. 312.

**7. Dominion and provincial lands** — *Military reserve—Title of the Dominion—Transfer by Imperial Government—British North America Act, 1867, ss. 108, 117.*]—The land in suit, called Deadman's Island, was de facto a "reserve" by the Government of British Columbia under paragraph 3 of the Proclamation of 1859, and according to the evidence a military reserve:—*Held*, that it remained Imperial property at the time of the British North America Act, 1867, and was transferred to the Dominion by special

grant dated the 27th March, 1884. It did not, therefore, fall to the colony in virtue of s. 117 of the Act, nor to the Dominion in virtue of s. 108. Judgment in *Attorney-General v. Ludgate*, 11 B. C. R. 258, affirmed. *Attorney-General for British Columbia v. Attorney-General for Canada*, [1906] A. C. 552.

**8. Extra-provincial corporations**—Act respecting licensing of—Intra vires—Company carrying on business in Ontario. *International Text-Book Co. v. Brown*, 8 O. W. R. 835.

**9. Extradition**—Establishment of federal court—Provincial courts—Prohibition—Refusal—Appeal to Court of King's Bench.]—The refusal of a Judge of the Superior Court to grant leave to issue a writ of summons in a demand for prohibition is a judgment from which an appeal lies to the Court of King's Bench.—2. The right of supervision and control of the Superior Court and its Judges given by art. 50, C. P. C., does not extend to a federal court established to administer the extradition laws, and the remedy by art. 1003, C. P. C., is not open against the latter court.—3. The federal government has power by the constitution to establish a court presided over by a commissioner appointed for that purpose to administer the extradition laws. *Gaynor v. Lafontaine*, Q. R. 14 K. B. 99.

**10. Foreshore of harbour**—British North America Act, 1867, ss. 91, 92, 108—Power of the Dominion to legislate for provincial Crown property—Dominion Act 44 V. c. 1, s. 18 (a)—Provincial foreshore.]—Section 108 of the British North America Act, 1867, empowers the Dominion Parliament to legislate for any land, including foreshore, which is proved to form part of a public harbour. Sections 91 and 92, read together, empower the Dominion to dispose of provincial Crown lands, and therefore of a provincial foreshore, for the purposes of the respondents' railway, which is a trans-continental railway connecting several provinces:—Held, that s. 18 (a) of the respondents' incorporating Dominion Act (44 V. c. 1) is not controlled by the Consolidated Railway Act, 1879, and applies to provincial as well as Dominion Crown lands.—Power given thereunder to appropriate the foreshore in question includes a power to obstruct any rights of passage previously existing across it.—Judgment in 11 B. C. R. 289, 1 W. L. R. 299, affirmed. *Attorney-General for British Columbia v. Canadian Pacific R. W. Co.*, [1906] A. C. 204.

**11. Illegal fishing**—Three-mile limit—Legislative jurisdiction—Continuous chase—Capture on high seas.]—The Do-

minion cruiser "Kestrel" sighted the American schooner "North" on the fishing grounds in Quatsino Sound, within the three-mile limit off the coast of British Columbia, having four dories out and evidently engaged in fishing for halibut, contrary to the provisions of R. S. C. c. 94. On being chased by the cruiser, the schooner picked up two of her dories, and stood out to sea. The cruiser kept up a continuous chase (picking up one of the dories on the way), overhauled and seized the schooner on the high seas, some distance outside the three-mile limit, and towed her into port at Winter Harbour, B.C., where she was properly attached and libelled in the Exchequer Court of Canada. At the time of seizure, freshly caught halibut were lying upon the deck of the schooner, and there were other evidences that she had been recently engaged in fishing:—Held, affirming the judgment of MARTIN, LOC. J., *Res v. The "North"*, 11 B. C. R. 473, 2 W. L. R. 74, GIBOUARD, J., dissenting, that the Parliament of Canada, under the provisions of the British North America Act, 1867, has exclusive jurisdiction to legislate with respect to fisheries within the three-mile limit off the coasts of Canada; that the cruiser had the right to immediately pursue the schooner sighted within the three-mile limit beyond that limit on to the high seas for the infraction of a municipal regulation of Canada; and that the seizure there made was justified by the rules of international law. *The "North" v. The King*, 26 C. L. T. 380, 37 S. C. R. 385.

**12. Ontario Liquor License Act, s. 10**—Selling liquor on vessel—Territorial limits of province—Offence committed on great lakes—Jurisdiction—Admiralty—International law—Foreign vessel—Conviction—Police magistrate—Place where offence committed—Unlawfully allowing liquor to be sold—Master of ship—"Occupant"—Amendment of conviction—Criminal Code, s. 889.]—The province of Ontario extends to the middle line of Lake Huron as defined in the treaties of Paris and Ghent; and the British North America Act, in fixing the electoral divisions of the province, recognizes the territorial subdivisions provided for by the statute which is now R. S. O. 1897 c. 3, by which the limits of the counties and townships bordering on Lake Huron extend to the boundary of the province; within the territorial limits of the province, as to the subjects of legislation assigned by the British North America Act to the provinces, the legislative authority of the province is as plenary and as ample as the Imperial Parliament in the plenitude of its power possessed and could bestow; the regula-



tion of the traffic in intoxicating liquors within the limits of the provinces by a license law is one of the subjects assigned by the British North America Act to the provincial legislatures; and therefore the Ontario legislature had authority to enact s. 10 of the Liquor License Act, which provides that no license shall be issued for the sale of liquor nor shall any liquor be sold or kept for sale in any room or place on any vessel navigating any of the great lakes, etc.; notwithstanding the contention that the only jurisdiction over the great lakes is in the Admiralty Courts.—*Regina v. Keyn*, 13 Cox C. C. 413, and *Regina v. Sharp*, 5 P. R. 135, distinguished.—The defendant, the master of the steamer "Greyhound," was convicted before a police magistrate having jurisdiction over the whole county of Huron, for that he (the defendant), on Canadian waters adjacent to the harbour of the town of Goderich, in said county of Huron, did "unlawfully allow liquors to be sold" on the steamer "Greyhound," of the city of Detroit, in the State of Michigan, "without a license therefor by law required."—*Held*, upon the evidence, that the vessel, although a foreign vessel, was not when the offence was committed proceeding from one foreign port to another, but was being used for an excursion which went out from the port of Goderich for a few miles and returned to that port, and therefore the rule of international law forbidding interference with persons on board a foreign vessel navigating the high seas or the great lakes was not applicable.—*Scmble*, that where it is plain that the legislature has intended to disregard or interfere with a rule of international law, the Courts are bound to give effect to its enactments.—*Held*, that the conviction was not invalid merely because the place in the county where the offence was committed was not stated with more particularity than as above recited.—*Held*, that the conviction disclosed no offence, unlawfully allowing liquor to be sold not being an offence created by the Liquor License Act; but the conviction should be amended so as to make it for an offence under s. 1 of s. 49 of the Act, viz., the selling or bartering of liquors without the license required by law; MEREDITH, C.J., doubting whether the defendant was an "occupant" within the meaning of s. 111, whether the words "house, shop, room, or other place," included a vessel, and whether the offence of selling liquor without a license was of the nature of the offence alleged in the conviction: Criminal Code, s. 889. *Rex v. Meikleham*, 11 O. L. R. 366, 6 O. W. R. 945.

**13. Railway Act, 1888. ss. 187, 188—Protection of crossings—Party in-**

**terested—Railway Committee.]—**Sections 187 and 188 of the Railway Act, 1888, empowering the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates, or otherwise, are *intra vires* of the Parliament of Canada; IDINGTON, J., dissenting. (Sections 186 and 187 of the Railway Act, 1903, confer similar powers on the Board of Railway Commissioners.)—Section 188 of the Act of 1888 also authorizes the Committee to apportion the cost of providing and maintaining such protection between the railway company and "any person interested:"—*Held*, IDINGTON, J., dissenting, that the municipality in which the highway crossed by the railway is situate is a "person interested" under the section.—Judgment of the Court of Appeal in *Grand Trunk R. W. Co. v. City of Toronto*, 6 O. W. R. 27, affirming judgment of BOYD, C., 4 O. W. R. 450, affirmed. *City of Toronto v. Grand Trunk R. W. Co.*, 26 C. L. T. 247, 37 S. C. R. 232.

**14. Trading stamps—Statute prohibiting trade—Method of trade—Stamps or coupons—Municipal by-law—Ultra vires—Injunction.]—**An interlocutory injunction is the most efficacious remedy, and is therefore open to the persons interested, to restrain the promulgation of a municipal by-law, alleged to be ultra vires, which prohibits a certain trade, when such prohibition will cause the persons interested a serious wrong or irreparable loss.—2. A provincial legislature has no power to pass a statute permitting municipalities to prohibit by by-law the exercise of a trade which is not in itself contrary either to good morals or public order.—3. A business consisting in furnishing advertising matter to merchants, who engage themselves in turn to distribute to their customers, upon their cash sales, coupons or stamps giving the right to draw premiums, is not contrary to good morals or public order. A statute passed by the provincial legislature which permits municipalities to prohibit such trade is unconstitutional. *Wilder v. City of Montreal*, Q. R. 14 K. B. 139.

**15. Vancouver Island Settlers' Rights Act, B. C., 1904—Intra vires—Railway belt—Crown—Inoperative grant.]—**Section 3 of the Vancouver Island Settlers' Rights Act, 1904, enacts that upon application being made to the Lieutenant-Governor in council, within twelve months from the coming into force of the Act, shewing that any settler occupied or improved land within the railway land belt prior to the enactment

of c. 14 of 47 V. (the Settlement Act), with the *bona fide* intention of living on the land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge, and in accordance with the provisions of the Land Act in force at the time when the land was first so occupied or improved by said settler.—Section 4 provides that the rights of such grantees shall be asserted by and defended at the expense of the Crown:—*Held*, that, notwithstanding *Hoggan v. Esquimalt and Nanaimo R. W. Co.*, [1894] A. C. 429, the legislature considered that there may be persons who have valid claims to lands within the company's land grant, but who, by reason of poverty or limited means, are unable to assert their rights; that it decided to enable such rights, if any, to be effectively asserted by authorizing Crown grants in fee, which grants would transfer any interest left in the Crown and throw the onus of the litigation on the railway company, while the rights, if any, of the grantee are to be upheld by the province, but that there is nothing in the operative clauses of the Act which in terms purports to declare the title in the land to be in the Crown, or attempts to deprive the company of any interest vested in it under its patent from the Dominion:—*Held*, further, on the evidence, that the defendant had no legal authority for his entry upon and occupation of the lands in question when he went upon them in 1879, that he was never recorded as a pre-emptor, and that therefore there was no valid alienation of the land in question, taking it out of the grant to the railway company. There being no interest left in the Crown, in right of the province, to convey, the grant given to the defendant by the province was inoperative. *Esquimalt and Nanaimo R. W. Co. v. McGregor*, 12 B. C. R. 257.

See APPEAL, XII. 9—CROWN, 3—JUSTICE OF THE PEACE, 14—LIQUOR LICENSES, 3—RAILWAY, X. 3.

### CONTEMPT OF COURT.

**1. Disobedience of injunction**—Reasonable efforts to comply. *Leahy v. North Sydney*, 1 E. L. R. 431.

**2. Disobedience of subpoena**—*Service—Necessity for shewing original.*—To bring a person into contempt for disobedience of a subpoena, it must be

proved that the original writ was shewn at the time of service, as well as that a copy was delivered to and left with the person. *Woods v. Fader*, 10 O. L. R. 643, 6 O. W. R. 369.

**3. Jurisdiction over person resident out of Province**—Order nisi for committal—Discharge. *Re Place, Copeland-Chatterson Co. v. Business Systems Limited*, 7 O. W. R. 56.

**4. Motion to commit**—Attempt to procure destruction of letter—Excuse—Punishment—Payment of costs—Jurisdiction—Person in possession of letter out of province—Notice of motion—Other relief—Examination of defendants—Costs. *Copeland-Chatterson Co. v. Business Systems Limited*, 7 O. W. R. 319.

See COURTS, V. 1—JUDGMENT DEBTOR, 2, 4.

### CONTRACT.

- I. BREACH.
- II. BUILDING CONTRACT.
- III. CONSTRUCTION.
- IV. ILLEGALITY.
- V. MAKING THE CONTRACT.
- VI. RESCISSION.
- VII. SALE OF GOODS.
- VIII. TIMBER AND LUMBER.
- IX. WORK, LABOUR, AND MATERIAL.
- X. MISCELLANEOUS.

See ARCHITECT — ASSESSMENT AND TAXES, 9, 11—BANKRUPTCY AND INSOLVENCY—BILLS OF EXCHANGE AND PROMISSORY NOTES — BROKER — CARRIERS — CHOSE IN ACTION, ASSIGNMENT OF—COMPANY—COSTS—COURTS, V. 5, 6, IX. 6, 7, 8—CROWN, 2, 10—CROWN LANDS, 1, 5—DEED—DISCOVERY, IV. 5—DITCHES AND WATERCOURSES ACT, 1—FAMILY ARRANGEMENT—FRAUD AND MISREPRESENTATION, 1—HIRE OF CHATTELS—HOMESTEAD—HUSBAND AND WIFE—INFANT, 2, 3, 8—INJUNCTION—INSURANCE—INTEREST—JUDGMENT—LANDLORD AND TENANT — LIEN — LIMITATION OF ACTIONS—LUNATIC, 3—MASTER AND SERVANT—MECHANICS' LIENS — MISTAKE—MORTGAGE—MUNICIPAL CORPORATIONS, I.—PARENT AND CHILD, 1, 2—PARTIES, II. 1, III—PARTNERSHIP—PATENT FOR INVENTION, 6—PEREMPTION, 2—PLEADING, III. 3, VI. 4, VIII. 2, 12, IX. 9—PLEDGE—PRINCIPAL AND AGENT—PRINCIPAL AND SURETY—RAILWAY, IV., V. 1,

VIII. 4, IX., X. 1—RESTRAINT OF TRADE—SALE OF GOODS—SET-OFF—SPECIFIC PERFORMANCE—STATUTES, 6—STAY OF PROCEEDINGS, 2—STREET RAILWAYS, I., II. 1—SUBSTITUTION, 1—TIMBER—VENDOR AND PURCHASER—VENUE, 2, 3—WRIT OF SUMMONS.

### I. BREACH.

**1. Counterclaim—Damages.** *Gibson Art Co v. Bain*, 7 O. W. R. 842.

**2. Damages—Work and labour—Delay—Loss of tenant—Waiver—Security.]**—In an action by the plaintiff on a promissory note given by the defendant in part payment of the contract price for the erection by the plaintiff of a vault in an office building owned by the defendant, the defendant counterclaimed damages on account of the imperfect condition of the vault, and also on account of the loss of a tenant who had agreed to take a five years' lease of one floor of the building, on condition that the vault was completed by a specified date:—*Held*, that, in order to recover on the latter part of the counterclaim, the defendant must shew that there was a contract by the plaintiff to complete the vault by a specified date, and that the plaintiff was so far aware of the agreement between the defendant and his proposed tenant that he must be taken to have contracted to bear the loss covered by the repudiation of the tenancy in consequence of his failure to carry out the terms of his contract; and that, in the absence of evidence of a contract on the part of the plaintiff to complete his work within any definitely stated period, or of such notification of the agreement between the defendant and his proposed tenant as to give rise to a contract on the part of the plaintiff to bear the loss occasioned by the refusal of the tenant to take the premises on account of the non-completion of the vault, the defendant could not recover.—In answer to a letter from the defendant complaining of delay in the commencement of the work, and stating that on the plaintiff's assurance he had promised M., the prospective tenant, that the work would be completed by the 1st March, the plaintiff took the ground that the contract called for security, and offered to proceed with the work as soon as satisfactory security was given. There was nothing about security in the letters containing the offer and acceptance, which constituted the contract, but the defendant acquiesced, and furnished the security asked for:—*Held*, that while the defendant might have re-

fused to give security, and have insisted upon the prosecution of the work in accordance with the terms of the contract, he could not, after assenting to and acting upon the plaintiff's requirement, contend that there was any breach of agreement on the 1st March. *Sanders v. Sutcliffe*, 38 N. S. R. 352.

**3. Liquidated Damages—Penalty.** *Edwards v. Moore*, 1 E. L. R. 422.

**4. Manufacture of medicines according to formula—Supplying to other persons—Damages—Costs.]**—A company who contract to manufacture medicinal pills, at stated prices, for the owners of a formula made known to them, commit a breach of contract and are liable in damages, if they manufacture and supply the same pills to other persons, who order them and give, as samples for their order, the very pills which the company had manufactured under the contract, which these persons had procured by purchase in the open market.—The measure of damages in such a case is the profit which the owners of the formula would have realized by the sale of the merchandise so manufactured. The owners are also entitled to recover the expense of ascertaining the breach, through the services of detectives and chemical analysts, but they cannot claim costs incurred in the prosecution and conviction of the persons who infringed their rights. *Wampole v. Simard*, Q. R. 28 S. C. 122.

**5. Sale of business—Trade marks or brands—Abatement in price.]**—The sale of a cigar factory with its accessories and trade marks or brands, followed by a transfer of those which are registered and the rights which the vendor may have in a special mark, does not comprehend the latter. Default in putting the vendor in possession does not entitle him to an abatement in the price nor to damages for breach of the contract, especially where the vendee knew that there was a dispute between his vendor and a third person on the subject of this special mark. *Reliance Cigar Factory v. Royal Bank of Canada*, Q. R. 14 K. B. 432.

### II. BUILDING CONTRACT.

**1. Deduction for portion of work dispensed with—Waiver of performance.** *Reid v. McDonald*, 1 E. L. R. 171.

**2. Delay caused by other contractors—Failure to notify architect and**

apply for extension of time—Penalty for delay—Liquidated damages—Provisions of contract—"Prosecution" of work—Notice—Extra work ordered by defendant—Effect of. *Grey v. Stephens* (Man.), 4 W. L. R. 201.

**3. Engineer's certificate—Extras—**Written direction of engineer—Grading marks on posts. *Courtney v. Provincial Exhibition Commission*, 2 E. L. R. 226.

**4. Extras.** *Brine v. Shearing*, 2 E. L. R. 44.

**5. Sub-contract—Defective work—**Decision of architect—Right of contractor against sub-contractor—Counterclaim. *Mitchell v. Flodden* (Man.), 4 W. L. R. 194.

### III. CONSTRUCTION.

**1. Advances — Share of profits —**Breach—Damages—Measure of—Possible profits. *Battle v. Willox*, 8 O. W. R. 5.

**2. Advertising — Vagueness — Renewal—Price to be agreed on.]—**A provision in a contract for the right to use space for advertising purposes for its renewal "at the end of three years at a price to be agreed upon, but not less than \$5,000 per annum," leaves the matter at large unless the price is agreed upon, and the person using the space cannot insist on a renewal at the rate of \$5,000 per annum. —Judgment of TEEZEL, J., affirmed. *Henning v. Toronto R. W. Co.*, 11 O. L. R. 142, 7 O. W. R. 1.

**3. Conditional obligation—Mandatory.]—**One who undertakes, in case he succeeds in recovering the amount of a life insurance policy, to pay a certain sum of money to another, both having an interest in the policy, becomes the mandatary of the other for the purpose of recovering the money. If then he makes terms with the insurer and accepts less than the amount of the insurance, without consulting the other, he puts himself in the position of a debtor conditionally bound who hinders the accomplishment of the condition, and is therefore bound to pay the sum agreed. *Ménard v. Jackson*, Q. R. 14 K. B. 348.

**4. Correspondence—Sale of wheat —**Dispute as to price—Terms of contract—Evidence of custom or usage in trade—Appreciation of evidence. *Northern Elevator Co. v. Lake Huron and Manitoba Milling Co.*, 7 O. W. R. 484.

**5. Dependent and independent covenants — Indemnity — Evidence —**Costs. *Twyford v. York* (N.W.T.), 3 W. L. R. 14.

**6. Division of land — Trespass—**Title—Damages—Scale of costs. *Scott v. Jerman*, 8 O. W. R. 813.

**7. Easement — Aqueduct — "Augmentations"—Pipes and tubes.]—**An agreement by which the owner of land gives "the right to make upon his land the said aqueduct, as it actually exists, comprising reservoir and tubes placed upon and passing over his said property, right of passage or entry upon his said property, at any time of the year, to repair the said reservoirs, tubes, and pipes, serving the said aqueduct and actually existing . . . paying . . . when they make certain repairs or augmentations to the said aqueduct the damages which may result from it . . . " does not comprise the addition of a branch of the system in another part of the land. The "augmentations" referred to must be understood as meaning augmentations to the pipes, etc., existing at the time of the making of the agreement. *Perrot v. Belleau*, Q. R. 14 K. B. 526.

**8. Lease or license—Sale of stone to be extracted from quarry—Remedies of landlord.]—**An agreement by which the owners of a quarry give a person the right to extract stone from it during a fixed period, at places to be indicated by them, and in consideration of a sum to be paid according to measurement of the stone, is not a lease of a portion of the quarry, but a sale of the stone to be extracted. No relation of landlord and tenant arising out of such an agreement, the remedies specially provided by law to enforce obligations under a lease, do not apply in favour of the parties to it. *Hendershot v. Lionais*, Q. R. 27 S. C. 292.

**9. Lien on "property" —**Application to land—Ejusdem generis rule. *London Guarantee and Accident Co. v. George and Lenton* (Man.), 3 W. L. R. 236.

**10. Mines and minerals—Working agreement—Option to purchase—Ownership of ore—"Net proceeds."]**—Under an option to purchase a mineral claim, and develop the same during the term of the option, one of the conditions was that "if any ore is shipped from the property the net proceeds are to be deposited to the credit of the vendors . . . and to be applied in part payment to the vendors." The defendant contended that



the words "net proceeds" as used in the option, meant a sum to be arrived at after deducting from the gross proceeds the cost of mining, delivery at the smelter, and of smelting:—*Held*, on the facts, that the defendant's rights in respect of the ore extracted from the property were limited to the right to ship the ore for the purposes of conversion, and were subject to the condition that the proceeds of such conversion should be applied in accordance with the terms of the agreement above mentioned. Pending the payment of the purchase price provided for in the option, the defendant acquired no right of property in the ore *in situ*, and none after extraction from the mine.—The operation of developing the property was, pending the payment of the purchase price, to be done by the defendant for the owners of the property, and in shipping or dealing with the ore, he was to deal with it as a trustee for the plaintiffs, and the proceeds would be in his hands as such trustee. *Grobe v. Doyle*, 12 B. C. R. 191, 3 W. L. R. 285.

**11. Modification — Waiver—Work done under contract—Damages for breach—Counterclaim—Detinue — Demand and refusal—Conversion.** *J. L. Nichols Co. v. Markland Publishing Co.*, 7 O. W. R. 407.

**12. Oil lands—Forfeiture—Lease or license—Profit à prendre.]—**The defendant by written lease gave the plaintiff the exclusive right to drill on certain oil lands for five years from the 16th December, 1903, "this lease to be null and void and no longer binding . . . if a well is not commenced . . . within six months, . . . unless the lessee shall thereafter pay yearly to the lessor \$50 per year for delay." No well had been begun by the 16th June, 1904, when the first six months expired. On the 8th July, 1904, the plaintiff paid the defendant \$50 by cheque, which the defendant cashed on the 10th August, 1904, and receipted as "received on account of delay in beginning operations under the lease." In August, 1905, the plaintiff tendered the second yearly payment of \$50, which the defendant refused, having made another lease to his co-defendant on the 28th July, 1905:—*Held*, that the second payment of \$50 was in time, and might have been validly made at any time during the second year, which did not terminate until the 16th December, 1905.—The legal effect of the instrument in question was more than a license; it conferred a profit à prendre, an incorporeal right to be exercised in the land comprised in it. *McIntosh v. Leckie*, 13 O. L. R. 54, 8 O. W. R. 490.

**13. Sale of bonds and stock of company—Payment of debts—Right of way.]—**When by a deed of sale of the controlling interest (bonds and stock) of a street railway company, it is agreed, first, that, in consideration of \$30,000 paid by the purchaser in addition to the price of sale, the vendors shall liquidate and pay all the debts of the company except a given number specified and described, and, second, that the vendors shall, within a fixed period, settle any right of way claims that they may be called upon to pay, towards which settlement the purchasers shall contribute \$5,000, the payment, within the stated period, of a sum for a right of way acquired before the sale, but the consideration for which was, at the time it took place, still the subject of negotiations, is one to which the purchasers are bound to contribute out of the fund of \$5,000 under the latter stipulation, and not one which the vendors are bound to pay out of the \$30,000 under the former. *Montreal Street R. W. Co. v. Montreal Construction Co.*, Q. R. 15 K. B. 77.

**14. Shares in company—Sale of—Terms of payment—Absence of covenant to pay—Default in payments—Refusal of Court to infer obligations to pay.]—**By an agreement of the 11th August, 1903, between the plaintiff and defendant, after reciting that the plaintiff was the owner of 302 fully paid-up shares of the common stock in a named company, of the par value of \$100 each, and his agreement to sell the same to the defendant, for the consideration therein mentioned, and subject to the terms thereafter expressed, it was witnessed that the plaintiff had agreed to sell the shares to the defendant for \$18,120, with interest at 6 per cent. until the same was fully paid—viz., on his paying \$500 on account, he was to have the right of paying the balance in the manner set out in the agreement. The plaintiff was to deposit in a bank the stock certificates, indorsed in blank, to be delivered to the defendant, on payment of the purchase money in full, and he was to be at liberty to pay into the bank the sums of money thereinbefore referred to, to be held to his credit, and which should fully discharge him in respect of the payment of the purchase price and interest, and entitle him to the delivery of the shares; the defendant was to pay the plaintiff the \$500 on account upon the deposit of the certificates so indorsed; and in consideration of the premises and of the payment of \$500 the plaintiff covenanted and agreed with the defendant that he would not for 5 years from the date of the agreement, directly or indirectly,

erect or cause to be erected in Canada a mill for the manufacture of book and writing papers, or of coated papers, or associate himself or accept employment from any mill erected during the said period for manufacturing such papers:—*Held*, that the terms and whole effect of the agreement completely negatived the existence of any covenant on the defendant's part to pay for the shares. *Finlay v. Ritchie*, 12 O. L. R. 368, 8 O. W. R. 176.

**15. Time — Season — Commencement.]**—In interpreting agreements as regards times fixed for doing particular acts, when they run from a fixed date, that date is not reckoned; but when they run for a period or space of time, for example, a season, it is the commencement and not the end of that space of time which is the beginning of the term. Therefore, the words "to begin from next autumn" must be understood as referring to the commencement and not the end of that season. *Columbus Fish and Game Club v. W. C. Edwards & Co., Limited*, Q. R. 29 S. C. 175.

#### IV. ILLEGALITY.

**1. Non-recovery back of money paid and cancellation of notes—Impounding of notes.]**—The Court will not intervene, at the instance of a party to an illegal contract, to enable him to obtain relief from the exigencies thereof. —W., having been threatened with a criminal prosecution for having sexual intercourse with a young girl under 16 years of age, effected a settlement whereby cash payments were made and promissory notes given by him. On his death, he having in no way repudiated the settlement during his lifetime, his administrator brought an action for the recovery of the money paid and the cancellation of the notes:—*Held*, that the action was not maintainable, but the notes having been filed in Court, it was ordered that they, being illegal and void as against public policy, should remain on the files until further order. *Wood v. Adams*, 10 O. L. R. 631, 6 O. W. R. 407.

**2. Oral agreement—Proof of terms—Right to recover — Subsequent agreement in writing.]**—The defendant agreed to pay the plaintiff \$150 as wages or compensation for his services on a fishing voyage, and afterwards persuaded him to sign articles for the purpose of inducing other men to join the vessel as sharesmen:—*Held*, that the plaintiff was not debarred, by the fact of signing arti-

cles, from shewing that that was not the real contract made between himself and the defendant, but that it was made for another and different purpose.—*Per Russell, J.*—As the plaintiff made out his case on the oral and valid contract between himself and the defendant, without having to prove any fact shewing fraud or illegality, he must succeed on that contract. For the same reason the defendant must fail in his defence, which could not be made out without exposing an illegal transaction to which he was a party. *Smith v. Haughn*, 38 N. S. R. 153.

**3. Sale of liquor—Place of completion — Prohibited sale — Knowledge of vendor.]**—The plaintiffs, who carried on business in Glasgow, in Scotland, as whisky distillers, appointed sales agents at Halifax, N.S., with authority restricted to receiving and transmitting orders: the acceptance of such orders and forwarding of the goods being in the discretion of the plaintiffs' officers in Glasgow. The defendant, who carried on a trade in liquors in Nova Scotia, without the license required by the Liquor License Act, R. S. N. S. 1900 c. 100, placed orders, by written memoranda, with these agents, which orders were transmitted to the plaintiffs at Glasgow. On receipt of the orders, the plaintiffs shipped the whisky thereby ordered to the defendant, through common carriers at Glasgow, to be forwarded to him at the addresses he gave in Nova Scotia, and, after he had received the goods, passed drafts upon him for the price, which he accepted. The drafts were dishonoured at maturity, and, upon being sued for the amount, the defendant pleaded that the contract was void, having been entered into in Nova Scotia with the object of enabling him to make illicit re-sales of the whisky in a locality where the Canada Temperance Act was in force, and in contravention of the provisions of that Act, and of the local License Act prohibiting such sales on pain of fine and imprisonment:—*Held*, affirming the judgment appealed from, 37 N. S. R. 482. *Idington, J.*, dissenting, that the contract was not completed until the acceptance of the orders and delivery of the goods to the defendant at Glasgow, in Scotland, and that the plaintiffs were entitled to recover, as there was no evidence to shew actual knowledge upon their part of any intention to contravene the statutes. *Bigelow v. Craigellachie-Glenlivet Distillery Co.*, 26 C. L. T. 186, 37 S. C. R. 55.

**4. Simulation — Nullity—Parties.]**—Simulation not being an absolute cause of nullity, a contract tainted with it may be declared void as against the person

who invokes it, without bringing before the Court the other contracting parties. *Desmarais v. Léveillé*, Q. R. 14 K. B. 382.

**5. Uncertificated engineer**—Steam Boilers Ordinance—Failure of action for wages. *Hardy v. Worchomoka* (N.W. T.), 3 W. L. R. 579.

See *post*, IX. 2.

## V. MAKING THE CONTRACT.

**1. Place of making** — *Correspondence* — *Acceptance of offer* — *Posting letter.*] — Although a contract by correspondence is made at the place where the offer is accepted, the acceptance must be held to result from the deposit in the office of the letter which contains it. Therefore, an order sent by a purchaser from Montreal to New York, and simply noted by the clerk of the vendor on its arrival on the 21st November, 1901, without any other manifestation of the acceptance of it, is not a sale concluded on that day. *Borgfield v. La Banque d'Hochelaga*, Q. R. 28 S. C. 344.

**2. Proof of making** — *Telegraph* — *Original message* — *Destruction* — *Absence of proof* — *Secondary evidence* — *Admissibility of transcript received* — *Mistake* — *Agency of telegraph company* — *Failure to prove contract* — *Sale of goods* — *Refusal to accept* — *Non-delivery of part.*] — The plaintiffs, who were dealers in canned fruits in Ontario, wrote to the defendants in British Columbia a letter quoting prices of various canned goods. Proof of the loss of this letter was given, and secondary evidence of its contents received. It concluded with a request to the defendants to order by telegraph at the expense of the plaintiffs. The defendants telegraphed an order for specified quantities of goods. The message as received by the plaintiffs specified "three fifty Lombard plums," and the plaintiffs shipped 350 cases of plums, and the other goods specified, with the exception of 250 gallons of pears, which they proposed to send later. The defendants refused to accept the goods shipped, because they said they had ordered only "fifty Lombard plums" and because the pears were not sent. The defendants alleged that the telegraph company had made a mistake in the transmission of the message, but the original message as delivered by the defendants to the company at Vancouver was not proved:—*Held*, that, assuming the mistake to be proved by proper evidence, the defendants were not responsible for it, for, even if the telegraph company were the defendants' agents, the

authority of the agents was limited to the transmission of the message in the terms in which the defendants delivered it; and the document handed to the company for transmission was the original order which must be proved to establish the contract. *Henkel v. Pape*, L. R. 6 Ex. 7, and *Kinghorne v. Montreal Telegraph Co.*, 18 U. C. R. 60, followed. — The fact of the destruction of the message delivered by the defendants to the telegraph company was not shewn, and, though secondary evidence of the contents was given by the defendants, it was inadmissible, and there was therefore no evidence that the transcript delivered to the plaintiffs was incorrect. But the burden of proving the contract was upon the plaintiffs; and the admission of the transcript in evidence without objection did not render its terms binding upon the defendants. It was not evidence of the order given by the defendants; it was relevant and admissible primary evidence to prove that the order had in fact been transmitted and delivered to the plaintiffs; but its admission in evidence did not excuse the plaintiffs from making proof of the order by production of the original or by proof of its destruction or loss and secondary evidence of its contents. Moreover, although secondary evidence was given of a portion of the contents of the plaintiffs' letter quoting prices, the plaintiffs had omitted to prove what were the prices quoted, and this material element of a contract was lacking:—*Held*, also, that the non-delivery of the pears ordered would have justified the defendants' rejection of the other goods sent. *Flynn v. Kelly*, 12 O. L. R. 440, 8 O. W. R. 120.

**3. Reducing to writing** — *Substantial condition* — *Onus.*] — When two persons have agreed that a contract which has been the subject of an interview between them shall be reduced to writing, there is a presumption that they have made the reducing to writing a substantial condition of the formation of the contract, and the burden of proof is on the one who asserts the contrary. *Dorion v. Bédard*, Q. R. 27 S. C. 193.

**4. Sale of goods** — *Correspondence* — *Completion.*] — A contract by correspondence for the sale of coal is concluded by an offer of the seller of a quantity at a given price per ton and the acceptance by the purchaser, and a statement by the latter in his letter of acceptance that he understands "the ton to be of 2,240 lbs., and that he would prefer not to have more than two cars shipped at a time," is not one of essential terms to which a reply of the seller is required to perfect the bargain. *Keating v. Dillon*, Q. R. 28 S. C. 323

## VI. RESCISSION.

**1. Action to set aside—Parties—Married woman — Sale of immovable—Obligation contracted for husband—Payment of wife's debts.]—**A contract will not be set aside in an action unless all the contracting parties are before the Court.—The sale of an immovable with a proviso for redemption, entered into by a married woman separate as to property, will not be set aside at her suit upon the ground that the transaction really amounts to an obligation entered into for her husband in violation of art. 1301, C. C., when it appears that the purchase money has been used to discharge debts due by her alone. *Lachapelle v. Viger*, Q. R. 15 K. B. 257.

**2. Action to set aside, for improvidence—Delay in bringing action—Interest in partnership — Inadequacy of price — Fraud—Bad debts—Goodwill—Counterclaim—Costs.** *Van Tuyl v. Fairbank*, 8 O. W. R. 271.

**3. Arbitration clause — Action—Stay of proceedings—Willingness to arbitrate.** *Fernan v. Monitor* (B.C.), 3 W. L. R. 426.

**4. Contract not yet executed — Grounds for rescission.] —** There is no ground for a demand for the rescission of a contract in course of execution, except when the debtor is actually in default as regards the fulfilment of the obligations which arise from it. Consequently, the probability of his not being able to perform it within the time agreed upon, however strong that may be, and his default in accomplishing what is required by the contract, according to the mode or in the order provided, are not grounds sufficient to give the creditor the right to exercise this remedy. *Flood v. Larouche*, Q. R. 28 S. C. 271.

**5. Division of estate — Release—Action to set aside—Delay—Statute of Limitations — Misrepresentations — Undue influence—Improvidence—Failure of proof.** *Collins v. Bobier*, 8 O. W. R. 111.

**6. Time for performance — Implication of law—Undue delay—Notice.]—** Where no time is specified between the parties for the carrying out of a contract, the law implies that it should be carried out within a reasonable time, having regard to all the circumstances. If there be an undue delay on the part of either party, the other party has the right to notify him that unless the contract is carried out within a specified time, such time to be reasonable, the contract will be considered at an end, and where the

work to be done requires a considerable period of time he may also fix a reasonable time for its commencement. *Johnson v. Dunn*, 11 B. C. R. 372, 2 W. L. R. 317.

## VII. SALE OF GOODS.

**1. Account — Gold dust — Water—Counterclaim—Set-off—Costs.** *Morin v. McDonald* (Y.T.), 4 W. L. R. 159.

**2. Agreement as to prices on resale—Illegal combination or conspiracy unduly to enhance prices and lessen competition—Refusal to enforce contract.]—**The plaintiffs, manufacturing chemists and sole owners of certain proprietary medicines, brought this action for damages and for an injunction to restrain the breach of two contracts entered into between themselves and the defendants, in one of which the defendants covenanted not to sell wholesale any of the plaintiffs' preparations below the price therein mentioned, and in the other not to sell the same to any retailer except at the prices therein mentioned, and then only when such retailer had signed an agreement with the plaintiffs. The agreement was in the form adopted by the committees representing a large part of the wholesale and retail trade, and the evidence shewed that the commodities in question could not be purchased by the defendants or any one else unless and until they had signed the agreements in question: — *Held*, that the agreements were a breach of ss. 516 and 520 of the Criminal Code, inasmuch as they unduly prevented, and in fact entirely destroyed, competition in the articles referred to, and affected the entire trade in such articles. *Wampole & Co. v. F. E. Kern Co., Limited*, 11 O. L. R. 619, 7 O. W. R. 810.

**3. Time of shipment — Fulfilment of provision—Time of loading on cars—Receipt of shipping bill—Place of weighing—Costs.]—**A contract for the sale of a car load of wheat to be shipped in the first half of October is fulfilled if the grain is loaded on a car on or before the 15th of that month, although the bill of lading is not signed until the 17th and is not received by the purchaser until the 19th. Shipment means simply putting on board. *Bowes v. Shand*, 2 App. Cas. 455, followed.—The car of wheat in question was shipped from a station of the O. N. R., and was, in the regular course of the traffic over that railway, sent to Port Arthur, and the wheat was weighed there and not at Fort William, where wheat sent over the C. P. R. is generally weighed; and it ap-



peared that the insertion in the contract of the words "Fort William weight." was inadvertently made by the defendants' manager who had prepared it, and that it really made no difference to the defendants whether the wheat was weighed at one of those places rather than the other:—*Held*, that the plaintiff was entitled to recover, although the weighing had not been at Fort William.—When the defendants' manager received the shipping bill, he objected to the delay, as the price of wheat had declined, but offered to pay within \$5 of the amount demanded by the plaintiff:—*Held*, that the plaintiff should not have incurred the risk of litigation for so small a sum, and should be deprived of costs on that account. *Perry v. Manitoba Milling Co.*, 15 Man. L. R. 523, 1 W. L. R. 541.

**4. Warranty**—Test of machine—Jury — Ambiguous answers — New trial — Amendment. *Underfeed Stoker Co. v. Ready*, 1 E. L. R. 502.

## VIII. TIMBER AND LUMBER.

**1. Cutting logs**—Survey—Qualification of surveyor.]—A written contract, under which L. was to cut logs for P. at a stated sum per thousand, contained a clause providing that the logs were to be surveyed by any surveyor P. might have in his employ, said survey to be final:—*Held*, that a survey made by two surveyors employed by P., who surveyed about one-third of the logs, counted the balance, and made an estimate of the count on the basis of the survey, might be a good survey under the contract.—It is not necessary that the surveyor should be qualified under R. S., tit. xvii., c. 96, and amending Acts. *Patterson v. Larsen*, 37 N. B. R. 28.

**2. Hauling tan bark**—Cord—Agreement as to cubic contents—Admission of evidence of collateral agreement as to sale—Jury—Submitting questions. *Shaw v. Stairs*, 2 E. L. R. 111.

**3. Lumbering operations** — Cleaning out stream—Allowance for—Proportion of cost—Driving timber—Breach of contract—Construction of contract—Impossibility of performance — Failure to get logs out—Measure of damages—Destruction of logs by fire—Negligence—Nominal damages—Interest — Costs—Claim and counterclaim. *E. B. Eddy Co. v. Rideau Lumber Co.*, 8 O. W. R. 361, 839.

**4. Purchase of timber limits** — Agreement to share profits — Denial of

signature — Action to perpetuate testimony and enforce agreement—Assignee of part of claim—Purchase for benefit of incorporated company—Parties—Amendment—Declaratory judgment. *Millar v. Beck*, 8 O. W. R. 501.

**5. Sale of growing timber**—Time for removing—Subsequent growth.]—The right, by virtue of an agreement, to cut and remove a certain kind of wood from land, during a fixed period of time, extends to subsequent growths of the same kind of wood as long as the period endures. *Belouin v. Hovey*, Q. R. 28 S. C. 31.

**6. Sale of timber limits**—Ascertainment of price—Survey—Boundaries.]—A stipulation in a sale of timber limits, estimated to contain 5,550 acres, that the seller will cause the acreage to be verified by a sworn provincial land surveyor within a reasonable time, and upon a sworn statement by such surveyor, the purchaser will pay for any number of acres in excess of the 5,550, at the rate of \$2 per acre, does not contemplate a survey that will settle the boundaries of the limits as against third parties, neighbours, or squatters, but simply a verification of the area of the property sold, in order to arrive at an equitable settlement of the price. *Nadcau v. Price*, Q. R. 14 K.B. 439.

**7. Supply of bark**—Dispute as to quantity — Measurements — Action — Counterclaim — Costs. *Hamill v. Muskoka Leather Co.*, 7 O. W. R. 751.

**8. Supply of logs**—Action for price —Subsequent agreement—Finding of trial Judge — Appeal — Costs — Discretion—Payment into Court. *Payne v. Murphy*, 8 O. W. R. 972.

**9. Supply of logs**—Condition—Driving and towing — Season for towing. *Playfair v. Turner Lumber Co.*, 8 O. W. R. 614.

**10. Supply of logs**—Moneys advanced—Scaling logs—Conditions of contract—Duty to measure — Implied contract — Ascertainment of quantity—Impossibility of performance. *Iequime v. Brown* (B.C.), 3 W. L. R. 480.

**11. Supply of logs**—Permission to use roads—Failure to furnish good road — Oral representations — Evidence of—Admissibility — Conflict. *Charest and Brunet v. Chew*, 7 O. W. R. 241.

**12. Supply of lumber** — Survey—Statute.]—The Act relating to the survey and exportation of lumber, C. S. N.

B. c. 96, does not apply to contracts for small lumber such as is used for pulp-wood. *Rose v. St. George Pulp and Paper Co.*, 37 N. B. R. 247. Affirmed, *St. George Pulp and Paper Co. v. Rose*, 37 S. C. R. 687.

## IX. WORK, LABOUR, AND MATERIAL.

**1. Accidental destruction of product of work before completion—Liability for loss.]**—When work is undertaken by contract or by estimate and bargain, and the articles produced by the work are destroyed by accident before completion and delivery to the employer, the loss is that of the workman or contractor. *Shallow v. Lessard*, Q. R. 14 K. B. 292.

**2. Action for price of work—Plaintiff contracting in partnership name—Failure to register declaration—Effect on contract—Penalty—Partnership Act.]**—The plaintiff sued the defendant for a balance due on a printing contract. The plaintiff carried on business under the name of the Victoria Printing and Publishing Company, during the term of the contract, until after his action was launched, and in excess of a period of three months, without having complied with the provisions of ss. 74 and 75 of the Partnership Act, which require (s. 74) every person trading alone under a firm or company name implying a plurality of partners, to file a declaration to that effect with the registrar of the County Court of the county in which the business is being conducted, and (s. 75) that such declaration shall contain certain particulars and be filed within three months of the adoption of such firm or company name. The defendant contended that the action was barred by his non-compliance with ss. 74, 75, and 76, and that he therefore could not enforce the contract:—*Held*, that while the plaintiff came within the wording of the statute, and became liable to the penalty provided for not registering, yet the penalty is imposed for something not contemplated by the contract in this case, and he was therefore entitled to recover. *Smith v. Finch*, 12 B. C. R. 186, 3 W. L. R. 476.

**3. Faulty work — Extras — Dismissal.]** — On appeal by the defendants from the judgment of the Court of Appeal in *Metallic Roofing Co. of Canada v. City of Toronto*, 6 O. W. R. 656, the Supreme Court of Canada held that the plaintiffs could not recover for extras, as the terms of the contract in respect thereto had not been observed. It was held, however, that the plaintiffs were

entitled to damages for wrongful dismissal, and the judgment below was varied by directing that the reference should include such damages. No costs of the appeal were given. *City of Toronto v. Metallic Roofing Co. of Canada*, 37 S. C. R. 692.

**4. Performance of work within fixed time—Penalty for delay—Delay caused by owner.]**—A person who undertakes by contract to build a bridge for a municipal corporation, to be completed and delivered at a stated date, under a penalty of \$5 per diem for delay, is liable only for such delay as occurs through his own fault or negligence, and not for that caused by failure of the corporation to locate, through some proper officer, as agreed, the site of the abutments, or by their altering the work, during performance, and substituting iron railings for the wooden ones mentioned in the contract. *Dupuis v. Parish of Laprairie*, Q. R. 28 S. C. 196.

**5. Supply of railway material—Payment—Certificate of railway commission's engineer — Condition precedent—Interference by commission with engineer—Fraud — Hindering performance of condition—Monthly estimates—Finality—New trial.]**—The plaintiff supplied the defendants with railway ties under a written contract, which provided that 90 per cent. of the value of the ties delivered and accepted was to be paid monthly on the written certificate of the engineer, which was to be a condition precedent to the right of the plaintiff to be paid the 90 per cent., or any part thereof; the remaining 10 per cent. to be retained until the final completion of the whole work to the satisfaction of the engineer, whereupon the engineer was to give the final certificate accordingly, and such 10 per cent., or the balance payable under the contract, was to be paid within 40 days after the granting of such final certificate, which was also to be a condition precedent to the right of the plaintiff to be paid 10 per cent., or any part thereof; and it was declared that the word "engineer" should mean the chief engineer for the time being appointed by the defendants having control of the work of construction of the defendants' line of railway:—*Held*, that under this contract the certificate was in the nature of a condition precedent, and, while the plaintiff might be said to have agreed to the risk of the natural bias created by the situation, he was entitled to have at the hands of the engineer, the defendants' servant, good faith, and the expression of his own honest opinion. The employer has the right to direct the attention of the certifying official, before he certifies.

to alleged defects of performance, and to ask for care and diligence in the discharge of his duty, but he has no right to dictate or impose his own opinion; and any attempt by the employer to do so, especially if yielded to by the servant, is in the nature of a fraud, or is at all events evidence of fraud which will, if established, relieve the plaintiff from the necessity of obtaining the certificate—no one can take advantage of the non-fulfilment of a condition the performance of which he has himself hindered.—And *held*, in the circumstances of this case, that there was evidence for the jury that the defendants had prevented their engineer from certifying; and a nonsuit was set aside and a new trial directed.—*Semble*, that the monthly estimates certified to by the engineer under the contract were final as to the quantities mentioned in them. Judgment of FALCONBRIDGE, C.J.K.B., reversed. *Wallace v. Temiskaming and Northern Ontario Railway Commission*, 12 O. L. R. 126, 7 O. W. R. 663. An appeal from this decision was dismissed by the Supreme Court of Canada, no opinion being expressed on the merits, and the reasons of the Court of Appeal not being adopted. *Temiskaming and Northern Ontario R. W. Commission v. Wallace*, 37 S. C. R. 696.

**6. Terms and conditions** — Payment—Satisfaction of engineer—Value of work—Conflicting evidence. *Wallace v. Township of Tilbury East*, 7 O. W. R. 34.

**7. Time fixed for completion**—Delay of owner of building — Increase in cost of materials—Contract price—Correspondence — Quantum meruit. *Sherlock v. City of Toronto*, 8 O. W. R. 646.

## X. MISCELLANEOUS.

**1. Action to enforce**—Counterclaim for damages — Judgment dismissing action and counterclaim—Appeal by plaintiff—No appeal by defendant—Appellate Court no jurisdiction to enter judgment in defendant's favour on counterclaim. *Corbin v. Purcell*, 2 E. L. R. 217.

**2. Gaming transaction**—*Intention*.] —A contract, to be a gaming transaction, must be so in the intention of both the parties to it. The intention to gamble of one of them, even though known to the other, does not alter the nature of the contract. *Brosseau v. Bergerin*, Q. R. 27 S. C. 510.

**3. Implied contract**—Payment for keep of horse—Proof of ownership.]—

The obligation, quasi-contractual, to reimburse money expended upon the chattel of another person (in this case the keep of a horse), arises from the fact of ownership of the chattel, which it is necessary to prove against one from whom reimbursement is sought. *Richard v. Stevenson*, Q. R. 28 S. C. 188.

**4. Judicial sale of land**—*Agreement not to bid*—*Consideration*—*Validity*—*Limitation to particular sale*.] — An agreement by which a person undertakes for a legal consideration not to bid at a judicial sale of immovables is lawful and valid. Such an agreement made on the day before the sale, with the condition that the person to whom the undertaking is given shall become the purchaser, is to be regarded as made in view of this particular sale only, and the condition not being realized, is extinguished. It is vain to attempt to revive the undertaking and exact the consideration several years later, under pretext that the condition has been realized at a subsequent judicial sale of the same property made in different circumstances. *Duhamel v. O'Sullivan*, Q. R. 15 K. B. 109.

**5. Mining location** — Discovery of minerals—Agreement between prospectors—Declaration of interest of co-owners—Statute of Frauds—Trust—Lease taken in name of one—Agreement of lessee with stranger — Construction—Ratification by co-owners—Notice of interests of co-owners—License to mine—Taking out ore—Share in proceeds—Fraud—Amendment—Land Titles Act—Injunction—Costs. *McLeod v. Lawson*, *McLeod v. Crawford*, 7 O. W. R. 319, 8 O. W. R. 213.

**6. Novation**—*Discharge of old contract*—*Statute of Frauds*—*Breach of contract*—*Damages*—*Recovery of money paid*.]—1. If the parties to a written contract enter orally into a new agreement to be substituted for it, such new agreement, although, by reason of the Statute of Frauds, it cannot be enforced, will have the effect of discharging and cancelling the written contract.—*Goss v. Lord Nugent*, 5 B. & Ad. 65, *Morgan v. Bain*, L. R. 10 C. P. 15, and *Ogle v. Lord Vane*, L. R. 3 Q. B. 272, followed.—2. In such case neither party can enforce the new agreement or recover damages as for a breach of the written contract.—3. Any money or other consideration, however, that may have been paid or given under the substituted agreement by one of the parties to the other may be recovered back or its value sued for by such party. *Clements v. Fairchild Co.*, 15 Man. L. R. 478, 1 W. L. R. 524.

**7. Part performance—Settlement of action—Litigious rights—Party in default—Judgment.]**—An agreement between the parties to several transactions involving litigation, to do a series of acts, in settlement of their differences, is divisible, and a performance of part of them will be held binding and effective, notwithstanding the failure to perform the whole, more particularly as against the party through whom such failure occurs.—2. A right affirmed by a judgment is, by law, excluded from the class of litigious rights, and is not, therefore, subject to the restraints put upon the sale and alienation of such rights. *Armstrong v. Connolly*, Q. R. 14 K. B. 295.

**8. Patent for invention—Agreement to transfer—Allotment of shares—Concurrent conditions—Injunction.]**—The plaintiffs and defendant entered into an agreement in writing for the assignment by the defendant to the plaintiffs of all his rights in a gold separator of which he was the inventor, upon receiving a certain number of shares in a company to be organized for the purpose of obtaining a patent for the separator and for other purposes in connection therewith. Prior to the incorporation of the company a patent obtained in Canada was assigned to the plaintiffs, and an action was brought for an injunction to prevent the defendant from dealing as his own, with a patent obtained in the United States, and which was included within the terms of the agreement:—*Held*, that the obligation to transfer the invention on the one side and to allot the shares on the other were concurrent conditions, and that the plaintiffs had no right to ask for a transfer of the invention until they were ready to deliver the shares.—*Held*, also, that, in the absence of any indication of readiness or willingness on the part of plaintiffs to perform their part of the agreement, they were not in a position to come into a court of equity and ask for an injunction against the defendant to restrain him from selling the American patent, or for a declaration as to their interest in it. *Sutherland v. Westhaver*, 39 N. S. R. 52, 1 E. L. R. 102

**9. Sale of land—Payment to be made upon plaintiff producing purchaser—Refusal of defendant to make sale—Damages for breach of contract—Interest of plaintiff in lands—Forfeiture—Construction of contract.** *Rogers v. Braun* (Man.), 4 W. L. R. 40.

**10. Sale of railway charter—Share of promoter in proceeds—Remuneration for services—Amount fixed by referee—Quantum meruit—Evidence.** *Paradis v. National Trust Co.*, 7 O. W. R. 756, 8 O. W. R. 707.

**11. Sale of restaurant business and furniture—Action for balance of purchase price—Counterclaim for goods wrongfully removed by vendor—Evidence—Presumption from wrongful acts—Costs.** *Ross v. Parks* (Man.), 4 W. L. R. 212.

**12. Supply of gas—Fixing rate—Oral agreement—Conversations—Evidence.** *Selkirk Gas and Oil Co. v. Erie Evaporating Co.*, 8 O. W. R. 667.

**13. Use of licensed premises—Exclusive occupation—Landlord and tenant—Breach of contract—Damages.]**—An agreement between a licensed restaurant keeper and a third person whereby the latter engages, under a penalty, to fulfil the obligation of the former prescribed by the License Act, s. 913, to be able at all times to furnish meals to at least ten persons at one time, implies the right of the third person to use the restaurant for this purpose, but does not give him any right of exclusive occupation; and the relationship of landlord and tenant does not arise from the agreement. Therefore, the restaurant keeper has no right to refuse the person with whom he contracts access to the restaurant, and the refusal of the latter to perform his engagement is equivalent to a renunciation of the bargain on his part and puts an end to it.—One who violates the right of another, while not causing any appreciable injury, is nevertheless liable to exemplary damages. *Bourque* 1. *Massé*, Q. R. 28 S. C. 133.

**14. Validity—Taking effect at death—Testamentary disposition—Married woman—Absence of authorization.]**—A writing in the following words, "I hereby state that if death should overtake me, I hereby wish and command that she shall have the option on all the Bridge Company stock held by me, paid for or on option of same," does not disclose a perfected agreement or undertaking transmissible to and binding on the legal representatives of the writer. It amounts at most to a testamentary disposition, and is therefore subject to revocation by a subsequent will.—*Per* TRENHOLME, J.—Even if such a writing were a valid contract in form, it would be null and void in the present instance, because the obligee, a married woman, was not authorized thereto by her husband or by a Judge. *Pattle v. Simpson*, Q. R. 14 K. B. 178.

## CONTRIBUTION.

**Action for—Joint tort-feasors—Res judicata—Remedy over.]**—A party sued

jointly with another in damages for a tort, who is condemned alone, the action being dismissed as to the other, and who pays the plaintiff the amount of the judgment, has an action against his co-defendant to recover the whole or part of the amount so paid, accordingly as it is proved at the trial of such action that the tort was caused solely or in part by such co-defendant. The judgment in the original suit is not *chose jugée* between the joint tort-feasors, and their liability to one another is not affected by it, nor by the payment made by the one against whom it was rendered. *Mills v. Cox*, Q. R. 28 S. C. 375.

See INSURANCE, II. 8.

### CONTRIBUTORY.

See COMPANY.

### CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT—NEGLIGENCE—NUISANCE, 4—RAILWAY—STREET RAILWAYS, II., III.—WAY, III.

### CONTROVERTED ELECTIONS.

See PARLIAMENTARY ELECTIONS.

### CONTROVERTED ELECTIONS ORDINANCE.

See CONSTITUTIONAL LAW, 4.

### CONVERSION.

**1. Bill of Sale—Estoppel—Misdirection.]**—F. claimed to be the owner of a horse that S. had given her for the board of herself and child. S., being indebted to H., left the province, and H. seized the horse as the property of S. under an absconding debtor's warrant. While the horse was in the possession of the sheriff under the warrant, negotiations were had with H. by persons professing to be acting for F., and a bill of sale of the horse was given to H., and the horse was returned to F. The amount secured by the bill of sale not having been paid, H. seized the horse under the bill of sale,

and F. brought an action in the Kent County Court against H. for a conversion of the horse. On the trial, the Judge told the jury that the only question was, who was the owner of the horse at the time it was taken, and that the plaintiff was not estopped by the bill of sale from recovering in the action:—*Held*, on appeal from a judgment affirming a verdict entered on a finding on this direction, that the direction was right. *Hannay v. Fraser*, 37 N. B. R. 39.

**2. Sale by sheriff under execution—Action for conversion—Goods of partnership—Misdirection—New trial.]**—L. and P. each carried on business in Saint John, buying and selling fruit. P. was a licensed auctioneer. To avoid competition between the parties, it was agreed that P. was to buy all the apples handled by either in the market square, L. to furnish the money when apples were purchased. All commissions on commission sales, and net profits on sales of apples purchased, were to be equally shared. Under this agreement P. purchased the cargo of the schooner C., some 342 barrels. After a part had been sold, the sheriff, under an execution in the suit of R. against P., seized and, without removing any of them, sold 62 barrels. At the sale the sheriff, in answer to a bidder, stated that he was selling P.'s interest only, and would guarantee nothing, and he did not deliver the barrels sold to the purchaser. In an action of trover, brought by L., in the St. John County Court against the sheriff for a conversion of the 62 barrels, the Judge told the jury that if they found that the apples were purchased under the agreement on the joint account of L. and P., there was a conversion, and the verdict should be for the plaintiff:—*Held*, on appeal, that the direction was wrong, and there must be a new trial. *Ritchie v. Law*, 37 N. B. R. 36.

**3. Trespass—Horse used in common—Exchange by person not its owner—Owner's right to substituted horse.** *Dillman v. Simpson*, 2 E. L. R. 105.

See CARRIERS, 5—CONTRACT, III. 11—COSTS, VIII. 7—EXECUTORS AND ADMINISTRATORS, 11—ILLEGAL DISTRESS—SALE OF GOODS, II. 4—VENDOR AND PURCHASER, I. 16.

### CONVEYANCE OF LAND.

See DEED—TRUSTS AND TRUSTEES, 1, 2, 6, 7, 11, 12, 13—VENDOR AND PURCHASER, I. 4, 6, 14.



**CONVICTION.**

See CANADA TEMPERANCE ACT — CENSURE—CONSTITUTIONAL LAW, 12 — CRIMINAL LAW—HABEAS CORPUS, 3—HAWKERS AND PEDLARS—INDIAN — INFANT, 3 — JUSTICE OF THE PEACE — LIQUOR LICENSES—MUNICIPAL CORPORATIONS, VII. 1, 5 — POLICE MAGISTRATE—PROHIBITION—PUBLIC HEALTH—RAILWAY, X, 2—SEMP. 24, 25—STIPENDIARY MAGISTRATE.

**COPYRIGHT.**

**1. Assignment of British copyright—Canadian registration—Infringement—Proof of title—Imperial statute.]**—The assignee of a copyright granted in England under 5 & 6 V. c. 45 (Imp.) is entitled to copyright of the same work, etc., in Canada by having it registered at the Department of Agriculture, under the provisions of R. S. C. c. 62, s. 6.—Upon suit brought for infringement of such a copyright, the certificate of its registration by the proper officer of the department, together with proof of the assignment of the British copyright, is sufficient evidence of the plaintiff's title to the same.—Evidence, in addition to the foregoing, that the work had been entered at Stationers' Hall, London, Eng., entitles the plaintiff to his remedy under the Imperial Act. *Anglo-Canadian Music Publishers Association v. Dupuis*, Q. R. 27 S. C. 455.

**2. Dramatic rights—Acquisition by foreigner—Defence denying title—Striking out pleading.** *Lieber v. Harkins*, 1 E. L. R. 157.

**3. Drawings—Publication in newspapers—British copyright—"Book"—Contract—"Assign"—Foreign author—4 & 5 V. c. 45 (Imp.)—Infringement—Form of indictment—Injunction—Delivery up of copies.]**—The plaintiffs claimed copyright in certain cartoon drawings and the accompanying titles and letter-press prepared for the plaintiffs by a celebrated artist, and first published simultaneously in the plaintiffs' newspaper in the United States and in another newspaper in England owned by one H., under agreements between H. and the plaintiffs, to which the artist was also a party. By the agreements H. was acknowledged to be the owner of the British copyright. H. granted a license to the artist to publish the drawings in book form in the United Kingdom. Entry was duly made at Stationers' Hall of H.'s ownership of the copy-

right of his newspaper. Subsequently this copyright was said to have been assigned by H. to H. & Sons, and before this action was brought H. & Sons registered eight copies of the newspaper containing the eight drawings and letter-press in question, and assignments thereof to the plaintiffs. Before this registration the defendants had, without the consent of the plaintiffs or their predecessors, printed in Canada for the purpose of sale a quantity of pictorial post cards, on which were reproduced copies of the eight drawings, taken from books published by the artist under the license mentioned, but not registered at Stationers' Hall. The artist was not a British subject, and was not, at the time of the preparation or publication of the material in England, within any part of the British dominions. None of the material was protected by a Canadian copyright:—*Held*, that the effect of the agreements referred to was to vest in the plaintiffs the common law right to copyright in the drawings, and this right was validly transferred to H., who was an "assign" of the artist or author, within the meaning of s. 3 of the Imperial Copyright Act, 4 & 5 V. c. 45; and the English newspaper was a book within the meaning of that section, and H. became entitled thereunder to statutory copyright in the drawings as part of his book, for when drawings form part of a book they come within the provisions of that Act, and are protected not only as part of the book but as drawings.—*Maple & Co. v. Junior Army and Navy Stores*, 21 Ch.D. 589, and *Bradbury v. Hotten*, L. R. 8 Ex. 1, followed.—*Held*, also, that the evidence sufficiently established the plaintiffs' title to the copyright by re-assignment.—*Held*, also, that the present Copyright Act protects the productions of foreign authors wheresoever resident, where there is a first or contemporaneous publication within the Empire.—*Jefferys v. Boosey*, 4 H. L. C. 815, and *Routledge v. Lou*, L. R. 3 H. L. 100, discussed.—*Held* therefore, that the plaintiffs were entitled to an injunction, and to delivery up of the infringing copies.—*Judgment of Teetzel, J., affirmed.* *Life Publishing Co. v. Rose Publishing Co.*, 12 O. L. R. 386, 7 O. W. R. 337, 8 O. W. R. 28.

**CORROBORATION.**

See CRIMINAL LAW, I. 4.

**CORRUPT PRACTICES.**

See MUNICIPAL ELECTIONS, 7, 11—PARLIAMENTARY ELECTIONS.

**COSTS.**

- I. DEPRIVING PARTY OF COSTS.
- II. DISTRIBUTION OF COSTS.
- III. RIGHT TO COSTS.
- IV. SCALE OF COSTS.
- V. SECURITY FOR COSTS.
- VI. SET-OFF OF COSTS.
- VII. TAXATION OF COSTS.
- VIII. MISCELLANEOUS.

See ARCHITECT, 2—ARREST, 9, 12—ASSESSMENT AND TAXES, 15, 16, 17—ATTACHMENT OF DEBTS, II. 3—ATTACHMENT OF PERSON—BANKRUPTCY AND INSOLVENCY, 13, 24, 30—BENEVOLENT SOCIETY, 3—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 6—BROKER, 2—CARRIERS, 1—CHOSE IN ACTION, ASSIGNMENT OF, 3—COMPANY, I. 2, II. 3, 8, III. 22, 27, IV. 3—CONTEMPT OF COURT, 4—CONTRACT, I. 4, III. 9, VI. 2, VII. 1, 3, VIII. 3, 7, 8, X. 5, 11—COURTS, I.—CRIMINAL LAW, III. 36, 37, IV. 6—CROWN, 7—DAMAGES, 6, 7—DEED, 8—DEFAMATION, 4, 6—DISCOVERY, IV. 6—DISMISSAL OF ACTION, 2, 3, 4, 6—DOWER, 2—EASEMENT, 1—EJECTMENT, 2, 3—EXECUTORS AND ADMINISTRATORS, 4, 5—FIRE, 2—FISHERIES, 4—FRAUDULENT CONVEYANCE, 1—GIFT, 1—HAWKERS AND PEDLARS—HUSBAND AND WIFE, I. 2, VII. 6, VIII. 2—INFANT, 2, 7—INJUNCTION, 10, 13—INSURANCE, I.—INTEREST, 1—JUDGMENT, I. 4, 5, 7, II. 3, IV. 3—JUDGMENT DEBTOR, 1—JUSTICE OF THE PEACE, 1, 2, 11—LANDLORD AND TENANT, 6—LIMITATION OF ACTIONS, I. 5—LIQUOR LICENSES, 13—MASTER AND SERVANT, I. 6—MECHANICS' LIENS, 2, 6—MEDICAL PRACTITIONER, 3, 4—MINES AND MINERALS, 7, 10—MORTGAGE, 5—MUNICIPAL CORPORATIONS, V. 2, 3, IX. 6, XIV. 5—OPPOSITION, 1—PARTIES, I. 11, 13, II. 7—PARTNERSHIP, 14—PLEADING, III. 2, VIII. 5, 8, 11, IX. 2, 7, 8, 11—PRACTICE, 4—PRINCIPAL AND AGENT, 1—RAILWAY, IV. 3, IX. 2, 9—REFERENCE—SALE OF GOODS, I. 5, 8, 12, V. 3, 5—SCHOOLS, 5—SET-OFF, 3, 5—SHIP, 9, 11, 13, 21, 24—SOLICITOR—TRADE MARK, 1—TRESPASS TO LAND, 1—TRUSTS AND TRUSTEES, 3, 7, 10, 13, 14—VENDOR AND PURCHASER, I. 5, 12, 28, 29, 36—VENUE, 6, 9, 12, 18—WATER AND WATERCOURSES, 7—WAY, III. 1, 8, VI. 1—WRIT OF SUMMONS, 18.

**I. DEPRIVING PARTY OF COSTS.**

**1. Class action** — Plaintiff held not entitled to sue. *Hart v. City of Halifax*, 2 E. L. R. 158.

**2. Defamation**—Verdict for defendant—Depriving defendant of costs—Discretion—Rule 1130—Good cause. *Byers v. Kidd*, 8 O. W. R. 739.

**3. Discretion — Appeal to Supreme Court of Nova Scotia.**—In an action brought by the plaintiff against the defendant for the conversion of a two-masted schooner, the "Mayflower," the trial Judge found that the property claimed was that of the plaintiff, when taken by the defendant, but he deprived the plaintiff of costs on the ground of fraudulent proceedings in connection with the prosecution of his claim.—It appeared that some time previously the defendant recovered judgment against the plaintiff, and issued execution, under which the property in question was levied upon, and that, at the instance of the plaintiff, an action was brought by his wife to recover the property, alleging it to be hers. Afterwards, the judgment recovered by the defendant against the plaintiff having been set aside, the plaintiff brought this action in his own name:—*Held*, that the Judge's discretion was properly exercised, and that, on a question of fact, and especially a question of costs, it should not be reviewed. *Jenkins v. McAdam*, 38 N. S. R. 124.

**4. Mortgage action** — Depriving mortgagee of costs—Reference—Conduct of mortgagee—Costs awarded to mortgagor — Discretion — Appeal. *Bank of Hamilton v. Leslie* (N.W.T.), 3 W. L. R. 401.

**II. DISTRIBUTION OF COSTS.**

**1. Appeal from award — Five grounds of appeal—Success on one—"Event" — Statutes — Construction.]**—Sam Kee, having obtained an award from arbitrators appointed under the Railway Act, 1903 (Dominion), which award, by reason of s. 162 of the Railway Act, 1903, entitled him to the costs of the arbitration, the railway company appealed to the full Court, advancing several distinct grounds of appeal, on all of which with the exception of that relating to the rate of interest allowed by the arbitrators, they failed, the interest being reduced to the statutory rate, from six per cent. to five per cent.:—*Held*, IRVING, J., dissenting, that the word "event" in s. 100 of the Supreme Court Act, 1904, may be read distributively.—(2) That s. 162 of the Railway Act, 1903 (Dominion), does not apply to costs of appeals to the full

Court from the award of arbitrators, but that such appeal is an independent proceeding, and is therefore governed by s. 100 of the Supreme Court Act, 1904.—

(3) That the success of the appellant company on the question of interest was merely an "issue" arising on the appeal, and not an "event" on which it was taken. *Vancouver, Westminster, and Yukon R. W. Co. v. Sam Kee*, 12 B. C. R. 1; *Re Sam Kee*, 3 W. L. R. 8.

**2. Appeal to full Court—Supreme Court Act, 1904, s. 100—"Event"—Set-off.]**—By s. 100 of the Supreme Court Act, 1904, the legislature provided an automatic code for the disposition of the costs of all trials, hearings, and appeals in the Supreme Court, and swept away all discretion save in relation to the specific exceptions set out in s. 100.—Therefore, in an action relating to the validity of a will, the full Court could not order that the costs of an appeal thereto should be paid out of the estate, but was confined to a strict observance of the section. But, there being two distinct appeals, the Court could and ought to distribute the costs according to the event of each, and, success being divided, to order a set-off. *Hopper v. Dunsmuir*, 12 B. C. R. 18, 3 W. L. R. 35.

### III. RIGHT TO COSTS.

**1. Abandoned motion—Examination of transferees of judgment debtor.** *Lumbers v. Dundass*, 7 O. W. R. 250.

**2. Action dismissed with costs—Successful appeal by plaintiff—Further appeal to Privy Council—Original judgment restored.]**—In a suit against L. and R. the bill was dismissed by this Court with costs. An appeal to the Supreme Court was allowed with costs. On appeal by R. to the Judicial Committee of the Privy Council it was ordered that the decree of the Supreme Court should be discharged as against the appellant with costs, and that the decree of this Court should be restored:—*Held*, that costs under the original decree should be taxed to L. *Fairweather v. Robertson*, 3 N. B. Eq. 276; *Fairweather v. Lloyd*, 1 E. L. R. 154.

**3. —Company — Winding-up — Costs of alleged contributories payable out of assets—Deficiency — Costs of petitioning creditors — Liquidator's costs and compensation—Priority — Abatement]**—On the application of the liquidator of a

company directed to be wound up, an order was made by a local Judge directing two persons to be placed on the list of contributories, which was affirmed by a Judge of the High Court and by the Court of Appeal, but was reversed by the Supreme Court of Canada with costs to be paid by the liquidator as well of that Court as of the prior appeals:—*Held*, that the successful appellants were entitled to their costs out of the assets of the estate in priority to those incurred by the liquidator—the reasonableness of the liquidator's claim forming no element in the matter—but subject to certain costs payable by the liquidator to the petitioning creditors, and to such costs of litigation as were incurred by the liquidator in the realization of certain assets, as well as a reasonable sum as compensation for his care and trouble in such realization, payable out of the assets so realized. *Re Baden Machinery Co.*, 12 O. L. R. 634, 8 O. W. R. 555.

**4. Divided success.** *Cairns v. Murray*, 1 E. L. R. 93.

**5. Interlocutory motion—Costs reserved to be disposed of at trial—Jurisdiction of trial Court after appeal.]**—Where on an interlocutory motion costs are reserved to be disposed of at the trial, and the trial is had without any reference to these costs, if an appeal from such judgment be taken and the judgment affirmed, the jurisdiction of the appellate Court attaches, and the trial Court on the further application has no power to render any further decision unless remanded, and even then the court will deal with such application only under special circumstances. *Tucker v. The "Tecumseh"*, 10 Ex. C. R. 153, 7 O. W. R. 377.

**6. Motion for better affidavit on production of documents—Production of document sought — Costs of motion.** *Canadian General Electric Co. v. Keystone Construction Co.*, 8 O. W. R. 683.

**7. Motion to quash municipal by-law—Intervening statute validating by-law—Costs left to discretion of Court—Costs in Court of Appeal.** *Re Cartwright and Town of Napanee. Re Knight and Town of Napanee*, 8 O. W. R. 65.

**8. New trial—Contradictory findings of jury.]**—Where it was held that both parties to the action were entitled to a new trial because of the contradictory findings of the jury, and a new trial was



ordered, no costs of the appeal or of the application for a new trial were allowed, and the costs of the former trial were made costs in the cause. *Kirk v. Chisholm*, 39 N. S. R. 98.

**9. Postponement of trial—Powers of Judge in Chambers after trial.** *Liddiard v. Toronto R. W. Co.*, 8 O. W. R. 222.

**10. Probate Court.** *In re McDonald Estate*, 2 E. L. R. 215.

**11. Solicitor—Lien or charge—Property preserved—Costs of action—Writ of attachment—Costs of interpleader proceedings—23 & 24 V. c. 127, s. 28 (Imp.)—Manitoba Rule 852—Ratable distribution of moneys realized—Priority—Salvage claim.** *Velentinuzzi v. Lenarduzzi* (Man.), 4 W. L. R. 226.

#### IV. SCALE OF COSTS.

**1. Action to quash municipal by-law.]** — Where an action to quash a municipal by-law, begun before the Superior Court, is dismissed, the attorney of the defendant corporation has a right to the fees appropriate to an action of the third class in the Superior Court. *Caillois v. Parish of St. Félix de Valois*, 8 Q. P. R. 33.

**2. Action to set aside resolution of municipal corporation.]** — When a direct action is taken to set aside a resolution of a municipal corporation, the costs should be taxed as in a contested action of the third class, although the disbursements are those of an action of the fourth class of the Superior Court. *Ledoux v. Corporation of St. Edwidge of Clifton*, 7 Q. P. R. 353.

**3. Contestation of opposition — Original action.]** — The fees taxable upon a contestation of an opposition *à fin de'annuler* are those appropriate to the original action, where the contestation is made by the plaintiff, by another party, or by a third person. *Sun Life Assurance Co. v. Palliser*, 7 Q. P. R. 455.

**4. Controverted municipal election — Local Improvement Ordinance—Taxation—Appeal—Direction as to scale of costs.** *Re Clark* (N.W.T.), 4 W. L. R. 316.

**5. District Court — Action beyond jurisdiction of County Court—Discretion of District Judge as to scale of costs—Rules of Court — Application of.]** — Where, in an action tried before a Dis-

trict Court Judge, without a jury, there is a recovery for an amount beyond the jurisdiction of the County Courts, the Judge is not compelled, under s. 11 of the District Courts Act, R. S. O. 1897 c. 109, read in the light of the Rules of Court applicable thereto, either to withhold costs altogether or to grant a certificate therefor on the High Court scale. He has a discretionary power, and may certify for costs on the County Court scale only. *Schaeffer v. Armstrong*, 12 O. L. R. 40, 8 O. W. R. 564.

**6. Opposition to sale—Class of action—Court of King's Bench—Amount in controversy — Insolvent estate.]** — On an opposition to the sale of personal and real property, the fees, in the Court of King's Bench, will be the same as on the original action, that being the limit of the plaintiff's interest, and consequently the value in contest.—2. On an intervention against a demand of abandonment, based upon the fact that a prior abandonment has already been made and a curator appointed thereto, the value in contest is the value of the insolvent estate. *Henderson v. Harbec*, 8 Q. P. R. 126.

**7. Set-off reducing claim to lower scale.** *Starratt v. Benjamin*, 2 E. L. R. 35.

See APPEAL, V. 11—CONTRACT, III. 6 —LANDLORD AND TENANT, 12.

#### V. SECURITY FOR COSTS.

**1. Absence from jurisdiction.** *Wallace v. Bank of Montreal*, 1 E. L. R. 232.

**2. Affidavit of merits — Belief — Sufficiency.** *O. W. Kerr Co. v. Lowe* (N.W.T.), 3 W. L. R. 400.

**3. Appeal to Supreme Court, N. W.T.—Extension of time for moving for security—Special circumstances—Poverty of appellant.]** — The Judicature Ordinance No. 6 of 1893, s. 504, as amended by Ordinance No. 7 of 1895, s. 7, provides that "No security for costs shall be required in applications for new trials or appeals or motions in the nature of appeals, unless by reason of special circumstances such security is ordered by a Judge upon application to be made within fifteen days from the service of the notice of motion, application, or appeal." The defendants succeeded at the trial. The plaintiff served notice of appeal, and at the expiration of 37 days obtained an ex parte order extending the time for filing the appeal books. This order was

obtained upon an affidavit of the plaintiff to the effect that owing to poverty he had been till then unable to procure sufficient means to meet the cost of printing. On the following day the defendants took out a summons to extend the time for applying for security for the costs of appeal, and for an order for security. The defendants' application was founded upon the plaintiff's affidavit, and a further affidavit to the effect that the sheriff was prepared to return "nulla bona" the execution against the plaintiff for the taxed costs of the action:—*Held*, that, inasmuch as the defendants' delay in applying for an extension of time within which to make their application for security for costs of appeal had not prejudiced the plaintiff, the extension should be granted. (2) That the plaintiff's poverty was a "special circumstance" entitling the defendants to security for the costs of appeal. *Morton v. Bank of Montreal*, 3 Terr. L. R. 14.

**4. Application for extension of time after dismissal of action.** *Hutchinson v. Twyford* (N.W.T.), 3 W. L. R. 66.

**5. Companies Act — Special provision for security—Action by company—Delay in applying—Costs of appeal—Supreme Court Act.]**—The defendants applied under s. 114 of the Companies Act, for security for the costs of the action, which had been decided in their favour, and also for the costs of the plaintiffs' appeal from that decision. The judgment appealed from was given in February, 1905; in March, 1905, the defendants were aware of the plaintiffs' inability to pay the costs of the action unless an appeal resulted in their favour. Taxation took place the 27th June, 1906, and the application for security was made on the 30th July, 1906:—*Held*, on appeal, that the application was made too late, the plaintiffs having in the meantime perfected all necessary steps for taking an appeal:—*Held*, as to the costs of the appeal, that s. 110 of the Supreme Court Act, which limits the security that may be required for costs of appeal to \$200, governed. *Star Mining and Milling Co. v. Byron N. White Co.*, 12 B. C. R. 355.

**6. Dilatory exception — Notice of deposit.]**—When the deposit required to support a dilatory exception is mentioned in the notice of motion given to the opposite party, the procedure is in accordance with the requirements of art. 165, C. P. *Leclair v. Mayrand*, 8 Q. P. R. 87.

**7. Effect of order obtained while motion pending—Right to enlarge motion.** *Stewart v. Lawrence*, 1 E. L. R. 163.

**8. Foreign corporation — "Residence"—63 V. c. 24 (O.)]**—In order to shew that a corporation resides in Ontario (within the meaning of Rule 1198), it should appear that the company is incorporated and has its head and controlling office within the jurisdiction where its business is carried on, and "residence," as contemplated by the practice as to security for costs, is not implied where a foreign corporation has only a constructive residence through agents acting in its business interests and licensed so to do in a comparatively small and transient sort of way, as were the plaintiffs in this action; and the evidence not disclosing sufficient property of the plaintiffs within the jurisdiction, they were ordered to give security for costs. Judgment of a local Master affirmed. *Ashland Co. v. Armstrong*, 11 O. L. R. 414, 7 O. W. R. 401.

**9. Motion — Stamps — Deposit.]**—A motion for security for costs is a preliminary exception, and the notice of motion must be stamped as such, and accompanied by the deposit required by law. *Williams v. Chicopee*, 7 Q. P. R. 411.

**10. Motion—Necessary deposit—Certificate—Service.]**—The service of a certified copy of the prothonotary's certificate of deposit, upon a motion by the defendant for security for costs, is a sufficient notice of the deposit; and a sufficient compliance with the Code of Procedure in that behalf. *Clifton Manufacturing Co. v. Montreal Canada Fire Ins. Co.*, 8 Q. P. R. 64.

**11. Opposition afin de conserver — Commencement of cause—Foreign corporation—Trustee for persons resident in jurisdiction — Contestants — Practice—Costs of motion.]**—An opposition afin de conserver is a proceeding which commences a cause, and when it is instituted by a corporation who have their head office abroad, they must file a procuration and furnish security for costs in accordance with art. 177, C.P.C. The capacity in which they act (in this case as trustees for persons residing in the province) cannot affect this obligation.—Security and procuration may be demanded by motion, as a preliminary matter, by every creditor interested who intends to contest the opposition, but the costs of the motion must follow the event of the cause. *Morse v. Lewis County R. W. Co.*, Q. R. 28 S. C. 42.

**12. Penalty—Qui tam action—Alien Labour Act.]**—The action given to "any person who first brings his action," etc., to recover the penalties imposed by the Alien Labour Act, 60 & 61 V. c. 11, as

amended by 1 Edw. VII. c. 13, is a *qui tam* or popular action, and the plaintiff may be required under art. 180, C. C. P., to give the security *judicatum solvi*. *Laurin v. Raymond*, Q. R. 20 S. C. 101.

**13. Plaintiff leaving jurisdiction after commencement of action**—Defendant's merits — Examination for discovery—Delay in applying—Discretion—Security for future costs. *Gumm v. McDonald* (Y.T.), 4 W. L. R. 149.

**14. Plaintiff leaving jurisdiction pendente lite**—Application for security after trial—New trial ordered—Delay in applying. *Gyorgy v. Dawson*, 8 O. W. R. 422.

**15. Plaintiff out of jurisdiction**—Assets in jurisdiction — Interest in land under agreement of sale. *Slack v. Malone* (N.W.T.), 4 W. L. R. 549.

**16. Plaintiff out of jurisdiction**—Interest in land in the jurisdiction—Unsatisfactory security — Nature of defence. *Clark v. Fawcett* (N.W.T.), 4 W. L. R. 329.

**17. Plaintiff out of jurisdiction**—Property in jurisdiction — Shares in company. *Wooster v. Canada Brass Co.*, 7 O. W. R. 748, 807.

**18. Procuration—Exception — Costs of motion.**]—The defendant has a right to his costs, whatever be the event of the cause, of a motion in the nature of a dilatory exception for security for costs and procuration, under clauses 2 and 7 of art. 177, C. P. C., where the plaintiff resides out of the jurisdiction. *Block v. Carrier*, Q. R. 28 S. C. 49.

**19. Residence abroad—Test of residence.**]—A plaintiff who works 7 or 8 months of the year outside the province of Quebec, and who does not keep any dwelling-place in his own name during his absence, does not reside in that province, and will be ordered to furnish security for costs. *D'Iorio v. Canadian Pacific R. W. Co.*, 7 Q. P. R. 334.

**20. Residence of plaintiff**—Adoption of permanent residence—Rule 1198 (b)—Burden of proof. *Levy v. Manes*, 7 O. W. R. 806.

**21. Residence of plaintiffs out of jurisdiction**—Affidavit of information and belief—Sufficiency. *Balcovski v. Olson* (N.W.T.), 3 W. L. R. 367.

**22. Rule 1198 (d)**—Costs of former proceeding under — Merits — Discretion. *Wendover v. Ryan*, 7 O. W. R. 160.

**23. Several defendants** — Separate orders — Practice — Increased security. *O'Leary v. Gordon*, 7 O. W. R. 728.

**24. Workmen's Compensation Act**—*Proceeding under.*]—The object of Rule 34 under the Workmen's Compensation Act (Rules of 1904) is to make the proceedings under the Act subject to the same rules as an action; and where the applicant resides out of the jurisdiction, the respondent is entitled to security for costs. *Cizowski v. West Kootenay Power and Light Co.*, 12 B. C. R. 63, 3 W. L. R. 515.

See APPEAL, V. 3, 20—COMPANY, III. 22, IV. 8—CRIMINAL LAW, IV. 16—DISMISSAL OF ACTION, 1—MUNICIPAL ELECTIONS, 12 — PARTIES, II. 8 — PARTNERSHIP, 3.

## VI. SET-OFF OF COSTS.

**1. Distraction — Advocate—Security deposit — Withdrawal — Costs of party making deposit.**]—An advocate who has obtained distraction of costs in his favour under a judgment of the Court of Review may immediately withdraw the deposit made by the party who has inscribed in review. He has a right to this amount even if the judgment of the Court of Review is reversed by the Court of Appeal. The party who has made such deposit cannot set off against the advocate, who has withdrawn it, certain costs of a seizure which the latter has caused to be made against such party and which the Court of Appeal has specially granted to him. *Delisle v. McCrea*, 7 Q. P. R. 309.

**2. Interlocutory costs** — Appeal to Court of Appeal—Jurisdiction of Master in Chambers. *McConnell v. Erdman*, 7 O. W. R. 874.

**3. Mortgage action** — Executors—Trustee — Redemption. *Murphy v. Brodie*, 8 O. W. R. 686.

**4. Parties—Amendment at trial—Apportionment.**]—In an action brought in the name of a married woman for damages for various acts of trespass to land, it became necessary to amend by adding the plaintiff's husband as a party, and an order was granted by the trial Judge allowing the amendment, and allowing the plaintiffs to enter final judgment for damages and costs to be taxed. On appeal from the latter part of the order, the order was amended so as to give the defendant the costs of the trial up to the time of the amendment and of the

amendment, if any, and the plaintiff the costs of the action not including the costs of trial; costs to be set off. *Hart v. Simpson*, 39 N. S. R. 105.

## VII. TAXATION OF COSTS.

**1. Appeal — Objections — Solicitor's slip—Setting aside certificate.]**—Notwithstanding the provision of Rule 774 that the taxing officer's certificate of the result of a taxation of costs shall be final and conclusive as to all matters not objected to in the manner provided by Rules 1182 and 1183, the certificate may, in a proper case, be set aside in order to allow objections to be carried in, and the certificate re-signed as of a later date; and this was ordered in a case where the solicitor for the party objecting had himself taken out the certificate, intending to appeal from it, but at the moment not remembering that it was necessary to carry in objections in writing, and had promptly applied for relief. *In re Furber*, [1898] 2 Ch. 538, followed. Order of MAGEE, J., affirmed. *Robinson v. England*, 11 O. L. R. 385, 7 O. W. R. 47, 130.

**2. Appeal—Ruling of taxing officer—Costs of interlocutory examinations — Rules 767, 774, 1136, 1267—Right of appeal—Time—Extension.]**—*Semble*, that no appeal lies from the decision of the senior taxing officer at Toronto, under Con. Rule 1136, as amended by Con. Rule 1267, as to the allowance of the costs of interlocutory examinations.—*Held*, that if an appeal lies, it must be either under Con. Rule 774 or 767—probably the latter—and, under either, notice of appeal must be given within four days and made returnable within ten days after the decision complained of; and notice in this case not having been given in time, an extension should not be granted, having regard to the character of the decision complained of—a ruling against allowing the costs of examining more than one of the plaintiffs for discovery. *Mann v. Crittenden*, 11 O. L. R. 46, 6 O. W. R. 799.

**3. Counterclaim — Witness fees — Counsel fees—Subpoenas — Other items. Welwyn Farmers' Elevator Co. v. Byrne** (N.W.T.), 3 W. L. R. 365.

**4. Defendants' costs of action—**Items relating to security for costs — Claim and counterclaim—Judgment for defendants on counterclaim. *Griffin v. Ruller* (N.W.T.), 4 W. L. R. 12.

**5. Judgment for default of defence —**Refusal to allow affidavit to prove that no defence served. *Masscy-Harris Co. v. Hutchings* (N.W.T.), 3 W. L. R. 252.

**6. Preparing for trial—Searches for missing documents—Party and party costs—Tariff.]**—In this action a certain contract and certain plans of material importance were lost, and the plaintiffs employed two of their former solicitors to try and find them, which they succeeded in doing, and they were put in evidence at the trial. For these services a sum of \$350 was paid to them:—*Held*, that this expenditure was properly taxable as part of the plaintiffs' party and party costs, though not specially provided for in the tariff. *City of Toronto v. Grand Trunk R. W. Co.*, 13 O. L. R. 12, 8 O. W. R. 310, 333.

**7. Quashing conviction —**Appeal from taxation—Brief and counsel fee in chambers—Mode of preparing bill—Inflating items for taxation. *Res v. Dimmock*, 1 E. L. R. 30.

**8. Retaxation —**Alteration of order. *Boak v. Deblois*, 1 E. L. R. 109.

**9. Right to tax—**Interlocutory costs payable "in any event"—Settlement of action. *McDonald v. Crites*, 7 O. W. R. 795.

**10. Stenographer's fees—**Evidence on reference—Rule 1143—Consent—Certificate of Master. *Murphy v. Corry*, 3 O. W. R. 68.

**11. Witness fees—Briefing evidence — Witnesses not called —**Con. Rule 1176.]—In an action for libel the plaintiff, not having pleaded justification, before the trial gave a notice, under Rule 488, of his intention to adduce, in mitigation of damages, evidence of the circumstances under which the libel was published. To meet such evidence the plaintiff had brought a number of witnesses to the trial, but the evidence was not admitted, and the witnesses were not called in reply:—*Held*, that by implication from Con. Rule 1176, or by analogy to the practice therein prescribed, the costs of procuring the attendance of these witnesses and the briefing of their evidence, etc., should be allowed on taxation of the plaintiffs' costs against the defendant. *Ludlow v. Irwin*, 12 O. L. R. 43, 7 O. W. R. 720.

## VIII. MISCELLANEOUS.

**1. Action by Attorney-General—**Payment of costs by relator—Statutes.]

—In an action by the Attorney-General at the relation of a private individual, the Crown sues as *parens patriæ*, and the only object of inserting the name of the relator in the proceedings is to make him responsible for costs.—The Act 18 & 19 V. c. 90 (Imp.) is not in force in British Columbia. *Attorney-General ex rel. Kent v. Ruffner*, 12 B. C. R. 299, 3 W. L. R. 272.

**2. Action** — Injunction—Partnership—Fraud—Master and servant — Disclosure by servant of master's business secrets—Use in another action—Action becoming unnecessary—Summary disposition of costs. *Mitchell v. Mackenzie*, 8 O. W. R. 139.

**3. Action by execution creditors for declaration that land subject to execution**—Class suit—Payment of execution creditors' claim—Disposition of costs. *Walkerville Brewery Co. v. Knittle*, 8 O. W. R. 696.

**4. Administration proceeding** — Taxed costs in lieu of commission—Special circumstances—Consent. *Re Greer, Greer v. Greer*, 8 O. W. R. 69.

**5. Recorder's Court**—Landlord and tenant — Fees of advocates.]—The costs of trial of causes between landlords and tenants before the Recorder's Court do not include the fees of the advocates. *Blouin v. Parent*, 7 Q. P. R. 479.

**6. Settlement of judgment debt**—Agreement—Construction — Solicitors costs.]—An agreement to accept a specified sum in settlement of a judgment debt and costs, means the taxed costs in the suit, and does not include other charges due by the creditor to his solicitors in connection with the debt. *Blackwood v. Percival*, Q. R. 14 K. B. 445.

**7. Trover for goods converted**—Return of goods after action begun—Dispute as to identity — Stay of proceedings.] — After the commencement of an action of trover for the conversion of a threshing engine, the defendants shipped to the plaintiffs an engine which the defendants alleged but the plaintiffs denied to be the one in question. The plaintiffs also asserted that, if it was the same, it was of very much less value than when converted: — Held, that the defendants were entitled, on motion, to an order permitting them to return the engine in question upon paying the costs of the action to date, and of the motion within two weeks, and providing that if thereafter the plaintiffs should proceed to trial and should not recover more than nominal damages, they should pay the

costs subsequently incurred. *Phillips v. Hayward*, 3 Dowl. 362, *Peacock v. Nichols*, 8 Dowl. 367, and *Earle v. Holderness*, 4 Bing. 462, followed. *Brown v. Canada Port Huron Co.*, 15 Man. L. R. 638.

**8. Unnecessary cross-action**—Useless proceedings—Incidence of costs.]—A party, who lost as defendant, and as plaintiff in a cross-action, when the issues could have been determined by means of one action, must pay the costs of both issues.—When a party does not prove the greater part of his allegations, he must bear the expenses of the days of trial occupied by his useless *enquete*. *North American Life Assurance Co. v. Lamothe*, 7 Q. P. R. 439.

## COUNCILLORS.

See MUNICIPAL CORPORATIONS, I. 2 — MUNICIPAL ELECTIONS.

## COUNSEL FEES.

See COSTS, VIII. 3, 7—INTEREST, 1.

## COUNTERCLAIM.

See PLEADING, IX.

## COUNTY BOUNDARY LINE ROAD.

See WAY, I.

## COUNTY COURT JUDGE.

See ALIENS, 1—LIQUOR LICENSES.

## COUNTY COURTS.

See APPEAL, VI. 1, 2, 3—ARREST, 8—ATTACHMENT OF DEBTS, II. 6—ATTACHMENT OF GOODS, 2—COSTS, IV. 5—COURTS, II.—EQUITABLE EXECUTION, 2 — FISHERIES, 2 — FRAUDULENT CONVEYANCE, 8—MASTER AND SERVANT, II. 13—VENUE, 10, 14, 15.

## COUPONS.

See COMPANY, IV. 2.



**COURT OF APPEAL FOR ONTARIO.**

See APPEAL, V.

**COURT OF KING'S BENCH, MANITOBA.**

See COURTS, I.

**COURT OF KING'S BENCH, QUEBEC.**

See APPEAL, X.

**COURT OF REVISION.**

See ASSESSMENT AND TAXES, 1—CRIMINAL LAW, III. 11.

**COURTS.**

- I. MANITOBA—SURROGATE COURT.
- II. NEW BRUNSWICK — COUNTY COURT.
- III. NOVA SCOTIA—JUSTICE'S COURT.
- IV. NOVA SCOTIA—PROBATE COURT.
- V. ONTARIO—DIVISION COURT.
- VI. ONTARIO—SURROGATE COURT.
- VII. QUEBEC—CIRCUIT COURT.
- VIII. QUEBEC—RECORDER'S COURT.
- IX. QUEBEC—SUPERIOR COURT.

See APPEAL—CONSTITUTIONAL LAW, 9—COSTS, IV. 6—SHIP, 27.

**I. MANITOBA—SURROGATE COURT.**

**Removal of cause into Court of King's Bench**—Notice to parties concerned—Appeal from order removing cause—Costs. *Re B. Estate (Man.)*, 3 W. L. R. 225.

**II. NEW BRUNSWICK—COUNTY COURT.**

**Jurisdiction** — *Excessive demand—Reduction.*]—The plaintiff in an action in a County Court, where the particulars shew a demand beyond the jurisdiction, may bring the amount within the jurisdiction by proof of payments. *Patterson v. Larsen*, 37 N. B. R. 28.

**III. NOVA SCOTIA—JUSTICE'S COURT.**

**Territorial jurisdiction**—Evidence—Judgment for plaintiff—Appeal by defendant to County Court—Defendant entitled to dismissal of action if want of territorial jurisdiction made out—Not limited to remedy by certiorari. *Slipp v. Morris*, 2 E. L. R. 218.

**IV. NOVA SCOTIA—PROBATE COURT.**

**Jurisdiction**—Order for sale of land to pay deficiencies in legacies—*Laches*—Statute of Limitations—Executor—Assignee for creditors—Status—"Person interested."]—Testator, who died in 1872, by his last will directed the residue of his property, consisting of certain real estate enumerated, to be appraised and sold, and the proceeds divided equally between his two daughters I. and E., and directed that if said property, when sold, should not realize the sum of £2,000, the difference should be made up from property devised by a previous clause of the will to his son J. H. R., who was named, with two others, since dead, as an executor. Portions of the properties referred to were sold and the proceeds paid over to the daughters, leaving a balance due in each case. In December, 1902, J. H. R. made an assignment, under the provisions of the Assignments Act, to F., and in April, 1903, he applied to the Judge of Probate for a license to sell the real estate devised to himself, and covered by the assignment, for the purpose of paying the legatees I. and E. the balances due them:—*Held, per TOWNSEND, J.*, that it was not competent for the Judge of Probate to make the order applied for, more especially after the rights of third parties had intervened, the executor having power to sell under the terms of the will, and it being open to the legatees, in case of his refusal, to compel him by suit in equity to do so; also that the executor could not be permitted, after the property had passed out of his possession, to set up the rights of the legatees in opposition to his own deed; that the rights of the legatees would not be affected by any transfer made by him, but the transferee would take the same right which he himself possessed, including the right to set up the Statute of Limitations as a bar to the legatees' right of recovery; also that, as, at the time the application was made, J. H. R. was not a trustee in possession, but had conveyed to F., who was in possession, he was not within the exception in s. 26 of R. S. N. S. c. 167, of the limitation of actions; also that, in the absence of anything in the

terms of the will vesting the property in J. H. R. as a trustee upon an express trust, and there being merely a charge on the share of the estate given to him, and no payment within 20 years, the legatees were barred from resorting to the land in question; also that the legatees, having allowed a period of 30 years to elapse without taking steps to enforce their claims, were guilty of laches, and must be assumed to have acquiesced in the mode in which such claims were dealt with.—*Semble*, that the better course would have been for the assignee to have commenced a suit in the Supreme Court to restrain the sale, but that he was a "person interested" within the meaning of the Act, and, as such, entitled to be heard on the application in the Probate Court:—*Held*, per RUSSELL, J., concurring, that J. H. R. was "a person interested," within the meaning of the statute; that the facts stated shewed the sale applied for to be unnecessary; that there are no words in s. 43 restricting the inquiry as to the necessity for the sale to the circumstances mentioned in s. 42; and that the terms in which the jurisdiction of the Court is defined should not be narrowly construed. GRAHAM, E.J., dissented. *In re Runciman*, 38 N. S. R. 89.

See WILL, I. 2.

#### V. ONTARIO—DIVISION COURT.

**1. Judgment debtor—Married woman—Committal.]**—The committal of a judgment debtor in a Division Court for wilful default in appearing to be examined is in the nature of process to coerce payment, rather than of a punitive character, as for contempt; and there is no jurisdiction to make an order for the committal of a married woman judgment debtor who refuses to attend for examination upon a judgment summons, even though her non-attendance amounts to wilful misconduct. *Ex p. Dakins*, 16 C. B. 77, followed. *Re Stewart v. Edwards*, 11 O. L. R. 78, 7 O. W. R. 23.

**2. Execution against lands**—Previous return of nulla bona—Transcript from one Division Court to another—Execution issued from wrong Court—Invalidity—Injunction to restrain sale. *Scharf v. Fitzgerald*, 7 O. W. R. 267.

**3. Jurisdiction** — Interpretation of statute—Public Health Act—Prohibition. *Re Township of Ameliasburg v. Pitcher*, 8 O. W. R. 915.

**4. Jurisdiction**—Title to land—Occupation rent—Statute of Limitations—Prohibition. *Re McDonald v. Richmond*, 7 O. W. R. 844.

**5. Removal of plaint to High Court**—Grounds for—Question raised by claim of set-off—Construction of contract—Other litigation depending on similar contracts—Absence of right of appeal in Division Court case. *Re McGregor v. Union Life Ins. Co.*, 7 O. W. R. 423.

**6. Territorial jurisdiction**—Contract—Statute of Frauds—Cause of action—Where arising—Sale of goods—Acceptance—Place of delivery—Prohibition. *Re Taylor v. Reid*, 8 O. W. R. 623, 763.

**7. Trial of plaint by jury**—Motion for nonsuit—Reservation till after verdict—Jurisdiction of Judge—Indorsement of verdict and costs on record—Inadvertence—Judgment—Execution—Stay—Prohibition. *Re McDermott v. Grand Trunk R. W. Co.*, 7 O. W. R. 602, 678.

See ATTACHMENT OF DEBTS, II. 4—JUDGMENT, III. 3—PLEADING, IX. 6—STATUTES, 6.

#### VI. ONTARIO—SURROGATE COURT.

**1. Jurisdiction** — Reopening order made on passing executors' accounts—Fraud or mistake—Con. Rule 642 not applicable—Inherent jurisdiction—Ecclesiastical Courts—Statutory Courts—Surrogate Judge—Persona Designata—Courts of record. *Re Wilson and Toronto General Trusts Corporation*, 8 O. W. R. 677.

**2. Passing accounts** — *Executors and administrators—Trustee—Creditor's claim—Surrogate Courts Act, R. S. O. 1897 c. 59, s. 72—5 Edw. VII. c. 14 (O.)* — A Surrogate Court Judge on passing the accounts of an executor, administrator, or trustee, under the provisions of s. 72 of the Surrogate Courts Act, as amended by 5 Edw. VII. c. 14 (O.), has no jurisdiction to call upon a creditor of the estate to prove his claim and to adjudicate upon that claim and allow it or bar it. If, however, the executor, administrator, or trustee, has in good faith paid the claim of a creditor before bringing in his accounts, the Surrogate Court Judge has jurisdiction to consider the propriety of that payment and to allow or disallow the item in the accounts.—Order of the Surrogate Court of Elgin barring the claim of a creditor

set aside as having been made without jurisdiction. *In re MacIntyre*, 11 O. L. R. 136, 7 O. W. R. 122.

**3. Removal of cause into High Court**—Difficulty and importance of questions arising—Value of estate. *Re Wilcox v. Stetter*, 7 O. W. R. 65.

See ACCOUNT, 4—APPEAL, V. 7—EXECUTORS AND ADMINISTRATORS, 8, 13.

## VII. QUEBEC—CIRCUIT COURT.

**Jurisdiction of Superior Court—Prohibition.**—There is no such Court as the Circuit Court of the District of . . . ; but there is a Circuit Court for the province of Quebec, of which sittings are held in all the districts and counties by Judges of the Superior Court.—A Judge of the Superior Court, whether sitting in Court or in Chambers, has no power to order the issue of a writ of prohibition to a Judge of the same Court to restrain him, while sitting in the Circuit Court, from proceeding with any suit or action in that Court. *Palliser v. Circuit Court for the District of Terrebonne*, Q. R. 28 S. C. 66.

See ATTACHMENT OF DEBTS, II.

## VIII. QUEBEC—RECORDER'S COURT.

**Jurisdiction—Cesser—Annexation of city—Petition—Recusation against recorder.**—A recorder has no right to himself adjudge and dismiss a petition setting forth grounds of recusation against him.—The plaintiff's action having been instituted after the annexation of the city of Ste. Cunégonde to the city of Montreal, the Recorder's Court of the former city had ceased to exist, and had no jurisdiction over property within the previous limits of the same. *Leclair v. Goyette*, 8 Q. P. R. 22.

See CRIMINAL LAW, III. 44 — PENALTY, 3.

## IX. QUEBEC—SUPERIOR COURT.

**1. Jurisdiction—Amount in controversy.**—When it may be found necessary to condemn one or the other of the defendants for such a proportion of the sum asked as will exceed \$100, and the conclusions are broad enough to justify such a condemnation, the action is pro-

perly instituted in the Superior Court. *City of Montreal v. Arnovitch*, 7 Q. P. R. 351.

**2. Jurisdiction—Rescission of assignment of patent rights—Territory—Domicile—Election.**—The Superior Court sitting at Montreal has jurisdiction to try an action wherein process has been served personally on the defendant within the district, to rescind a contract of assignment of patent rights, on the ground that the patent is void, although the defendant had elected his domicile at Ottawa when applying for the patent and never had a domicile in the province of Quebec: Patent Act, R. S. C. c. 61, s. 34.—The impeachment of the patent in such a case is made incidentally, and the Court cannot thereby be ousted of its jurisdiction to try the main issue, the rescission of the contract. Judgment in 7 Q. P. R. 369 reversed. *Shawinigan Carbide Co. v. Wilson*, Q. R. 15 K. B. 240, 8 Q. P. R. 1.

**3. Jurisdiction—Reversal of interlocutory judgment—Railway company—Crossings—Damages—Board of Railway Commissioners.**—At the final hearing of a cause, the Court has power to reverse an interlocutory judgment rejecting a declinatory plea, and to dismiss the action for want of jurisdiction.—2. The Superior Court of Quebec has jurisdiction in actions to compel railway companies, within the legislative authority of the Parliament of Canada, to make railway crossings, to pay damages for their neglect to do so, etc., the Railway Act of 1903 having nowhere taken away such jurisdiction by express words, or necessary implication. *Perrault v. Grand Trunk R. W. Co.*, Q. R. 14 K. B. 245.

**4. Jurisdiction—Splitting cause of action—Sale of goods—Parts sold and delivered in different districts.**—Where a part of the goods the price of which is claimed in an action has been sold and delivered in one district, and the remainder in another district, each of the sales gives a separate right of action, and the defendant may be sued in the Court of the place where each of the causes of action arose. *Chapman-Dart Co. v. Cheralier*, 8 Q. P. R. 50.

**5. Removal of action to—Future rights.**—Where by the judgment sought in an action begun in a Circuit Court the defendant would be compelled to maintain for all time to come, under a by-law, a road on his property, he has a right to have the action removed into the Superior Court. *Parish of St. Martin v. Leblanc*, 7 Q. P. R. 367.



**6. Territorial jurisdiction—Cause of action—Contract—Domicile of defendant.]**—The plaintiff sued for damages, alleging that the defendant, who lived in Quebec, had induced him to leave his employment in Montreal to go and work for him in Quebec, and had afterwards refused to employ him in accordance with the terms agreed upon:—*Held*, that the cause of action did not arise in the district of Montreal, and the defendant must be sued in the district of his domicile. *Stevens v. Valiquet*, 7 Q. P. R. 477.

**7. Territorial jurisdiction—Contract—Place of making.]**—An agreement that one party will make for the other purchases of fruit during the season which is opening, in consideration of a commission upon the price, to be fixed later, is a contract within the meaning of paragraph 5 of art. 94, C. P. C. The Court of the district in which the agreement is made is therefore competent to entertain actions arising thereout. *Archambault v. Laroche*, Q. R. 14 K. B. 380.

**8. Territorial jurisdiction—Contract—Place of making—Election of domicile.]**—Where a promissory note has been made and signed in the district of Three Rivers, and the contract by virtue of which the note was given was also made there, and the contract contains, besides, an election of domicile in the same district for suits or actions to which it may give rise, an action begun in the district of Montreal will be dismissed upon declinatory exception. *St. Laurent Laiterie Co. v. Trottier*, 7 Q. P. R. 428.

**9. Territorial jurisdiction—Domicile of defendant—Locus of subject matter—Reference to competent Court.]**—In a real or mixed action, the defendant can only be summoned before the Court of his domicile, or before that of the place where the thing in dispute is situated.—2. A Court that has no jurisdiction *ratione personæ*, on the face of the action, over a defendant who fails to appear, can neither entertain the suit, nor make the order of reference to the competent Court mentioned in art. 170, C. C. P. *Canadian General Electric Co. v. Canada Wood Manufacturing Co.*, Q. R. 29 S. C. 148.

See ATTACHMENT OF DEBTS, II.—BAILIFFS—HUSBAND AND WIFE, V. 4—JUDGMENT, III. 1—MUNICIPAL CORPORATIONS, V. 4—PENALTY, 1—SUBSTITUTION, 1.

## COVENANT.

**1. Instrument under seal—Charge on land—Collateral security for payment**

of promissory notes—Implied covenant for payment. *John Abell Engine and Machine Works Co. v. Harms* (Man.), 4 W. L. R. 565.

**2. Restraint of trade—Breach—Injunction—Damages—Trade name—Competition—Representations.** *Davies v. Davis*, 7 O. W. R. 211.

**3. Restraint of trade—Termination of partnership—Covenant not to carry on similar business—Carrying on business as agent or manager for another.** *Anderson v. Ross*, 8 O. W. R. 691.

See BANKRUPTCY AND INSOLVENCY, 4—DEED, 8—LANDLORD AND TENANT—MASTER AND SERVANT, I. 3—MORTGAGE, 6—PARTNERSHIP, 11—RAILWAY, IX. 9—RESTRAINT OF TRADE—SHIP, 4—VENDOR AND PURCHASER, I. 6, II. 2, 3—WAREHOUSE RECEIPTS—WATER AND WATERCOURSES, 25.

## CREDITORS.

See BANKRUPTCY AND INSOLVENCY.

## CREDITORS' ACTION.

See PARTIES, II. 7.

## CREDITORS' RELIEF ACT.

**Filing sheriff's certificate—Necessity for—Affidavit of claim—Locus standi—Statutes.]**—Where a prior creditor has filed a sheriff's certificate under s. 7 of the Creditors' Relief Act, R. S. O. 1897 c. 78, it is not necessary for subsequent creditors to do so.—*Semble*, that the provisions of s. 7 as to filing a sheriff's certificate are directory only and not imperative.—*Semble*, also, that it is not open to another execution creditor to question the sufficiency of an affidavit of claim where the execution debtor does not object. *In re Secord v. Mowat*, 12 O. L. R. 511.

See MONEY IN COURT.

## CRIMINAL CODE.

See CONSTITUTIONAL LAW, 5, 6.

## CRIMINAL CONVERSATION.

See HUSBAND AND WIFE, IX. 3.

**CRIMINAL INFORMATION.**

See JUSTICE OF THE PEACE, 9.

**CRIMINAL LAW.**

- I. EVIDENCE.
- II. JUSTICES OF THE PEACE.
- III. PARTICULAR OFFENCES.
- IV. PROCEDURE.
- V. SUMMARY CONVICTION.

See ALIENS — APPEAL, III. 2—ASSAULT—CANADA TEMPERANCE ACT—CERTIORARI—CONSTITUTIONAL LAW, 5, 6, 12—EXECUTORS AND ADMINISTRATORS, 6—EXTRADITION—FISHERIES, 2, 4—HABEAS CORPUS—HAWKERS AND PEDLARS—INDIAN—INFANT, 3—JUSTICE OF THE PEACE—LIQUOR LICENSES—MASTER AND SERVANT, IV. 1—MUNICIPAL CORPORATIONS, III. 2, VII. 1, 5—POLICE MAGISTRATE—PROHIBITION—PUBLIC HEALTH—RAILWAY, X. 2—SHIP, 24, 26—STIPENDIARY MAGISTRATE.

**I. EVIDENCE.**

**1. Admission of prisoner—Admissibility—Onus—Statement improperly obtained—Repetition—Prisoner's counsel—Waiver.]**—The defendant, while confined in gaol awaiting trial on a charge of murder, was visited by a detective who had been sent by the provincial government to inquire into the case, and who, without preliminary warning or caution of any kind, succeeded in obtaining from the defendant an admission that a statement made by her previously was untrue. —Shortly afterward the same admission was made to the prosecuting officer in the presence of the defendant's counsel:—*Held*, that, in the absence of evidence to rebut the presumption that the second statement was made under the operation of the same influence as the former one, the trial Judge erred in receiving evidence of it, and that the defendant, who had convicted, was entitled to a new trial; also, that the burden of shewing that the influences under which the first statement was made had been dispelled when the second statement was obtained rested upon the Crown; also, that the prisoner's counsel, who was present when the second statement was made, could not assent to or waive anything to the prisoner's prejudice, and that in a case where the prisoner herself could not make a waiver or admission, such waiver or admission could not be made through the agency of her counsel. *Rex v. Hope Young*, 38 N. S. R. 427.

**2. Confession — Admissibility — Inducement—False statements.]**—Evidence of an alleged confession made to a constable, by the prisoner, who was charged with stealing letters from a post office box, was held not admissible, inasmuch as it appeared that the alleged confession was induced by the statements of the constable that "decoy letters have been put in the box" (which was false), "and you must not think they were not watched," and "you may as well tell us as have it come out in a court of law." *Regina v. McDonald*, 3 Terr. L. R. 1.

**3. Confession — Admissibility — Inducement—Person in authority — Indian agent—Onus—Privilege.]**—If upon a proposal to give evidence of an alleged confession the question is raised whether it was made by the accused to a person in authority, and induced by a promise of favour or by menaces or under terror, the onus is on the Crown to shew affirmatively that it was not so induced.—*Regina v. Thompson*, [1893] 2 Q. B. 12, followed.—An Indian agent, an *ex officio* justice of the peace, under general instructions to advise the Indians of his reserve, who was in fact in the habit of interviewing Indians of the reserve charged with offences with a view to aiding them in their defence, is, *quoad* the Indians of his reserve, a person in authority.—*Quære*, whether a confession by an Indian to the Indian agent of the reserve to which the Indian belonged, would not be a privileged communication. *Regina v. Charcoal*, 3 Terr. L. R. 7.

**4. Corroboration — Seduction under promise of marriage—Criminal Code.]**—Where a statute requires that evidence shall be corroborated in some material particular, the corroboration required is in some material respect that will fortify and strengthen the credibility of the main witness and justify the evidence being accepted and acted upon.—The prisoner was charged with having seduced and had illicit connection with an unmarried female of previously chaste character under 21 years of age, contrary to s. 182 of the Criminal Code. It was shewn that a couple of months prior to the connection he had told her brother that "he always thought enough of A. to marry her," and about a month before he and she had their photographs taken together. Subsequent to the connection he told her parents "that he always intended to marry A.:" — *Held* (OSLER, J.A., dissenting), sufficient corroboration of the girl's evidence that he had had illicit connection with her under promise of marriage.—*Per* OSLER, J.A.: — There was no corroboration as to the illicit connection on the occasion in question; the

admissions and conversations sworn to had reference to a later occasion. Even the girl's evidence did not shew seduction and illicit connection, or that the seduction, if any, was under promise of marriage. *Rex v. Daun*, 12 O. L. R. 227, 8 O. W. R. 173.

**5. Deposition on preliminary hearing**—Prisoner not represented by counsel—Death of deponent before trial—Depositions not admissible. *Rex v. Snelgrove*, 1 E. L. R. 107.

**6. Depositions on trial of another**—*Reception of—Consent of counsel—New trial.*—Even if a mistake is made by counsel at a trial, that does not relieve the Judge in a criminal case from the duty to see that proper evidence only is before the jury.—At the trial of a prisoner, the prosecuting counsel put in a letter, addressed to the Crown Attorney, from a counsel who had been retained to act for the prisoner, as follows: "I find that I will be unable to go on with this trial on the 28th December. . . Would you kindly see the Judge and ask him if he can take it on Saturday the 6th January. . . I am quite willing to accept the evidence of the family, in particular those who gave evidence at the H. trial, so that it would not be necessary for you to call them." The trial was proceeded with on the 29th December, the prisoner then being represented by another counsel, when, in addition to the letter, the depositions of two witnesses taken at the trial of H., who were not members of the family, were put in without the consent of, or objection to on the part of, the prisoner's counsel:—*Held*, that, even assuming the consent in the letter, which seemed to be a concession for the proposed postponement of the trial to the 6th January, wide enough to authorize the admission of the specified depositions, the depositions of the two witnesses, not members of the family, were improperly received.—Conviction quashed and a new trial granted. *Rex v. Brooks*, 11 O. L. R. 525, 7 O. W. R. 533.

**7. Signature of accused**—*Statement at preliminary hearing—Forgery.*—The signature of the accused to his statement at the preliminary hearing may be tendered as evidence against him at his trial for forgery. *Rex v. Golden*, 11 B. C. R. 349.

**8. Testimony of accused**—*Handwriting.*—A prisoner on trial, called as a witness on his own behalf, cannot be compelled to furnish a specimen of his handwriting. *Rex v. Grinder*, 11 B. C. R. 370.

**9. Verdict against evidence**—*New trial—Jury—Evidence of accused.*—Leave to move before the Court of Appeal for a new trial, upon the ground that the verdict is contrary to the whole of the evidence, will only be granted, under s. 747 of the Criminal Code, when the verdict amounts to a denial of justice; and that cannot be said of a verdict because the jury in rendering it have not taken into account the uncorroborated evidence of the accused of facts tending to shew that he is not guilty; the jury is at liberty to refuse it credence. *Rex v. Molleur*, Q. R. 15 K. B. 1.

## II. JUSTICES OF THE PEACE.

**1. Appeal from conviction**—Case stated by justices—Request to justices—Non-compliance with provisions of code—Waiver—Jurisdiction. *Rex v. Earley* (N.W.T.), 3 W. L. R. 189.

**2. Appeal from conviction**—Case stated by justices—Request to justices—Non-compliance with provisions of code—Waiver—Jurisdiction. *Rex v. Earley* (No. 2) (N.W.T.), 3 W. L. R. 193.

**3. Appeal from conviction by two Justices under Part LV., Criminal Code**—Right of appeal—Jurisdiction of Judge of Supreme Court. *Rex v. Pisoni*, *Rex v. Taylor* (N.W.T.), 4 W. L. R. 527.

**4. Conviction for keeping bawdy house**—*Criminal Code, ss. 207, 208—Warrant of commitment—Jurisdiction—Habeas corpus—Amended warrant—Reception on appeal—Form of conviction—Statement of offence.*—The prisoner was convicted before three justices of the peace for being the keeper of a disorderly house, bawdy house, or house of ill fame, or house for the resort of prostitutes—following the words of s.-s. (j.) of s. 207 of the Criminal Code—and was committed to gaol for six months under a warrant signed by two of the justices. She obtained a writ of *habeas corpus*, and upon the return of it moved for her discharge, which was refused by a Divisional Court. She then appealed to the Court of Appeal, and, after the appeal had been argued and judgment reserved, the justices returned a further warrant of commitment signed by all three justices, which was received by the Court of Appeal. The offence was stated to have been committed in a city, for which there was a police magistrate. The warrant returned to the Court of Appeal was signed by all three justices, under their respective seals, and set forth a

conviction by them, all acting in the absence of, and one at the request of, the police magistrate:—*Held*, that under s. 208 of the Criminal Code, as amended by 57 & 58 V. c. 57, one justice had jurisdiction to adjudicate upon the charge, and by R. S. O. 1897 c. 87, s. 7, had authority to act in the city in the absence of the police magistrate; and if authority be given to one justice it may be executed by any greater number, and the fact that others join in making the conviction does not invalidate the proceeding.—*Held*, also, that the conviction and commitment, following the language of s.-s. (j.) of s. 207 of the Code, properly set out and disclosed the offence: s. 846 (2) of the Code (63 & 64 V. c. 46). Order of a Divisional Court affirmed. *Rea v. Leconte*, 11 O. L. R. 408, 7 O. W. R. 189.

**5. Conviction for keeping bawdy house**—Jurisdiction of justices—Certiorari—Security—Necessity for—Information—Amendment—Offence after date of information. *Rea v. Earley* (N.W.T.), 3 W. L. R. 367.

**6. Summary trial**—Election by accused—Failure of magistrate to hold preliminary inquiry or to inform accused as to Court for trial.]—The omission by the magistrate to hold the preliminary inquiry as provided in s. 789 of the Code, to enable him to decide whether or not the case should be disposed of summarily, invalidates the conviction. — *Held*, further, that the omission to inform the accused as to the probable time when the first Court of competent jurisdiction would sit, was also fatal. *Rea v. Williams*, 11 B. C. R. 351, 2 W. L. R. 410.

### III. PARTICULAR OFFENCES.

**1. Altering or erasing names on voters' list** — Criminal Code, s. 503—Returning officer at Dominion election—Right to fix limits of polling divisions—Dominion Elections Act — Alteration of areas of divisions—"Polling division"—"Registration district"—Provincial polling subdivisions—"Wilfully." *Rea v. Duggan* (Man.), 4 W. L. R. 481.

**2. Assault** — Imprisonment for 60 days—Statutory maximum two months. *Rea v. Brindley*, 2 E. L. R. 43.

**3. Assault** — Intent — Jury.]—The prisoner was indicted, *inter alia*, under s. 415 of the Criminal Code, for being unlawfully in the house of P. with intent to commit an assault on D. The jury in effect found that the prisoner was un-

lawfully in the house, and committed an assault on D.:—*Held*, that the intent to commit the assault was involved in the committal of it; that the jury could not find the prisoner guilty of committing the assault without finding that he had the intent to commit it, and, as the being in and the intent concurred in point of time, the offence was complete. *Rea v. Higgins*, 38 N. S. R. 328.

**4. Assault on peace officer in execution of duty** — Attempt to arrest without warrant — Absence of offence justifying arrest. *Rea v. Cook* (B.C.), 3 W. L. R. 553.

**5. Burglary** — Possession of stolen property — Inference of guilt—Lapse of time—Jury—Verdict—Dissent of juror—Reconsideration — Judge's charge—Comment on failure of prisoner to testify.]—The jury in a criminal trial may be sent back for further deliberation when, upon being polled, one of the jurors dissents from the verdict of "guilty" announced by the foreman; and a subsequent unanimous verdict of "guilty" may properly be accepted.—Upon the trial of the prisoner for burglary and burglariously stealing property, the Judge in his charge to the jury remarked that if they did not believe the evidence of a certain witness, they were "brought face to face with the fact that the prisoner is found in possession of a pouch which was stolen . . . and that he has not given a satisfactory explanation of how he came into possession of it:"—*Held*, that the Judge did not thereby suggest to the jury that the prisoner might have given evidence in his own behalf, or that an inference unfavourable to him might be drawn from the fact that he had not done so.—The burglary was on the 18th or 19th December, 1903, and the prisoner was arrested on the 16th February, 1904, with one of the articles stolen upon his person:—*Held*, that the Judge could not properly have ruled, in all the circumstances of the case, that the lapse of time was so great as absolutely to repel any presumption that the prisoner was concerned in the burglary; and that the possession of the article and other circumstances warranted the jury in drawing an inference of guilt. Leave to appeal was refused, and rulings of STREET, J., at the trial, were affirmed. *Rea v. Burdell*, 11 O. L. R. 440, 7 O. W. R. 164.

**6. Conspiracy**—Illegal trade combination—Criminal Code, s. 520—Incorporated companies—Acts preceding incorporation—Adoption after incorporation—Evidence as to agreements to enhance prices and stifle competition—Sentence — Substantial fine. *Rea v. Master Plumbers*



and *Steam Fitters' Co-operative Association, Limited, and Central Supply Association of Canada, Limited*, 7 O. W. R. 213.

**7. Conspiracy**—Illegal trade combination—Criminal Code, s. 520—Individual members of trade association — Convictions on pleas of guilty—Sentences—Extenuating circumstances — Solicitors' advice—Duty of solicitors — Fines — Suspended sentences. *Rex v. McGuire and Others*, 7 O. W. R. 225.

**8. Conspiracy — Indictment.**—The defendants were indicted for unlawfully conspiring and agreeing together and with each other to deprive one W. G. of the necessities of life, to wit, proper medical care and nursing, whereby his death was caused:—*Held*, that this count did not charge the defendants with a conspiracy to commit any indictable offence known to the law, and should have been quashed.—A second count charged that the defendants did unlawfully conspire and agree together and with each other to effect the cure of W. G. of a sickness endangering life, by unlawful and improper means, thereby causing the death of the said W. G.: — *Held*, that this count was equally bad, and was properly quashed. *Rex v. Goodfellow*, 11 O. L. R. 359, 7 O. W. R. 92.

**9. Conspiracy**—Returning officer at provincial election—Defrauding candidate from being returned as member—Defrauding electors and public by illegally obtaining return of member—Charge—Particulars—Indictable offence—Criminal Code, ss. 394, 527. *Rex v. Sinclair* (N.W.T.), 4 W. L. R. 374.

**10. Defrauding creditors** — Evidence — Admissions—Depositions of defendants on examination in aid of execution—Admissibility—Order for examination—Privilege — Canada Evidence Act. *Rex v. Van Meter* (N.W.T.), 3 W. L. R. 416.

**11. Dissuading witness from giving evidence** — Court of Revision — Charge—Amendment — Criminal Code—Attempting to obstruct justice. *Rex v. Lake* (N.W.T.), 3 W. L. R. 244.

**12. Disturbing religious meeting** — *Conduct amounting to.* — A person who enters a hall, leased by a religious association or body, while a meeting for religious worship is being held in it, under the direction of officers of the association, and addressing himself to the assemblage, says he is a Catholic and a

French Canadian, as most of them are, that they should not stay where they are, and calls upon them to leave, is guilty of the offence of disturbing a religious meeting under s. 173, Criminal Code. *Moore v. Gauthier*, Q. R. 14 K. B. 530.

**13. Forcible entry of dwelling house** — Conviction—Proof of offence—Apprehension of breach of peace — Absence of actual force — Pleading — Surplusage—Evidence—Title of occupant—Evidence in rebuttal—Improper admission—New trial. *Rex v. Walker* (N.W.T.), 4 W. L. R. 288.

**14. Forgery** — *Application for reserved case—Absence of juror—Comment by trial Judge—Evidence of other forgeries—New trial—Substantial wrong or miscarriage.*—On the trial of the defendant on an indictment charging him with the forgery of two promissory notes, the defendant having been found guilty, a reserved case was applied for on the following grounds:—(a) Because one of the jurors was absent from the Court room at a time when a witness gave evidence of having seen the defendant at a previous trial write a number of names on a sheet of paper. (b) Because in the course of his address to the jury the trial Judge commented upon the failure of the defendant to produce a witness, S., and said that in the interests of truth and justice he should have done so. (c) Because certain notes other than those set out in the indictment having been received in evidence for certain purposes, the trial Judge did not tell the jury that these other notes could only be regarded for the purpose of shewing that the notes set out in the indictment were intended by the prisoner to be acted upon as genuine, and that they must disregard them for all other purposes. The reserved case applied for having been refused and an appeal taken, the Court was equally divided:—*Held, per GRAHAM, E.J., TOWNSEND, J., concurring*, that a case should be stated for the opinion of the Court. *Per RUSSELL, J., LONGLEY, J., concurring*, that the points mentioned were within the provisions of s. 746 (f) of the Code, and there having been no substantial wrong or miscarriage which would be ground for a new trial, the appeal should not be allowed. *Regina v. Corby*, 30 N. S. R. 330, and *Rex v. Hill*, 36 N. S. R. 253, discussed. *Rex v. McLean*, 39 N. S. R. 147, 1 E. L. R. 334.

**15. Forgery** — *Corroboration.* — Where a prisoner is charged with forgery, by writing three false signatures, as indorsements, on the back of a promissory

note, and each of the parties whose signature is thus made to appear, swears that it is not his and is a forgery, there is the corroborative evidence required by s. 684 of the Criminal Code, to make good a conviction. *Houle v. The King*, Q. R. 15 K. B. 170.

**16. Forgery** — *Having forged documents in possession* — *Criminal Code, s. 430—Evidence shewing guilty knowledge—Admission made to police officer—Admissibility* — *Onus—Verdict of Judge—“Forged note”* — *“Counterfeit token of value.”*]—The prisoner was convicted in a County Court, under the Criminal Code, s. 430, on a charge of having unlawfully, and without lawful authority or excuse, had in his custody and possession two forged bank notes for the payment of \$10 each, well knowing them to be forged. One of the witnesses called on behalf of the prosecution, H., testified that the prisoner one day shewed him a bill or note something like those in evidence (proved to have come out of the prisoner's possession) and that he then told the prisoner it was no good. Another witness, P., stated that, the day before the arrest, he had gone shooting with the prisoner, who said he had something to shew him when they got out of the woods, and that that evening he went to the prisoner's house and the prisoner there gave him two bills. Other evidence established that these bills, which were paid over by P. to G. and M., were both forgeries:—*Held*, that there was ample evidence in the dealings between the prisoner and P., and in the conversation between prisoner and H., to prove the prisoner's knowledge that the documents he was handling were not genuine, and to justify the Judge in finding the prisoner possessed of the guilty knowledge required by s. 430 of the Code.—At the trial evidence was given of a conversation with the prisoner in the presence of the chief of police, in which the prisoner said that he got the bills in question from S., and that he gave them to P.:—*Held*, that the onus was upon the prosecution to establish that the statement in question was entirely free and voluntary, and that it was not sufficient for this purpose that the officer should swear to it, but he should have negatived possible inducements by hope or fear which would have made the statement inadmissible. But that the reception of this evidence did not necessarily influence the Judge's decision in reference to the other evidence, the Judge having stated the evidence on which he based his judgment, and that evidence being sufficient.—A verdict by a Judge, in this particular, is different from the verdict of a jury.—At the trial evidence was given in relation to one of the bills in question,

shewing it to be a counterfeit or forgery, purporting to be a \$10 bill of the Bank of Montreal:—*Held*, that the document was a “forged note” and was such a document as is contemplated by s. 430 of the Code.—*Semble*, it might also be a “counterfeit token of value” under s. 430. *Rex v. Tutty*, 38 N. S. R. 136.

**17. Keeping common betting house**—*Betting booth on racecourse of incorporated association—Movable structure* — *“House, office, room, or other place”* — *Criminal Code, ss. 197, 198, 204.*]—A wooden box or booth, moved about on castors from one part to another of the grounds of an incorporated racing association during the progress of a race meeting, and used by book-makers for the purpose of making and recording bets with the public, is an “office” or “place” within the meaning of s. 197 of the Criminal Code. *Shaw v. Morley*, L. R. 3 Ex. 137, followed.—*Held*, also, GARROW and MEREDITH, J.J.A., dissenting, that the provisions of s.-s. 2 of s. 204 of the Criminal Code do not apply to the offence of keeping a common betting house contrary to ss. 197 and 198, and a conviction may properly be made under these latter sections for keeping a common betting house upon the racecourse of an incorporated racing association, even where the betting is confined to the races then in progress upon that racecourse. *Rex v. Hanrahan*, 3 O. L. R. 659, followed. Conviction by the senior police magistrate for the city of Toronto affirmed. *Rex v. Saunders*, 12 O. L. R. 615, 8 O. W. R. 534.

**18. Keeping common betting house**—*Incorporated company—Lease of premises—President.*]—The president of an incorporated company, owners of a racecourse, who lease for valuable consideration the privilege of taking and receiving bets in part of the premises, is not, merely by virtue of his office, and without anything more than acquiescence on his part, liable to conviction as a party to the offence of keeping a common betting house under ss. 197 and 198 of the Criminal Code. *Rex v. Hanrahan*, 3 O. L. R. 659, distinguished. Conviction quashed. MACLAREN, J.A., dissenting. *Rex v. Hendrie*, 11 O. L. R. 202, 6 O. W. R. 1015.

**19. Keeping disorderly house**—*Criminal Code—Cumulative or alternative punishments*]—The Court was moved to quash an indictment for keeping and maintaining a disorderly house, to wit, a common bawdy house, on the ground that s. 198 of the Code, under which the defendant was indicted, was repealed by s. 207 (j) or s. 783 (f) of the Code, as neither of these could be reconciled with

s. 198, as cumulative or alternative punishment for the one offence:—*Held*, dismissing the motion and affirming the conviction, that s. 198 was not repealed as contended; s. 207 being a comprehensive section dealing with all classes of vagrants (including, under (j), keepers and inmates of bawdy houses), and s. 783 (f) being pure procedure, and enabling a charge based upon the offence above indicated to be disposed of by a summary trial when a party charged with the offence was brought before a magistrate. *Rex v. Sarah Smith*, 38 N. S. R. 148.

**20. Libel — Evidence — Innuendo — Extrinsic circumstances — Particulars — Reserved case — Other publications — Newspaper — Previous libels.]**—Where an information for defamatory libel, consisting of words inoffensive in themselves, but importing, by ironical expression, a dishonourable imputation, contains, besides a repetition of the words complained of, an allegation of the sense in which they must be understood, the Crown may adduce evidence of extrinsic circumstances which go to shew the meaning to be attached to the words. It is not necessary that these circumstances shall be enumerated in the information, and the accused is sufficiently protected against surprise by the right which he has to demand particulars of the charge. In default of his applying for particulars, his objection to the evidence will not be entertained, and there is no ground for reserving for the Court of Appeal a question as to its legality.—Where the accused, in a prosecution for libel contained in a newspaper, has recourse to the defence, under s. 297 of the Criminal Code, that the publication of the libel was without his knowledge, the Crown may prove the previous publication of other libels of the same sort, by the same editor, in order to fix the responsibility of the accused, resulting, according to s. 297, from his persistence in maintaining this editor in charge of the newspaper. *Rex v. Molleur*, Q. R. 14 K. B. 556.

**21. Murder — Attempt to murder — Preliminary investigation — Committal on charge other than that preferred — Indictment — Amendment — Proof of criminal intent — Judge's charge — Inference of guilt.]**—The magistrate who holds the preliminary investigation on a charge preferred against an accused person, may commit him on any other charge or charges disclosed by the evidence.—2. On the trial of a person accused of attempt to murder by shooting, evidence that he had burglar's tools in his possession at the time is admissible, as tending to prove criminal intent.—3. An indictment that "A. B. attempted to kill and murder C. D." suffi-

ciently discloses an indictable offence, and the Court has the power to allow it to be amended so as to read that "A. B. with intent to commit murder, shot at C. D."—4. It is lawful for the Judge, in charging the jury in a trial for an attempt to murder, to instruct them that they may draw an inference as to the prisoner's intent to kill from the circumstances of his being a stranger loitering in a street or park, between 4 and 5 o'clock in the morning, with a loaded revolver and burglar's tools in his possession. *Rex v. Mooney*, Q. R. 15 K. B. 57.

**22. Murder — Evidence — Dying declaration — Admissibility — Abandonment of hope of recovery — Declaration not in deceased's own words — Sworn deposition not taken in presence of accused.** *Rex v. Magyar* (N.W.T.), 4 W. L. R. 396.

**23. Murder — Evidence — Misdirection — New trial.** *Rex v. De Marco*, 7 O. W. R. 387.

**24. Nuisance**—Indictment of electric railway company—Endangering safety of public—Removal from Sessions into High Court—Difficult questions of law—Delay of trial. *Rex v. Toronto R. W. Co.*, 8 O. W. R. 441.

**25. Obstructing highway — Nuisance**—Form of indictment. *Rex v. Reynolds*, 2 E. L. R. 42.

**26. Omission to provide necessities for wife — Provision by others — Injury to health — Necessity for proof of — (Criminal Code.)** — Under s. 210, s.-s. (2), of the Criminal Code, which deals with the non-support of a wife by a husband when a legal duty exists on the husband's part to provide necessities for his wife, the criminal responsibility for the omission to do so only arises when it is proved either that her death has been caused or her life endangered, or her health is permanently injured or likely to be, by such omission. Where, therefore, the husband was convicted on the charge of having "unlawfully omitted, without lawful excuse, to supply his wife and child with the necessities of life, whereby the health of each of them became, and was and is likely to become, permanently injured," and the evidence shewed that the wife and child were living with the wife's mother, who supplied all her needs: — *Held*, that the charge was not sustained, and the conviction was quashed. *Rex v. Wilkes*, 12 O. L. R. 264, 7 O. W. R. 854.

**27. Perjury — Offence committed on examination for discovery in civil action — Judicial proceeding — Postponement of**

*trial until determination of action.*—The accused, having been charged with perjury committed on his examination for discovery before the registrar in a civil suit, elected to take speedy trial. On his election, his counsel took the objection that perjury could not be assigned on examination for discovery:—*Held*, that, as every statement made upon oath by the person examined during his examination for discovery, forms part of his evidence at the trial, it is evidence given in a judicial proceeding within the meaning of s. 145 of the Criminal Code.—Discretion of Court exercised by refusal to hear charge of perjury while civil proceedings are pending. *Rex v. Thickens*, 12 B. C. R. 223, 4 W. L. R. 454.

**28. Personation and perjury — Acquittal on indictment for personation at election — Subsequent indictment for perjury in taking oath of identification—Validity of plea of “*autrefois acquit*”—Right to acquittal at common law—*Res judicata* — *Nemo bis reus*.]**—The prisoner was indicted at the assizes for having applied for and voted on a ballot in another person's name at a Dominion election, on which charge he was acquitted. He was subsequently indicted and convicted for perjury in having, on the same occasion, taken the oath of identity:—*Held*, that the offences were distinct; the personation being complete under s. 114 of the Dominion Election Act, 1900, when he applied for the ballot; while the perjury, which was an offence under the Criminal Code, was not committed until, on being challenged, he took the false oath; and therefore, a plea of *autrefois acquit* could not be set up as an answer to the subsequent indictment:—*Held*, however, OSLER, J.A., and TEETZEL, J., dissenting, that he had a good defence at common law—which was reserved to him under s. 7 of the Code—for the identity of the person committing the offence was essential in both indictments, and the acquittal on the first indictment being a finding on that question, it was *res judicata*, and could not be again raised on the perjury charge. *Rex v. Quinn*, 11 O. L. R. 242, 6 O. W. R. 1011.

**29. Rape — Aiding and assisting—Evidence—Right of prosecutrix, but not of companion, to refuse to answer as to specific act of unchastity—Finding of no substantial wrong or miscarriage.**—On the trial of an indictment for aiding and abetting the commission of rape, the evidence shewed that, prior to the commission of the offence, the prosecutrix and one B. had been together all the evening, and early in the morning were for some time together in a room in an

hotel with the door closed and the gas turned out. On leaving the hotel they were met by the prisoner and another man, who attacked B. and caused him to leave, whereupon the offence was committed. The prosecutrix and B. were called as witnesses for the Crown, and on cross-examination were questioned as to what took place in the room, which they refused to answer:—*Held*, that while the prosecutrix could properly be asked the question as going to her credit, she was not bound to answer; but that it was different as to B., for not only did it go to his credit, but its effect might be to shew a favourable tendency to the prosecutrix as his mistress, and an unfavourable one to the prisoner who had assisted in taking her away from him; but it appearing that no substantial wrong or miscarriage was occasioned thereby, applying clause (f) of s. 746 of the Criminal Code, a conviction was affirmed. *Rex v. Finnessey*, 11 O. L. R. 338, 7 O. W. R. 383.

**30. Rape — Criminal Code—Indictment—Negating exception—Amendment—Objection.**—The defendant was indicted and convicted for rape committed upon the person of W., “a girl under the age of 14 years, to wit, of the age of 8 years.” Application was made to the trial Judge on behalf of the prisoner to reserve a case for the opinion of the Court, on the ground that it was not alleged in the indictment that the person upon whom the offence was committed was not the wife of the prisoner. This having been refused:—*Held*, that the expression in the Code, s. 266, “not being his wife,” is an exception, and, if it required to be stated in the indictment and negated, the defect could have been remedied by the Judge by an amendment under s. 723 (2), and that the defendant's counsel was obliged to take the objection before pleading to the indictment under s. 629, and not having done so it was not open to him to take it subsequently. *Rex v. Wright*, 39 N. S. R. 103.

**31. Rape — Evidence — Complaint—Elicitation.**—Where the complainant makes a statement to a third person, not in the presence of the accused, it may be given in evidence upon his trial for rape, provided it is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating kind. *Rex v. Spuzzum*, 12 B. C. R. 291.

**32. Rape—Joint indictment—Separate trials—Canada Evidence Act, 1893, s. 4—Applicability to person not on trial—**



**"Person charged"—Right of Judge to comment on his not giving evidence.]—**The prisoner and one F. were jointly indicted, and a true bill found against them. It was ordered that the prisoner should be tried separately and apart from F., as to whom the indictment was traversed to another sittings. At the trial of the prisoner the presiding Judge commented on the fact that F. was not called as a witness:—*Held*, that F. was not a person charged under s. 4 of the Canada Evidence Act, 1893, 56 V. c. 31 (D.), for that section only referred to the person actually on trial; F. was a competent witness, but his competency did not depend on this Act, and therefore the Judge had the right to comment as he did. *Regina v. Payne*, L. R. 1 C. C. R. 340, and *Regina v. Gosselin*, 33 S. C. R. 255, commented on. *Rex v. Blais*, 11 O. L. R. 345, 7 O. W. R. 380.

**33. Sale of diseased animal—Animals Contagious Diseases Act—Conviction—Scienter—Evidence.]—**Section 7 of the Animals Contagious Diseases Act, 1903, provides "that every person who sells . . . any animal affected or labouring under an infectious or contagious disease . . . shall for such offence incur a penalty not exceeding \$200:—"*Held*, that knowledge on the part of the defendant that the animal sold was diseased was not necessary to make him liable to conviction. *Betts v. Armstead*, 20 Q. B. D. 771, and *Pain v. Boughtwood*, 24 Q. B. D. 353, referred to. Objections to evidence discussed. *Rex v. Perras*, 6 Terr. L. R. 58.

**34. Seduction of girl under 16—Evidence—Corroboration—Acquittal—Appeal by Crown—New trial—Criminal Code, s. 746. Rex v. Burr**, 8 O. W. R. 703.

**35. Seduction of girl under 16—Offence committed on named date—Election of prisoner to be tried summarily—Amendment to a prior date—Right of—Further election of prisoner.]—**A prisoner was indicted before a County Court Judge charged under s. 181 of the Criminal Code with having on the 9th January, 1905, seduced a girl of or above the age of 14 and under that of 16, of, as alleged, previously chaste character, upon which he elected, under s. 767 of the Code, to be tried summarily, but, on the evidence disclosing a connection with her six days previously at another place, the charge was amended by setting up the offence as having been committed on such prior date; and, without giving the prisoner the right of electing whether or not he would be tried summarily on such amended charge, he was tried thereon and con-

victed:—*Held*, that the conviction could not be supported, for the offence could only be committed once, namely, on the first occasion on which the connection took place, so that the date was material to the charge, and while an amendment could be made substituting the prior date, which was in effect preferring a new charge based on a different transaction, the prisoner should have been given the opportunity of electing under s. 767 how he would be tried thereon. *Rex v. Lacelle*, 11 O. L. R. 74, 6 O. W. R. 911.

**36. Selling liquor to Indian—Conviction—Appeal—Notice of—Rehearing on new evidence—Unsatisfactory testimony—Quashing conviction. Rex v. Russell** (N.W.T.), 4 W. L. R. 16.

**37. Selling liquor to Indian—Conviction—Indian Act—Criminal Code—Warrant of commitment—Description of offence—Award of costs—Person to whom payable—Sentence—Term—Hard labour—Jurisdiction of Indian agent—Costs of distress and conveying to gaol—Amendment. Rex v. Gour** (B.C.), 3 W. L. R. 308.

**38. Stealing trees—Value—Offence punishable on summary conviction—Jurisdiction of Court of King's Bench—Quashing indictment.]—**The stealing of trees of the value of \$25 being declared an indictable offence by s. 336 of the Criminal Code, and the stealing the whole or any part of any tree, etc., of the value of \$0.25 at least being declared an offence punishable on summary conviction only, by s. 337, it follows by necessary implication, from the combination of the two sections, that the stealing of trees of the value of \$14, is an offence punishable on summary conviction only, and is not an indictable offence cognizable by the Court of King's Bench.—2. In the absence of a special enactment, the Court of King's Bench has no concurrent jurisdiction to try offences punishable on summary conviction.—3. An indictment setting forth an offence which is not indictable will be quashed on motion to that effect. *Rex v. Beaurais*, Q. R. 14 K. B. 498.

**39. Theft—Special property in railway car—Manitoba Grain Act.]—**M. made application in the order book kept at Moosomin station, under s. 58 of the Manitoba Grain Act as amended, which provides that "cars so ordered shall be awarded to applicants according to order in time in which said orders appear on the order book." Section 42 of the Act, as amended by s. 5 of 2 Edw. VII. c. 19, provides (clause 5): "The railway company shall furnish cars to farmers, without undue delay, for the

purpose of being loaded at said loading platform." The station agent intended a special car for M., and told one S. to notify M. He was not notified; and the accused took possession of and loaded the car. He was convicted of theft:—*Held*, that M. could not insist on any particular car being delivered to him; and he had therefore no special property or interest in the car in question within the intent of clause A. of s.-s. 1. of s. 305 of the Criminal Code. Conviction quashed. *Rex v. McElroy*, 6 Terr. L. R. 10.

**40. Theft—Summary trial—Jurisdiction of stipendiary magistrate—Plea of guilty — Reducing charge to writing — Warning to prisoner—Form of conviction — Waiver.]**—The defendant was charged before the stipendiary magistrate for the city of Halifax with the theft of a number of amalgam plates and copper plates with gold amalgam thereon of the value of \$200 or thereabouts, and, the charge having been stated to him in open court, and he having pleaded guilty, he was thereupon convicted of the offence charged and sentenced to three years' imprisonment in the penitentiary. An order in the nature of a *habeas corpus* for the defendant's discharge was applied for, on the ground that the magistrate could not proceed with the trial without the preliminary examination required under s. 789 of the Code, and that the requirements of s. 786 were not complied with:—*Held*, WEATHERBE, C.J., dissenting, that the stipendiary magistrate had power to proceed with the trial under s. 785 of the Code, as amended by Acts of 1900 c. 46, without entering upon the preliminary examination under s. 789.—2. That the procedure adopted by the magistrate was sufficiently in accordance with the requirements of the statute to be considered as defective in form only, and, there being a good conviction and one alleging that the defendant had been convicted, the provisions of s. 800 applied.—3. That the charge having been read to the defendant in the terms of the information, which was in writing, and the defendant having pleaded guilty, it was not competent for him thereafter to say that he was not aware of the nature and particulars of the charge. *Rex v. "* 39 N. S. R. 108, 1 E. L. R. 202.

**41. Theft by an agent—Broker—Purchase of stock—Obtaining money to maintain margin.]**—A broker who receives money from a customer to purchase stocks on margin from a firm of correspondents, holds them in his own name and allows them to be sold on his account, but subsequently rearranges with his correspondents to resume busi-

ness and carry the same stocks, receiving in the meantime remittances from his customer to maintain the margin, without informing him of what has taken place, and who afterwards severs anew his connection with his correspondents, and receives at the same time from his customer instructions to sell the stocks, which would have resulted in a comparatively small loss, instead of doing so, replaces them by purchase of a like quantity of the same kind from another firm, whose subsequent failure causes their total loss, is not guilty of theft by an agent under the Criminal Code. *Rex v. Bastien*, Q. R. 15 K. B. 16.

**42. Theft of gold dust—Conviction of defendant—Circumstantial evidence—Corpus delicti—Admission of evidence—Judge's charge—Misdirection—Empanelling of jury—Evidence—Examination of defendant in civil action — Application for reserved case.** *Rex v. Brindamour* (Y.T.), 4 W. L. R. 339.

**43. Vagrancy — Conviction — Evidence—Criminal Code, s. 207 (1)—Habeas corpus—Discharge.]**—The evidence upon which a magistrate's conviction of the defendant under s. 207 (1) of the Criminal Code for vagrancy was based, was, that, though never convicted, he was an associate of pickpockets, and was "known to the police authorities of Montreal as a professional pickpocket." There was no further material evidence against the defendant, though a number of circumstances were shewn which would create suspicion of his honesty. There was no evidence offered by the Crown that he had no means of earning a livelihood; evidence of his being recently employed as an hostler was given on his behalf. He had \$40 on his person when arrested:—*Held*, that, if there was some evidence that the defendant "for the most part supported himself by crime," there was no evidence to warrant a finding that he had "no peaceable profession or calling to maintain himself by:" and he was discharged upon the return of a *habeas corpus*. *Rex v. Collette*, 10 O. L. R. 718, 6 O. W. R. 746.

**44. Vagrancy — Conviction — Sentence—Recorder of Montreal — Jurisdiction.]**—The recorder of the city of Montreal, by virtue of s. 493 of 62 V. c. 58, has a right to sentence an idle and disorderly person, who is an habitual drunkard and incorrigible, to imprisonment for six months at least, and a year beyond, but he is not at liberty to add to this punishment the condemnation of hard labour. *Gérris v. Weir*, 8 Q. P. R. 51.

## IV. PROCEDURE.

**1. Arrest of accused in foreign country — Forcible return to Canada without extradition proceedings—Right to question on habeas corpus—Remands—Verbal remands—Justice sitting for police magistrate—Jurisdiction.]**—The prisoner, who had committed a number of thefts in Canada, and had escaped to the United States, was arrested there on a telegram from Canada, and, as he alleged, was forcibly brought back against his will and without the intervention of extradition proceedings, the Crown however, alleging that he came back voluntarily. On the 11th November he was brought before a justice of the peace of the city where the offences were committed, for preliminary investigation into the charges. There were then two informations before the justice taken before the police magistrate on the 6th November, on which warrants of arrest had been issued, one being that on which the telegram had been sent directing the prisoner's arrest. Two further informations were taken on the same day before the justice for other alleged thefts. A remand was made to the 13th November, the justice issuing his warrant of remand, under his hand and seal, the warrant reciting the bringing of the prisoner before him as a justice of the peace, acting for, in the absence of, and at the request of, one of the police magistrates for the city, there being two such police magistrates, and on the depositions remands were noted without it being stated by whom. On the 13th November a writ of *habeas corpus* was issued, to which, by a return, dated the 14th, the gaoler returned, as the only cause of the prisoner's detention, the warrant of remand of the 11th November; but on the 16th November he made a further return of four additional warrants of remand, dated the 13th November, under the hand and seal of the said police magistrate, remanding the prisoner until the 17th November:—*Held*, that the circumstances under which the prisoner was brought back to Canada could not be inquired into, that being a matter to be raised by the government of the country whose laws were alleged to have been violated, or at the suit of the party injured against the person who had committed the alleged trespass against him.—*Held*, also, whether or not the justice had jurisdiction to take the informations or to make the remand, by reason of it not appearing that he was acting in the absence of both police magistrates, and for other reasons, the detention of the prisoner was justifiable, for he was properly before the police magistrate on the 13th on the informations taken before him on the 6th November, and was

then duly remanded; and, though the second return was made subsequently to the issue of the writ, it was valid, and could be looked at in support of the prisoner's detention. *In re Walton*, 11 O. L. R. 94; S. C., sub nom. *Rex v. Walton*, 6 O. W. R. 905.

**2. Arrest under warrant—Production of prisoner before magistrate—Commitment in absence of prisoner—Criminal Code—Habeas corpus.]**—A commitment to gaol by a magistrate of a woman, arrested under a warrant, made without having her brought before him, upon a verbal unsworn statement that she had shewn signs of insanity, and in order that a medical examination might be had, is illegal.—2. The first duty of a magistrate dealing with a person arrested upon his warrant is to have such person brought before him as soon as practicable, and then make such order as the case requires. The express enactment of the Criminal Code (s. 567), must be followed in this respect, although the form of remand in connection with it has no mention of the presence of the prisoner. The failure to conform to the above rule will entitle the prisoner, on petition for *habeas corpus*, to have the commitment quashed and to be discharged from custody. *Ex p. Sarrault*, Q. R. 15 K. B. 3.

**3. Bail—Estreat—Notice to surety to perform condition—Adjournment at accused's request for more than eight days** *Rex v. Burns*, 2 E. L. R. 167.

**4. Conviction — Imprisonment — Release of convict on bail pending appeal—Adjudication that appeal not competent—Convict remaining at large—Re-arrest on charge of being unlawfully at large—Arraignment—Plea of not guilty—Trial—Right to elect—Jury—Proof of conviction—Informalities—Return of amended conviction pending trial—Admissibility—Computation of term of imprisonment—Escape from custody—Lawful excuse—Conviction on second charge—Concurrent sentence.** *Rex v. Taylor* (N.W.T.), 4 W. L. R. 332.

**5. Conviction — Motion by prisoner for his release because insufficient penalty imposed.** *Rex v. Tupper*, 2 E. L. R. 110.

**6. Conviction for killing dogs—Complaint laid by wife of owner—Defendant ordered to pay costs to owner instead of to prosecutrix—Amended conviction returned on certiorari.** *Rex v. Grey*, 2 E. L. R. 68.

**7. Dismissal of complaint—Motion to quash.]**—An order dismissing a com-

plaint under the Summary Convictions Act may be quashed on *certiorari*. *Rex v. Ritchie, Ex p. Sandall*, 37 N. B. R. 206.

**8. Habeas corpus—Quashing writ—Powers of Judge—Part of sentence not executed.]**—The Judge to whom a writ of habeas corpus has been referred, and who supersedes it upon the ground that the petitioner is detained by virtue of a lawful sentence pronounced by a competent tribunal, has no power to order that tribunal to cause a part of the sentence to be executed (in this case the penalty of the lash) which had been suspended by reason of the issue of the writ. *Goldsberry v. Bernatchez*, Q. R. 28 S. C. 52.

**9. Inmate of bawdy house—Form of conviction—Imprisonment for time certain or until released.** *Rex v. Young*, 2 E. L. R. 65.

**10. Joint conviction — Prohibition to magistrate.]**—Every act committed by two or more persons in violation of s. 94 of 51 V. c. 22 is a contravention by each of them. A joint conviction of these persons is therefore illegal; and prohibition will be ordered against the convicting magistrate. *Amyot v. Chaveau*, Q. R. 28 S. C. 54.

**11. Lost indictment—Direction to prefer new indictment—Grand jury—Return of true bill—Refusal of prisoner to plead—Entry of plea by Court—Conviction—Regularity.** *Rex v. McAuliffe*, 7 O. W. R. 704.

**12. Motion to quash conviction—Rule nisi—Practice where cause not shewn.]**—An order nisi granted by a single Judge under Rule 7 of the General Rules of Michaelmas Term, 1899, if not entered to shew cause, will on proof of service be made absolute, and the Court will not consider and determine the sufficiency of the grounds on which the order was granted. *Rex v. Ritchie, Ex p. Sandall*, 37 N. B. R. 206.

**13. Motion to quash indictment—Written opinion of Judge after hearing motion—Effect of delivering to registrar—Judgment—Motion still pending.** *Rex v. Hannay (B.C.)*, 4 W. L. R. 96.

**14. Proof of previous conviction—Time for—Recollection of magistrate—Crown case reserved.]**—The proper time for proving a previous conviction against a prisoner under the Criminal Code, s. 971, is not upon the trial of the offence, but after the trial and before sentence.—Where there has been a previous con-

viction, within the recollection of the magistrate, but the Crown has failed to prove it, and it has not been otherwise shewn, the magistrate may proceed upon his own initiative, and may inform himself at the same time as to the previous conviction, and the age, character, and antecedents of the prisoner.—*Semble*, that the proper course to be pursued by the magistrate in such a case is not a subject for a reserved case. *Rex v. Bonnerie*, 38 N. S. R. 560, 1 E. L. R. 48.

**15. Prosecuting officer—Election of prisoner—Criminal Code — Inspection of depositions.]**—A barrister appointed by the Attorney-General, under the authority of R. S. N. S. 1900 c. 165, "to prosecute all matters in His Majesty's Supreme Court and County Court Criminal Court in and for the county of L. until further notice." has power to take the election of a prisoner under the Criminal Code, s. 706, the words "all criminal business" including all process necessary to bring the prisoner to trial, and the making of the election being a necessary act in these proceedings.—The Dominion statute (Code, s. 706, s.-s. 2, amended by Acts of 1900 c. 46), must be read, if possible, in such a way as to make it applicable to the varying circumstances of the different provinces for which it was passed.—Where the depositions handed to the prisoner for his inspection are contained in a bundle with other depositions, but in such a way that there is no difficulty in understanding those applicable to the particular offence charged, there is a sufficient compliance with the Code, s. 653. *Rex v. Jodrey*, 38 N. S. R. 142.

**16. Private prosecution—Prosecutor bound over to prefer indictment—Appearance before grand jury—Irregularity—Motion to quash indictment—Security for costs.]**—When a person preferring a charge requires the magistrate who has discharged the accused, to bind him over to lay and prosecute an indictment, and does submit such an indictment to the grand jury, at the following sitting of the Court, he has no right to appear, by himself or through counsel, before the grand jury, without the permission of the Court. The rule being, though not express, established by the hitherto unchallenged practice of the Court, a violation of it affords a ground for a motion to quash the indictment after a true bill has been found: but, when the question arises for a formal decision for the first time, and no injustice appears to have been caused by the irregularity, the motion will be discharged and the indictment allowed to stand.—2. The right of the accused to security for his costs, under



cl. 4 of s. 595 of the Criminal Code, will be enforced, upon motion, after the finding of a true bill under the circumstances stated above. *Rea v. Hoo Yoke*, Q. R. 14 K. B. 540.

**17. Prosecution under Ontario Act—Application to police magistrate by Attorney-General to state case—Time—Criminal Code—Ontario statutes.]—**Section 900 of the Criminal Code is now available for the review of all summary convictions under Ontario law, by virtue of the amendment to R. S. O. 1897 c. 90, by 1 Edw. VII. c. 13, s. 2 (O.)—An application to a magistrate to state a case in regard to a prosecution under an Ontario statute need not be made within the time limited by R. S. O. 1897 c. 90, s. 9, which applies only to appeals to the general sessions, but should be made within a reasonable time, no time being limited by s. 900, and no rules having been made under s. 533 of the Code. *Rea v. Ferguson*, 12 O. L. R. 411, 8 O. W. R. 306.

**18. Search warrant—Information on which based—Causes of suspicion—Certiorari—Quashing.]—**The proceedings upon which a search warrant is issued and the warrant itself may be brought before the Court on certiorari, and if the warrant is deemed to have been improperly issued, it may be quashed.—The information necessary to justify the issuing of such warrant must disclose facts and circumstances shewing the causes of suspicion, which tended to the belief of the commission of the alleged offence, with regard to which the warrant is deemed essential. The information herein being defective in this respect, the warrant was directed to be quashed, but on condition that no action should be brought against the police magistrate who issued it, or the officer who executed it. *Rea v. Kehr*, 11 O. L. R. 517, 7 O. W. R. 446.

**19. Sittings of Court—Appeal to Court of King's Bench—Dismissal of information—Autrefois convict—Invalid conviction.]—**The words "sittings of the Court," in s. 880 (a) of the Criminal Code, mean a term of the Court as fixed by law, and not a sitting had in virtue of an order of adjournment.—2. An appeal lies to the Court of King's Bench from an order of a justice of the peace dismissing an information or complaint on a plea of *autrefois convict*.—3. A conviction by a magistrate or magistrates upon an information or complaint charging an offence for which a previous information against the same defendant has been made before another magistrate, and while the same is pending, is null and

void, and will not avail in support of a plea of *autrefois convict* to the previous conviction or complaint. Hence an order dismissing the latter on such a plea will be quashed in appeal. *Cotton v. Bombardier*, Q. R. 15 K. B. 7.

## V. SUMMARY CONVICTION.

**1. Motion to quash—Recognizance—Necessity for defendant joining in—Company defendant—Leave to deposit money—Defective condition.]—**1. Where a corporation cannot enter into a recognizance, it can only comply with s. 4 of the Manitoba Summary Convictions Act, R. S. M. 1902 c. 163 (requiring the entering into of a recognizance or making a deposit with the justice of the peace or magistrate as a necessary preliminary to the application for a *certiorari* to quash a conviction), by making such deposit.—2. A recognizance under that section is defective if it is conditioned for the due prosecution of "a writ of *certiorari* issued," etc., instead of a writ to be issued.—3. Following *Ex p. Tomlinson*, 20 L. T. 324, and *Regina v. Robinet*, 16 P. R. 49, the defendant company should have leave to make the necessary deposit with the convicting magistrate within 14 days, and then to renew the motion. *Re Western Co-operative Construction Co. and Brodsky*, 15 Man. L. R. 681.

**2. Municipal by-law—Offence against—Defects on face of conviction—Keeping billiard room open in prohibited hours—Uncertainty.]—**Under a by-law of the village of Carman, providing that all pool rooms in the village should be closed from 8.30 p.m. every Saturday until 7 a.m. of the following Monday, and should remain closed on every other day from 10 p.m. until 6 a.m. on the following day, the defendant was convicted for that "he did refuse to close a pool room occupied by him in the village of Carman after the hour of half-past eight, contrary to the by-law of the village in that behalf:"—*Held*, that the conviction was bad and should be quashed on the following grounds:—1. It did not state that the pool room had been kept open after half-past eight in the afternoon.—2. It did not state that it was on a Saturday or Sunday the offence was committed: for, if it was not Saturday or Sunday, the pool room might have been lawfully kept open until ten o'clock p.m.—3. The conviction did not give the date when the offence had been committed, and, for all that it stated, it might have been before the by-law came into operation, or more than six months before the information

was laid. *In re Fisher and Village of Carman*, 15 Man. L. R. 475, 1 W. L. R. 276.

## CRIMINAL PROCEDURE.

See CRIMINAL LAW, IV.

## \* CROPS.

See EXECUTION, 1 — VENDOR AND PURCHASER, I. 16 — WATER AND WATER-COURSES, 14.

## CROWN.

**1. Canal bridge—Agreement between Crown and company as to construction—Liability for maintenance and operation of bridge.]**—In 1882 a company, the suppliants' predecessors in title, applied to the Minister of Railways and Canals for leave to construct a railway bridge across the Otonabee river, in the town of Peterborough, undertaking at the same time to construct a draw in such bridge in case the Crown should at any time thereafter determine it to be necessary for the purposes of navigation. By order in council of the 23rd October, 1882, and an agreement made in pursuance thereof on the 23rd December, 1882, between the company and the Crown, permission was given to the former to construct a bridge, upon the said undertaking to build a swing in the bridge if the Crown considered it necessary, or, in case of the carrying out of the proposed canal for the improvement of the Trent river navigation, and in that case it being considered necessary that there should be a new swing bridge over the canal, the cost of the swing and the necessary pivot pier therefor to be borne by the company. The canal having been constructed, it became necessary to have a new swing bridge over the canal on the company's line of railway. This bridge was built, and the suppliants discharged the obligation to which they succeeded to pay the cost of the pivot pier and of the swing or superstructure of the bridge. The cost of the maintenance and operation of the bridge being in dispute between the parties, the petition was filed to determine the question of liability therefor:—*Held*, that, in the absence of any stipulation in the agreement between the parties as to which should bear the cost of such maintenance and operation, the suppliants, having built the pivot pier and swing as part of their railway and property, should maintain and oper-

ate them at their own cost. *Canadian Pacific R. W. Co. v. The King*, 26 C. L. T. 777.

**2. Canadian Pacific Railway Company—Construction of branch line—Subsidy—Agreement to pay—Ascertainment of amount—"Cost"—"Equipment."]**—By 3 Edw. VII. c. 57, s. 2, it was provided that the Governor in council might grant the Canadian Pacific Railway Company, in aid of the construction of a certain branch line, a subsidy of \$3,200 per mile, where the line did not cost more on the average than \$15,000 per mile, and that where such cost was exceeded, a further subsidy might be given of 50 per cent. on so much of the average cost of the mileage subsidized as was in excess of \$15,000 per mile, such subsidy not exceeding in the whole the sum of \$6,400 per mile. By s. 1 of the Act the expression "cost" was defined to mean the "actual necessary and reasonable cost," to be determined by the Governor-General in council, upon the recommendation of the Minister of Railways and Canals, and upon the report of the chief engineer of government railways. The Minister of Railways and Canals, under authority of the Governor-General in council, entered into a contract with the plaintiffs respecting the construction of the branch line and the subsidy therefor, by which it was agreed that the Crown would "in accordance with and subject to the provisions of ss. 1, 2, and 4 of the Subsidy Act, pay to the company so much of the subsidies or subsidy hereinbefore set forth or referred to, as the Governor-General in council, having regard to the cost of the work performed, shall consider the company to be entitled to in pursuance of the said Act:—*Held*, that, inasmuch as the Act and the agreement made thereunder for the payment of subsidy left the amount thereof to be determined by the Governor-General in council, the decision of the Governor-General in council was not open to revision by the Court. *Canadian Pacific R. W. Co. v. The King*, 26 C. L. T. 778.

**3. Contract—Inspector of prisons—Employment of prisoners in manufacture of binder twine—Construction of contract—Assignments of contract—Extensions of time—Modifications—Ratification of original contract by resolution of Legislative Assembly—No ratification of assignments and extensions—Effect of resolution—Force of Act of legislature—Authority of executive government of province—Orders in council—Change in rates of payment—Retroactivity—Commission—Interest—Insurance—Accounts. *Independent Cordage Co. of Ontario v. The King*, 8 O. W. R. 723.**

**4. Expropriation of land — Compensation—Witnesses — Error in valuation—Report of referee—Reducing assessment on appeal.]**—Where the witnesses on whose evidence the referee seemed to rely were, in the opinion of the Judge, led into the error of applying to a large number of acres (in this case 623) a value which appeared to represent the value of a portion of the property, but not the whole, the amount of compensation recommended by the referee was reduced.—  
**2.** Where average values are applied to ascertain the value per acre of land taken by the government, such average values should be applied with great care and moderation. *Rex v. Dodge*, 26 C. L. T. 528, 10 Ex. C. R. 208.

**5. Intercolonial railway — Freight rates—Regular and special rate—Agent's mistake in quoting—Estoppel.]**—A freight agent on the Intercolonial Railway, without authority therefor and by error and mistake, quoted to a shipper a special rate for hay between a certain point on another railway and on one on the Intercolonial, the rate being lower than the regular tariff rate between the two places. The shipper accepted the special rate, and shipped a considerable quantity of hay. Being compelled to pay freight thereon at the regular rate, he filed a petition of right to recover the difference between the amount paid and that due under the special rate:—*Held*, that, as the claim was based upon the negligence or laches of an officer or servant of the Crown, for which there was no statutory remedy, the petition must be dismissed. *Gunn & Co. Limited v. The King*, 26 C. L. T. 780.

**6. Lease—Water power from canal—Temporary stoppage — Compensation—Total stoppage—Measure of damages — Loss of profits.]**—A mill was operated by water power taken from the surplus water of the Galops canal, under a lease from the Crown. The lease provided that in case of a temporary stoppage of the supply caused by repairs or alterations in the canal, the lessee would not be entitled to compensation unless the same continued for 6 months, and then only to an abatement of rent:—*Held*, IDINGTON, J., *dubitante*, that a stoppage of the supply for two whole seasons, necessarily and *bona fide* caused by alterations in the canal, was a temporary stoppage under this provision.—The lease also provided that in case the flow of surplus water should at any time be required for the use of the canal, or for any public purpose whatever, the Crown could, on giving notice to the lessee, cancel the lease, in which case the lessee would be entitled to be paid the value

of all the buildings and fixtures thereon belonging to him, with 10 per cent. added thereto. The Crown unwatered the canal in order to execute works for its enlargement and improvement, contemplating at the time only a temporary stoppage of the supply of water to the lessee, but afterwards changes were made in the proposed work, which caused a total stoppage, and the lessee, by petition of right, claimed damages:—*Held*, GIROUARD, J., dissenting, that, as the Crown had not given notice of an intention to cancel the lease, the lessee was not entitled to the damages provided for in case of cancellation.—*Held*, also, that the lessee was not entitled to damages for loss of profits during the time his mill was idle owing to the water being out of the canal.—Judgment of the Court below, 25 Occ N. 83, 9 Ex. C. R. 287, affirmed; GIROUARD and IDINGTON, JJ., dissenting. *Beach v. The King*, 26 C. L. T. 246, 37 S. C. R. 259.

**7. Mining leases—Action by Attorney-General to cancel — Improvidence — Misrepresentations—Affidavit as to discovery — Untruth of — Evidence—Land Titles Act—Costs—Compensation for improvements — Notice. Attorney-General for Ontario v. Hargrave.** 8 O. W. R. 127.

**8. Public officer — Judge of Yukon Court—Living expenses — "Appointee of Dominion"—Recovery of money paid.]**—The defendant was appointed a Judge of the Supreme Court of the Yukon Territory on the 12th September, 1898. By s. 3 of the Yukon Territorial Act, 1898 (61 V. c. 6), as such Judge he became a member of the council constituted to aid the Commissioner in his administration of the Territory. An order in council was passed on the 7th October, 1898, appointing him "to aid the Commissioner in the administration of the Territory," and since that time up to the action brought he had continued to act as a member of the council. In addition to the salary paid to him as such Judge, certain provision for living expenses was made from time to time by Parliament in his behalf. By orders in council of the 7th July, 1898, and the 5th September, 1899, relating to officers for the administration of the Yukon District, it was provided that such officers were, in addition to their salaries, to be furnished with "quarters and such living allowance as may from time to time be fixed by the Minister of the Interior;" and it was further provided therein that the provision mentioned should apply to "all appointees of the Dominion" who had been or might be appointed to the staff for the administration of the Yukon

Territory:—*Held*, that the defendant was an "appointee of the Dominion" on the staff for the administration of the Yukon Territory within the meaning of the order in council of the 5th September, 1899, and so entitled to the quarters and a "living allowance" provided thereunder.—2. That the circumstances disclosed approval and ratification by the Minister of the Interior and the Minister of Public Works of the action of the Commissioner in making the expenditures in question for the benefit of the defendant. *Rex v. Dugas*, 26 C. L. T. 460, 10 Ex. C. R. 67.

**9. Public work—Collision of vessel with entrance pier to canal—Negligence in construction—Liability of Crown.]—**One of the entrance piers to a government canal was so constructed that a substructure of masonry rested on crib-work. The base of the pier was set back three feet from the edge of the crib-work, which left a step or projection under water between the masonry and the side of the crib-work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then taking a sheer and getting out of control, swung over and came in collision with this pier:—*Held*, that, upon the facts proved, the accident was caused by the vessel being caught in a current or eddy and so carried against the pier.—2. That, as there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision. *British and Foreign Marine Ins. Co. v. The King*, 9 Ex. C. R. 478.

**10. Public work—Contract for widening canal—Change of plans—Extra work—Recovery for—Quantum meruit—Waiver.]—**The supplants were contractors for widening and deepening the lower part of the Grenville canal. Some portions of the work described in the specifications could not be done without unwatering the canal; other portions of it could not be very well done in the winter season; and nearly all of it could have been done more cheaply and conveniently during the open season. There was, however, nothing to prevent the work being done in the way the contractors did it, that is, by doing during the season of navigation such work as they could do with the water in the canal, by making the best use possible of the time in the spring after the frost was out of the

ground and before the water was let into the canal for the purposes of navigation, and also by using in the same way any time that might be available after the water was let out of the canal in the autumn and before the severe weather set in, and with regard to the rest, by work done in the winter season. It was also a term of the specifications that "parties tendering should consider in submitting their prices for the various items of work, that they must include the cost of removing snow and ice off dams, troughs, etc., and everything necessary to unwater the canal and weir pit during the progress of the work, and that navigation should not be interfered with." A large part of the work was done either in the winter season or with the water in the canal:—*Held*, that there was no such change in the conditions under which the contract was to be performed as to make its provision inapplicable to the work that was done, and that the case was not one in which the contractors were entitled to treat the contract as at an end and to recover upon a *quantum meruit*, as was done in the case of *Bush v. Trustees of the Port and Town of Whitehaven*, 2 Hudson on Building Contracts, p. 121.—2. In this case an order in council was passed waiving certain clauses of the contract:—*Held*, that the words in the first clause of s. 33 of the Exchequer Court Act, "the Court shall decide in accordance with the stipulations in the contract," might be treated as directory only, and that effect might be given to the waiver so far as it afforded relief from the clauses of the contract which would constitute a defence to the action if pleaded by the Crown, such as the absence of any written direction or certificate by the engineer with respect to the work done; but that the remaining clauses of the section were imperative, and there could be no valid waiver which would enable a contractor to obtain compensation for a larger sum than the amounts stipulated for in his contract, i.e., the contract prices for the different classes of work done must be applied to such work.—3. Where a contract has been entered into for the construction of certain works at schedule rates, and the work has been completed in accordance with the contract, the contract prices cannot be increased so as to give the contractor a legal claim for higher prices without a new agreement made with authority, for a good consideration. *Pigott v. The King*, 26 C. L. T. 463, 10 Ex. C. R. 248.

**11. Public work—Injury to adjoining property by fire—Liability of Crown under s. 16 (c) of Exchequer Court Act—Injury not actually happening on the public work.]—**It is sufficient to bring a



case within the provisions of s. 16 (c) of the Exchequer Court Act to shew that the injury complained of arose from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work. It is not necessary to shew that the injury was actually done or suffered upon the public work itself. *Letourneau v. The Queen*, 7 Ex. C. R. 1, 33 S. C. R. 335, followed. *Price v. The King*, 26 C. L. T. 462, 10 Ex. C. R. 105.

**12. Public work—Negligence—Canals—Natural channels or rivers—Distinction between public property and public works.]**—The natural channels of the St. Lawrence river, which lie between the canals, are not public works unless made so by statute, or unless something has been done to give them the character of public works.—2. By the 1st clause of the 3rd schedule of the British North America Act, 1867, canals with land and water power connected therewith (of which the Cornwall canal is one) are enumerated as part of the provincial public works and property, that in virtue of s. 108 of the Act became the property of Canada:—*Held*, that this does not give the Dominion any proprietary rights in the river St. Lawrence, from which the water is taken for the Cornwall canal, beyond the right to take the water, nor make the river itself a public work of Canada.—3. By an order of the Governor-General in council of the 22nd March, 1870, the St. Lawrence river to the head of Lake Superior, the Ottawa river, the St. Croix river, the Restigouche river, the St. John river, and Lake Champlain, are declared to be under the control of the Dominion government:—*Held*, that this order did not have the effect of altering in any way the proprietary rights, if any, that the government of Canada then had in the rivers and lakes mentioned, or of making them or any parts of them public works of Canada. *Macdonald v. The King*, 26 C. L. T. 781.

**13. Public work — Negligence — Freight elevator in post office—Use of, by employees — City by-law — Liability of Crown.]**—The suppliant, an employee of the post office in the city of Montreal, was injured by falling from a lift to the floor of the basement. The lift was used for the transfer of mail bags and matter with those in charge of them from one floor to another in the post office building. It was proved that the lift was constructed in the usual and customary manner of freight elevators; but the suppliant contended that, as the lift was allowed to be used by certain employees in going from one floor to another, it should have been provided with guards or some-

thing to prevent any one from falling from it, as the suppliant did while passing from the first floor to the basement:—*Held*, that such user by the employees did not constitute the lift a passenger elevator and impose a duty upon those in charge of it to see that it was better protected than it was.—2. In any event the suppliant was not using the lift as a passenger at the time of the accident, but to transfer mail matter of which he was then in charge.—3. The by-law of the city of Montreal respecting freight and passenger elevators passed on the 4th February, 1901, did not affect the liability of the Crown in this case. The lift in question was built in 1897, before the enactment of such by-law, and was situated in the post office at Montreal, which building constitutes part of the public property of the Dominion, and so was within the exclusive legislative authority of the Parliament of Canada. *Finigan v. The King*, 25 Occ. N. 145, 9 Ex. C. R. 472.

See ASSESSMENT AND TAXES, 9, 12—BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2—CRIMINAL LAW, III. 34—FISHERIES—MINES AND MINERALS, 2—MUNICIPAL CORPORATIONS, IV. 4 — PATENT FOR INVENTION, 1—PENALTY, 3—PLEADING, IX. 5—RAILWAY, VIII. 5, X. 1—SCIRE FACIAS—SHIP, 23—TRIAL, III. 3—TRUSTS AND TRUSTEES, 9 — VENDOR AND PURCHASER, II. 9 — WATER AND WATERCOURSES, 7.

## CROWN LANDS.

**1. Crown grant — Extent of—Evidence—Preliminary correspondence—Concluded agreement—Possession—Intention—Fishing rights — Navigable rivers.]**—1. Where letters patent issue as a grant of land by the Crown, upon the application of the grantee, and after correspondence, disclosing a concluded agreement, the latter should be read into the letters patent. Evidence of the application and correspondence is therefore admissible to prove the extent of the grant, e.g., that a grant of land along a river was made with the right to fish in it.—2. Although possession cannot give a title by prescription to Crown lands, it may be relied upon and proved to establish the extent of a grant or conveyance of land by the Crown, and the intention of the contracting parties respecting an accessory right; in this case, the right to fish.—3. *Per HALL, J.*—Rivers are navigable and floatable, and, as such, form part of the public domain, which are *de facto* used, or susceptible of being used, in their ordinary condition, by the public, as highways

for trade and travel by navigation, or for the transportation of timber afloat.—4. Also *per* HALL, J.—A grant by the Crown of land, along a non-navigable and non-floatable river (such as the river Moisie is proved in this case to be), conveys ownership of it to midstream, *usque ad medium filum aquæ*. As a consequence, the grantee acquires, as riparian proprietor, the right to fish in the river opposite the land granted to him. *Lefaiure v. Attorney-General for the Province of Quebec*, Q. R. 14 K. B. 115.

**2. Crown lands in New Brunswick**—*Adverse possession for less than 60 years*—Grant by the Crown during adverse possession valid — *Rights of grantee*—21 Jac. I. c. 14—*Construction*.]—In an action of ejectment it appeared that the land belonged to the Crown, and was in peaceable possession of its grantee, the defendant, but that the plaintiff and his predecessors in title had enjoyed uninterrupted occupation thereof for a period of 56 years down to a date about 7 years prior to date of action:—*Held*, that judgment was rightly entered for the defendant.—Occupation against the Crown for any period less than the 60 years required by the Nullum Tempus Act is of no avail against the title and legal possession of the Crown, and still less against its grantee in actual possession. — The Act 21 Jac. I. c. 14 only regulates procedure, and its effect is that if an information of intrusion is filed, and the Crown has been out of possession for 20 years, the defendant is allowed to retain possession till the Crown has established its title. Where no information has been filed, there is nothing to prevent the Crown or its grantee from making a peaceable entry, and then holding possession by virtue of title.—Decisions by the Courts of New Brunswick and Nova Scotia, to the effect that when the Crown has been out of actual possession for 20 years it could not make a grant until it had first established its title by information of intrusion, overruled. Judgment in *Maddison v. Emmerson*, 24 Occ. N. 204, 34 S. C. R. 533, affirmed. *Emmerson v. Maddison*, [1906] A. C. 569.

**3. Patent**—*Construction* — *Erroneous description*—*Description to accord with grants of other parcels*—*Occupancy under French title*.]—Under a patent from the Crown a parcel of land, forming part of a large block originally held under what is known as the French title, was granted to the defendant's grantor, with the express condition that the patent must be consistent with the patents of other portions of the block. The description of the land in the patent was erroneous, which was apparent from the other

patents and the registered and unregistered plans, and had the effect of including land to which the plaintiff had a good title derivable from such French title, and with which possession had gone. In an action of trespass against the defendant for pulling down the plaintiff's fence, and for a declaration as to his boundaries:—*Held*, that the patent must be read as only including the land according to the proper description thereof, and would not include the portion in question; but, even if it were otherwise, it could not be made use of to displace the title of the plaintiff, whose beneficial ownership was derivable through the French title. The occupancy of lands under the French title, and the rights vested in such occupants by virtue of the Imperial Acts 14 Geo. III. c. 83, s. 8, and 31 Geo. III. c. 31 s. 33, considered and commented on. *Dru-lard v. Welsh*, 11 O. L. R. 647, 7 O. W. R. 575.

**4. Patent**—*Revocation*—*Procedure* — *Incidental claim*—*Scire facias*.]—Where a party does not demand in a general and absolute manner the nullity or revocation of letters patent, but demands it only in an incidental manner, and as against himself only, it is not imperative to proceed by way of *scire facias*. *Shawinigan Carbide Co. v. Wilson*, 8 Q. P. R. 61.

**5. Pre-emption**—*Laches*—*Abandonment* — *Petition of right*—*Contract of Crown with pre-emptor*. *Cartwright v. The King* (B.C.), 3 W. L. R. 47.

**6. Reservation of timber in grant of land**—*Mortgage by patentee*—*Subsequent order in council rescinding reservation*—*Effect as to rights of mortgagee in timber*—*Accretion*—*Estoppel*. *MacCrimmon v. Smith* (B.C.), 3 W. L. R. 154.

See ASSESSMENT AND TAXES, 17, 21—CONSTITUTIONAL LAW, 7, 10, 15—HOME-STEAD—STATUTES, 8—TIMBER—VENDOR AND PURCHASER, II, 9—WATER AND WATERCOURSES, 17.

## CURATOR.

See BANKRUPTCY AND INSOLVENCY, 14, 19, 30—DOMICILE — LUNATIC, 1—SUBSTITUTION, 1.

## CUSTOM.

See CONTRACT, III, 4—SHIP, 2.

**CUSTOMS.**

See **REVENUE**, 1.

**DAMAGES.**

**1. Assignment of claim for damages ex delicto**—Action by assignee—Cause of action—Chose in action—Invalidity of assignment. *McCormack v. Toronto R. W. Co.*, 8 O. W. R. 467.

**2. Fatal Accidents Act**—Death of infant—Negligence of tramway company—Measure of damages of father.]—The father of an infant killed in a tramway accident can recover from the tramway company responsible for the accident only actual damages established by evidence. He has no right to damages for moral prejudice nor *in solatium doloris*. *Quebec Railway, Light, and Power Co. v. Poitras*, Q. R. 14 K. B. 429.

**3. Fatal Accidents Act** — Loss of child—Right of mother while father living — Excessive damages — Reasonable expectation of pecuniary benefit — New trial.]—The mother of the deceased is a person for whose benefit an action can be brought under the Fatal Accidents Act, although the father is living.—Damages assessed by a jury at \$3,000 for the loss of a daughter seventeen years old by reason of the negligence of the defendants, were held to be excessive, and a new trial was directed unless both parties would agree to have the damages fixed at \$1,500. Order of a Divisional Court, 11 O. L. R. 158, 6 O. W. R. 413, reversed. *Renick v. Galt, Preston, and Hespeler Street R. W. Co.*, 12 O. L. R. 35, 7 O. W. R. 673.

**4. Fatal Accidents Act** — Parent and child—Excessive amount—Suggested reduction—New trial — Evidence — Admissibility — Intention of deceased.]—Damages to the amount of \$2,100 were recovered by the plaintiff suing as the father and administrator of his deceased son, 22 years of age, who was killed through defendants' negligence. The son's occupation was principally that of a labourer, the highest rate of wages received by him being for a few days at the rate of \$35 a month. His mother was dead and his father had married again. He lived with a widowed sister, but was on good terms with his father and step-mother, whom he visited once or twice a month, on such occasions giving his father from \$2 to \$4, and once \$5. His habits were good and he was of a generous disposition. Evidence was received of his intention of helping his father to build a

house, of assisting him in paying on a mortgage of \$650 on his property, as well as a debt of \$400, which he owed another son, and for which the father had given his promissory notes: — *Held*, that the evidence of such expressed intention was properly admitted, not necessarily as shewing a promise to make the payments, but of his being well disposed to his father; the amount awarded the plaintiff for damages however was clearly excessive, and a new trial was ordered unless the parties agreed to a reduction of the damages to \$500. *Stephens v. Toronto R. W. Co.*, 11 O. L. R. 19, 6 O. W. R. 657.

**5. Fatal Accidents Act**—Trial without jury—Finding of Judge—Expectation of benefit—Nominal damages—Dismissal of action without costs—Appeal. *Wood v. London Street R. W. Co.*, 7 O. W. R. 601.

**6. Interlocutory injunction**—Dissolution—Time for applying for reference—Evidence — New agreement — Costs—Stay of proceedings—Appeal. *McLeod v. Lawson*, 8 O. W. R. 335.

**7. Remoteness**—False representation —Costs of action brought on faith of.]—The plaintiff, on the representation of the defendant, then president of the Accident and Guarantee Co. of Canada, that he was appointed manager of the company, resigned his position at the Canada Life Assurance Co. Later on, however, the accident company declined to ratify the contract made by their president. An action for salary brought by the plaintiff against the company was dismissed. Now the plaintiff sought to recover from the defendant, among other amounts, the sum of \$225, costs of that action. The defendant pleaded by inscription in law that there was no *lien de droit* between him and the plaintiff, these damages being indirect and too remote:—*Held*, that the claim of the plaintiff for recoupment of the costs of the proceedings was legally impossible of assertion as resulting from the alleged united false representations of the defendant and his co-directors. *Stewart v. Nelson*, 7 Q. P. R. 472.

**8. Street Railway** — Negligence—Married woman—Personal injury—Damages awarded husband—Excessive amount —New trial.]—The female plaintiff, 62 years of age, wife of the male plaintiff, who was 70 years of age, in attempting to alight from one of the defendants' cars, was through the defendants' negligence thrown to the ground and seriously injured. She was in the doctor's hands for several months, and her arm and hand which were injured were not likely to be

as useful to her as before the accident. The jury awarded the wife \$1,000 and the husband \$1,200:—*Held*, that the amount awarded the wife could not be deemed to be unreasonable; but, as regarded the husband, after due allowance for the medical expenses and for nursing and attendance, and considering the age of the parties, the amount awarded him was excessive, and a new assessment was ordered, unless an agreement was come to between the parties that the damages should be reduced to \$400. *Clarke v. London Street R. W. Co.*, 12 O. L. R. 279, 8 O. W. R. 185.

**9. Tort—Jury—Misdirection.]**—In an action for damages for tort tried before a jury, the verdict will not be set aside on the ground of misdirection by the Judge, because he told them they might if they chose allow the full amount of the loss which the plaintiff contended he had sustained, or the amount which, from actuarial tables, would be required to yield an annuity equivalent to and representing the full loss. *Sadler v. Grand Trunk R. W. Co.*, Q. R. 28 S. C. 501.

See APPEAL, IX. 1 — BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 22 — BROKER, 1, 3 — CARRIERS, 1 — CHAMPERTY AND MAINTENANCE — CONSPIRACY, 2 — CONTRACT, I. 1, 2, 4, III. 1, 6, 11, VIII. 3, X. 6, 13 — COURTS, IX. 3 — COVENANT, 2 — CROWN, 6 — DEFAMATION, 2, 4, 6, 11, 12, 13 — DISCOVERY, IV. 5 — DISTRESS — EASEMENT, 1 — EXECUTORS AND ADMINISTRATORS, 12 — FALSE ARREST AND IMPRISONMENT, 3 — FRAUD AND MISREPRESENTATION, 1, 2 — FRAUDULENT CONVEYANCE, 1 — HUSBAND AND WIFE, II., IX. 3 — ILLEGAL DISTRESS — INJUNCTION — JUDGMENT, II. 3, IV. 2 — LANDLORD AND TENANT, 3, 4, 7, 9, 11, 13, 14, 15, 16, 25, 30, 31 — MALICIOUS PROSECUTION AND ARREST, 5, 7 — MASTER AND SERVANT, I. 2, 3, 4, 5, II. — MINES AND MINERALS, 10, 12 — MORTGAGE, 11 — MUNICIPAL CORPORATIONS, II. — NEGLIGENCE — NUISANCE, 3 — PARTIES, III. 7 — PLEADING, VIII. 17, IX. 3 — RAILWAY, V. 2, VII. 4 — RESTRAINT OF TRADE — SALE OF GOODS, I. 12, II. 4, III. 2, IV. 1, V. 2, 3, VI. 5, 6 — SET-OFF, 4 — SHIP, 9, 10, 13 — SMALL DEBT PROCEDURE, 3 — STREET RAILWAYS, I. 4, II., III. — TRESPASS TO LAND, 1, 3-7, 11 — TRIAL, I. 5, 12 — VENDOR AND PURCHASER, I. 6, 16, 18, 23, 28, 29, 36, 37, II. 9 — WATER AND WATERCOURSES, 2, 3, 6, 13, 15, 19, 21, 23 — WAY, III., VI. 1.

## DEAD LETTER.

See BAILMENT.

## DEATH.

See DISTRIBUTION OF ESTATES — FATAL ACCIDENTS ACT — MASTER AND SERVANT, II. — PARLIAMENTARY ELECTIONS, II. 2 — PARTNERSHIP, 6 — RAILWAY — STREET RAILWAYS, III. — WILL.

## DEBENTURES.

See MUNICIPAL CORPORATIONS, V. 3.

## DECLARATION.

See PLEADING, III.

## DECLARATION OF QUALIFICATION.

See MUNICIPAL ELECTIONS.

## DECLARATION OF TRUST.

See PARTNERSHIP, 6.

## DEDICATION OF HIGHWAY.

See WAY, II.

## DEED.

**1. Absolute conveyance** — Cutting down to mortgage—Evidence — Redemption.] — Land of the plaintiff worth \$1,500, subject to a mortgage for \$900, and other charges for \$300, was conveyed to the defendant in consideration of his paying \$140 due for instalments under the mortgage, for the recovery of which an action had been brought. The costs of the action were paid by the plaintiff. The Court, finding under the evidence that the deed, though absolute in form, was intended as a mortgage, allowed the plaintiff to redeem. *Boston v. Wilbur*, 3 N. B. Eq. 309, 1 E. L. R. 472.

**2. Construction** — Ambiguity—Discharge of debtor—Contract—Illegal consideration—Right of action.] — Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration of the circumstances attending the execution of the agreement—A deed of settlement

between B. and a bank declared that he owed the bank \$4,731.61 for interest on an advance in respect to a lottery scheme, and a further sum of \$18,762.02 for advances on an account for the purchase of stock, two notes being given for these amounts, respectively, and the shares of stock being pledged as security for the larger note only. Subsequently the directors of the bank passed a resolution authorizing the discharge of B. on payment of \$15,000 by one V., "jusqu' à concurrence de la dite somme de \$15,000," and the transfer of the shares to V. This resolution was followed by a deed of compromise, V. paying the \$15,000, and obtaining a transfer of the shares; and it was thereby declared that by the transaction B. was discharged in so far as concerned the bank's advances on the stock account "vis-à-vis la banque des avances qu'elle lui a faites du chef susdit mentionnées en un acte de règlement," etc., the resolution being annexed and the deed of settlement referred to for imputation of the payment, and V. was to become creditor of B. under conditions mentioned "jusqu' à concurrence de \$15,000." In an action by D., to whom the notes held by the bank were assigned:—*Held*, reversing the judgment appealed from, that the effect of the deed of compromise was to discharge B. merely to the extent of the \$15,000 on account of the larger note; and further, affirming the judgment appealed from, that no action could lie upon the smaller note, as it represented interest on a claim in relation to a contract of an illegal nature. *L'Association St. Jean Baptiste v. Brault*, 30 S. C. R. 598, followed. *Deserres v. Brault*, 26 C. L. T. 848, 37 S. C. R. 613.

**3. Construction — Life estate—Remainder in fee—Grant of land—Habendum — Repugnancy—Remaindermen not named — Description of, as "children" of life tenant—Sufficiency.]**—A grantor by deed granted to the grantee "for and during the term of his natural life, the lands and premises hereinafter mentioned," and upon his death "unto those of his children who shall survive him or shall have died before him, leaving lineal descendants surviving" at his death. "their heirs and assigns forever, in equal shares in fee simple as tenants in common; the said estate granted to the children (of the grantee) to be subject, however, to the support and maintenance on the said lands hereinafter mentioned of the wife (of the grantee) during such time as she shall remain widow (of the grantee);" "to have and to hold unto" (the grantee), "his heirs and assigns, to and for his and their sole and only use

forever:"—*Held*, that the grantee took only a life estate, his children having the remainder in fee simple. The rule in *Shelley's Case* did not apply; otherwise, there would be no estate in the children charged with the support and maintenance of the widow, and there was an express grant of the fee in remainder to the children. The intent was clear that the grantee should only take a life estate; and the habendum, being repugnant to the grant, was void. *Purcell v. Tully*, 12 O. L. R. 5, 7 O. W. R. 848.

**4. Description — Ambiguity — Description aided by occupation—Trespass.** *Fulton v. Davidson*, 3 E. L. R. 153.

**5. Description — Ambiguity — Evidence to explain on trial of action.** *Ogilvie v. Grant*, 1 E. L. R. 117.

**6. Description — Ambiguity—Latent ambiguity—General followed by particular description — Falsa demonstratio—Evidence as to intention of parties — Adoption of boundary line.** *Oleson v. Jonasson (Man.)*, 3 W. L. R. 466.

**7. Description — Appurtenances — Evidence—Grantor's statement of what he intended to convey—Surrounding circumstances—Mode of user—Oral agreement to divide land—Limitation of actions — Possessory title—Wild lot—Isolated acts.** *Ogilvie v. Grant*, 2 E. L. R. 196.

**8. Description — Mistake—Reformation—Declaratory judgment—Building on land conveyed—Registry laws—Estoppel—Covenant—Costs.** *Ruetsch v. Spry*, 7 O. W. R. 705.

**9. Description—Reference to plan—Trespass — Evidence—Onus of proof—Misdirection — New trial.** *Bartlett v. Nova Scotia Steel Co.*, 1 E. L. R. 293.

**10. Incapacity of grantor — Absence of consideration—Conflict of evidence—Relief.]** — Judgment of BARKER, J. in *Winslow v. McKay*, 25 Occ. N. 88, 1 N. B. Eq. 84, affirmed. *McKay v. Winslow*, 37 N. B. R. 213.

**11. Maintenance — Enforcement of agreement—Breach—Onus of proof.]**—In a suit to enforce performance of an agreement by the defendant to maintain the plaintiffs, husband and wife, in consideration of a conveyance of land by them to the defendant, the onus of proving a breach of the agreement is upon the plaintiffs. *Ouilette v. LeBel*, 26 C. L. T. 466, 3 N. B. Eq. 205.



**12. Notarial act — Impeaching — Remedy — Inscription de faux.]**—The remedy of inscription de faux is not open to a party who simply attacks the truth of statements made in an authentic deed, where the party admits that the notary has set out the facts as he was instructed. In such a case the party must make his proof in the ordinary way. *Anderson v. Prévost*, Q. R. 28 S. C. 434.

**13. Rectification — Mistake — Description of land.]**—A mortgage deed executed by the defendant in favour of the plaintiffs described the land as lots 19 and 20 in the parish of Headingly, containing by admeasurement 418 acres more or less. The plaintiffs sought rectification so as to make it cover the outer 2 miles of the lot as well as the inner, the plaintiffs alleging that such was the intention of the parties at the time the loan was made, and that the outer 2 miles had been omitted by mutual mistake:—*Held*, that rectification should be ordered, because the defendant, who was a man of intelligence and good education, had signed the mortgage giving the acreage as 418 more or less, whereas without the outer 2 miles the 2 lots only contained 223.65 acres, and with them only 421.22 acres; and because the defendant had, 3 years after the date of the mortgage, asked the plaintiffs to discharge it as against the right of way of a railway running, to his knowledge, only through the outer 2 miles of the lots, and had arranged that the price of such right of way should be paid by the railway company to the plaintiffs in reduction of the mortgage debt. *British Canadian Loan and Agency Co. v. Farmer*, 15 Man. L. R. 593, 24 Occ. N. 273.

**14. Reservation — Use of part of building—Access—Usage.]**—The reservation in a deed of the usufruct of the garrets in a building being silent as to the manner of gaining access thereto, the condition of the premises and the usage established at the time of the reservation of the usufruct will determine the mode of access. *Godbout v. Godbout*, Q. R. 28 S. C. 481.

See ASSESSMENT AND TAXES, 17, 18, 21 — BANKRUPTCY AND INSOLVENCY — BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 21—CEMETERY — CHURCH—CROWN LANDS—EASEMENT, 2, 4—EJECTMENT, 4—EVIDENCE, I. 5, 6 — FRAUDULENT CONVEYANCE—LIMITATION OF ACTIONS, I. 3—MORTGAGE — PARENT AND CHILD, 1—REGISTRY LAWS, 6, 8—TRESPASS TO LAND, 12—TRUSTS AND TRUSTEES, 1, 2, 6, 7, 11, 12, 13—VENDOR AND PURCHASER, I. 4, 6, 14, 35, II. 2, 3, 7—WATER AND WATERCOURSES, 16, 25—WAY, VI. 1.

## DEFAMATION.

**1. Accusation against candidate at municipal election—Good faith—Privilege.]**—An elector who, in the course of a municipal election, being consulted about the qualifications of a candidate, and questioned by the canvassers of the candidate as regards his hostile attitude, replies that he would not vote for a man against whom an accusation of corruption has been publicly brought, and who repeats these remarks in good faith, is not liable in damages for defamation. *Quimet v. Durand*, Q. R. 28 S. C. 465.

**2. Damages.]**—In an action for libel, where no material or actual damage is proved, the plaintiff may recover exemplary damages. *Filiatrault v. "La Patrie" Publication Co.*, Q. R. 28 S. C. 380.

**3. Evidence — Discovery — Circular — Names of recipients—Source of information.]**—In an action for damages alleged to have been sustained by reason of the sending out by the defendants of a circular stating that they had been "advised that the (plaintiffs) had decided to discontinue their separator business," the defendants' manager was ordered to give on his examination for discovery the names of the persons to whom the circular had been sent and the name of the person who had "advised" the defendants of the fact alleged, this information being relevant to and important on the pleaded defences of *bona fides* and privilege. *Massey-Harris Co. v. DeLaval Separator Co.*, 11 O. L. R. 227, 7 O. W. R. 59.

**4. Failure of proof as to two charges—Success as to third—Damages—Costs.** *Welch v. Smith* (N.W.T.), 4 W. L. R. 4.

**5. Justification — Pleading.]**—A defendant sued for having defamed the ward of the plaintiff in the course of the months of November and December, 1904, and April and September, 1905, cannot plead in justification facts which occurred and words which were spoken in February and March, 1904; such allegations are useless, cannot but be injurious, and will be struck out upon inscription in law. *Balthazard v. Ethier*, 7 Q. P. R. 337.

**6. Letter reflecting on physician's professional skill — Justification — Damages — Costs.** *Williams v. Morris* (B.C.), 4 W. L. R. 99.

**7. Newspaper — Evidence — Comment on legal proceedings—Privilege—Public interest—Statutory declaration.]**—The publication of libellous matter in

a newspaper cannot be justified on the ground that it was published "as a matter of public news" or "in the *bona fide* belief that it is in the public interest that the matters referred to should be made public."—Neither can the publication be justified on the ground that the matter complained of has been embodied in a statutory declaration made before a justice of the peace with the object of bringing the charges contained in the declaration before the municipal council having power to inquire into the charges made and to dismiss the official complained of.—Under the heading of "Scott Act inspector accused of bribery" the defendant company printed in their newspaper an item to the effect that M. had made a declaration before a justice of the peace accusing the plaintiff, the county Canada Temperance Act inspector, of attempted bribery, and stating that in the declaration referred to it was alleged that the plaintiff on two different occasions promised that he would not prosecute M. if the latter would give him a certain sum of money, which M. refused to do. At the trial the statutory declaration referred to was tendered in evidence, on behalf of the defendant, as evidence of *bona fides*, and was rejected by the trial Judge:—*Held*, that the evidence was rightly rejected, and that the defendant's appeal must be dismissed with costs.—2. That the making of the statutory declaration before the magistrate was not a necessary preliminary to an inquiry into the conduct of the plaintiff by the municipal council, and that the defendant could not claim privilege in respect to the publication.—*Semble. per GRAHAM, E.J.*, that a communication addressed to the warden of the council, and sent to him, might have been considered privileged. *McDonald v. Sydney Post Publishing Co.*, 39 N. S. R. 81, 1 E. L. R. 61.

**8. Newspaper — Repeating article from another newspaper — Defence—Justification—Payment into Court — Pleading.]**—It is not a defence to an action of libel nor a justification to say that the alleged libel was published by the defendant in his newspaper simply as a fact upon the authority of another newspaper.—The defendant, having offered and paid into Court with his defence a certain sum of money, cannot demand the complete dismissal of the action, but only dismissal of the claim so far as it exceeds the amount paid in. *Prévost v. Huard*, 7 Q. P. R. 406.

**9. Newspaper interview—Publication—Privilege — Innuendo—Meaning of words—Nonsuit.]**—A defeated candidate in an interview with a newspaper report-

er the day after an election informed him that the plaintiff (who was a political opponent and an active party worker), had, as soon as it was known he was in the field, come to and asked him to indorse a note for \$1,000, which he refused to do, and had also later, in a speech, accused him of disloyalty. This was published in the newspaper the following day, and was the libel complained of. The innuendo alleged was, that the plaintiff had offered his services and support as a bribe, and had corruptly offered to desert his party and abandon his principles and support the defendant at the election if he would indorse his note; that his opposition to the defendant's candidature was not due to principle or party loyalty, but to the defendant's refusal to indorse the note; and that because of such refusal the plaintiff not only opposed his candidature but attacked him personally and accused him of disloyalty. The interview was published, and the defendant next day called at the newspaper office, and the only thing he found fault with in the report was the omission of a few words in the introductory part. At the trial the Judge allowed the case to go to the jury, who found a verdict in favour of the plaintiff:—*Held*, that there was evidence that the defendant knew he was speaking for publication, and that he authorized what he said to be published in a newspaper; and that the communication was not privileged.—*Held*, however, that the words were not capable of the meaning ascribed to them by the plaintiff, and that the motion for a nonsuit at the close of the case should have been allowed. *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, 744, referred to.—Judgment of MacMahon, J., at the trial reversed in part. *Hay v. Bingham*, 11 O. L. R. 148, 6 O. W. R. 447.

**10. Notarial notice — Absence of malice—Publication — Service.]**—A notification to a member of a municipal council not to take any part in a certain discussion and vote in the council, given by an interested party by means of a notice served by a notary, upon the ground that this member, having received favours from the party opposed to the one giving the notice, will not be impartial, is given in the exercise of a right, and, in default of proof of fraudulent or malicious intention, will not support an action for defamation.—The service by a notary of a notice upon a party is not a publication of the matter which it contains, and is not therefore ground for an action of defamation. *Montreal Brewing Co. v. Vallières*, Q. R. 15 K. B. 201.

**11. Pleading—Defence—Striking out—Embarrassment—Privilege—Mitigation of damages.** *Grant v. McRae*, 8 O. W. R. 304.

**12. Privileged occasion—Excessive privilege—Malice—Proof of special damage—Judge's charge.]**—In 1892, by an error of a town assessor, the amount deducted by the Court of Revision from the defendant's assessment was entered on the roll as the assessment itself, so that he was assessed for some \$40 less than he should have been. Subsequently the question of arrears of taxes came up in the council, of which the defendant was a member, and the cases of alleged arrears, including the undercharge of the defendant for 1892, were referred to a committee, of which the defendant was also a member. The committee by a majority reported that the defendant was liable for the amount, a minority report being presented by the defendant. On the report being considered, statements were made by those presenting it. The defendant in answer thereto, while contending that he was not liable, accused the plaintiff, who had been, but was not then, the assessor, of having violated his oath of office, and of having threatened to tax the defendant out of town, the defendant contending that he could have prosecuted him before a Judge, and was sorry he had not done so; and similar statements were made by him on other occasions:—*Held*, that the fact of the plaintiff not being then the assessor did not prevent the action from being maintained without proof of special damage.—*Held*, also, that malice could be inferred from the language of the defamatory words themselves.—*McIntyre v. McBean*, 13 U. C. R. 534, dissented from.—*Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495, followed.—*Held*, also, that though the occasion was a privileged one, the words used, being foreign to the subject matter in hand, created an excess of the privilege, and the statements then made, as well as on the other occasions, were evidence of malice, which could not be withdrawn from the jury.—The Judge in charging the jury left it to them to say whether the defendant had established that he had acted *bona fide* and without malice; but on the jury being recalled he pointed out that the onus in this respect was on the plaintiff. An objection, therefore, on this ground of the charge was overruled.—A further objection taken to the charge was that the Judge—after first stating, in substance, that if as a matter of fact the defendant believed the charges to be true, the fact that he had no reasonable ground for such belief, need not enter into their consideration on the question of malice; that such

belief was not sufficient, if he took advantage of a privileged occasion when this particular matter was not under discussion and was not relevant thereto, but to gratify some indirect motive of his own brought that in—proceeded: "The fact that it is true that he believed it to be true is immaterial. If he did not believe it to be true, that, in itself, was abundant evidence of malice; but if he believed it to be true that is not conclusive evidence of want of malice." — *Held*, that the words "the fact that it is true that he believed it to be true," which were objectionable words, were immediately corrected by the words which followed; and this was the way it was understood by the defendant's counsel at the trial as appeared by his objections to the charge; and therefore the charge in this respect was also unobjectionable. *Crate v. McCallum*, 11 O. L. R. 81, 6 O. W. R. 825.

**13. Privileged occasion—Misdirection—Absence of prejudice—Damages—Quantum.]**—In an action for slander the words complained of were: "You (meaning the plaintiff) stole my feather bed and silver spoons," and, at the same time, in answer to the question, "Do you really mean to blame me for stealing them," the further words, "Most undoubtedly I do" (meaning thereby that the plaintiff was guilty of stealing his feather bed and silver spoons).—The plaintiff was a tenant of a portion of the defendant's house, and, owing to some difference which had arisen, was engaged at the time the words in question were used in packing up the articles belonging to her with a view to their removal, and the defendant was objecting to having them removed until the following day, asserting that they had not been properly checked over. The words were uttered in the presence of third parties. The trial Judge instructed the jury that the occasion was privileged unless malice was shewn. The jury returned a verdict in the plaintiff's favour, and assessed the damages at \$250:—*Held*, that the occasion on which the words complained of were uttered was not privileged, and that the directions given to the jury were erroneous on this point, but, as it was evident that the defendant was not prejudiced thereby, a new trial should not be allowed; also, that, while the damages were large under the circumstances, that was a matter peculiarly within the province of the jury, and they were not so excessive as to call for the interference of the Court. *McLean v. Campbell*, 38 N. S. R. 11.

**14. Privileged occasion—Theft—Judge's charge.]**—In an action brought by the plaintiff for damages for words



spoken by the defendant of and concerning the plaintiff, imputing that the plaintiff was a thief, the defence set up was that, on the occasions when the words in question were used, the defendant, on behalf of the Reid Newfoundland Steamship Company, was conducting an inquiry into a shortage of accounts of one M., who was agent of the company at North Sydney, and that all the parties present were employees of the company, and were endeavouring to ascertain what had become of money which appeared by the accounts to have been taken from the office at the place where the inquiry was being held.—The trial Judge instructed the jury that the occasion upon which the words complained of were uttered was privileged, and that the words were not the subject of an action unless the jury found that the defendant, in uttering the words, was actuated by ill will or by some indirect motive other than a sense of duty, and that the burden of proving this was upon the plaintiff:—*Held*, that the instructions given were correct, and that, in the absence of evidence such as that indicated, the verdict of the jury in favour of the plaintiff was wrong; and the action was dismissed with costs. *Wilcox v. Stewart*, 38 N. S. R. 409.

**15. Qualified privilege** — *Quebec law* — *Functions of Judge and jury* — *Malice* — *Findings of jury* — *Exercise of right*.]—The rule of "qualified privilege" of the law of England in the matter of libel and slander corresponds to and is the same as that of the law of Quebec, in the same matter, that no action will lie for statements made by a person in the exercise of a right (*dans l'exercice d'un droit*), unless actual malice is proved.—As in England the question of privilege or no privilege is one of law for the Court, and not for the jury, to determine, so in Quebec it is for the Court and not for the jury to say whether the defendant in making a statement is in the exercise of a right.—Where in a trial by jury of an action for defamation, the jury finds that a statement caused the plaintiff damage to a fixed amount, but was made without actual malice, the Court, holding the defendant to have been in the exercise of his rights, or to employ the English equivalent, holding the occasion to have been privileged, will dismiss the action. *Kavanagh v. Norwich Union Fire Ins. Co.*, Q. R. 28 S. C. 506.

See APPEAL, V. 6—COSTS, I. 2—CRIMINAL LAW, III. 20—DISCOVERY, I. 2, 6, 15—HUSBAND AND WIFE, V. 5—MASTER AND SERVANT, I. 6—PARTICULARS, 3.

## DEFAULT JUDGMENT.

See JUDGMENT, I.

## DEFRAUDING CREDITORS.

See CRIMINAL LAW, III. 10.

## DEMURRER.

See PLEADING, V.

## DEPORTATION OF ALIENS.

See ALIENS, 2—CONSTITUTIONAL LAW, 1—IMMIGRATION ACT.

## DEPOSIT.

See OPPOSITION.

## DEPOSIT RECEIPT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 14—REVENUE, 2.

## DEPOSITIONS.

See CRIMINAL LAW, I., III. 10, IV. 15—EVIDENCE, I. — EXTRADITION, 6—JUDGMENT DEBTOR, 2.

## DETINUE.

See CONTRACT, III. 11—LANDLORD AND TENANT, 1, 9.

## DEVISE.

See WILL.

## DEVOLUTION OF ESTATES ACT.

See ADMINISTRATION ORDER—WILL, I. 25, 33.

## DIRECTORS.

See COMPANY, I.

## DISCHARGE OF MORTGAGE.

See MORTGAGE, 7.

**DISCLOSURE.**

See ARREST, 14—ATTACHMENT OF PERSON.

**DISCONTINUANCE.**

See INJUNCTION, 10—SMALL DEBT PROCEDURE, 1.

**DISCOVERY.**

I. EXAMINATION OF PARTIES AND OTHER PERSONS.

II. INSPECTION.

III. INTERROGATORIES.

IV. PRODUCTION OF DOCUMENTS.

See PARTICULARS—DEFAMATION, 3.

**I. EXAMINATION OF PARTIES AND OTHER PERSONS.**

**1. Defendant**—Action to establish partnership—Question as to profits—Stay of action—Agreement—Arbitration clause. *Vanderlip v. McKay* (Man.), 3 W. L. R. 232.

**2. Defendant**—*Libel*—Answers tending to criminate—Witnesses and Evidence Act, s. 5—Con. Rule 439.]—Upon the trial of an action for libel, s. 5 of the Ontario Witnesses and Evidence Act, as now enacted by 4 Edw. VII. c. 10, s. 21, would be applicable, and the defendant would not be excused from answering proper questions because the answers might tender to criminate him; and Con. Rule 439 (1250) puts a party on his examination for discovery in the same position as he would be in if he were being examined as a witness at the trial, and he is, therefore, not excused from answering any question that is properly put to him, upon the ground that the answer to it may tend to criminate him, and if he objects to answer on that ground, his answer is within the protection of s. 5.—*Regina v. Fox*, 18 P. R. 343, applied. Order of MULOCH, C.J. Ex. D., affirmed. *Chambers v. Jaffray*, 12 O. L. R. 377, 7 O. W. R. 371, 8 O. W. R. 26.

**3. Defendant**—Refusal to answer questions—Relevancy—Pleading—Statement of claim. *Canavan v. Harris*, 8 O. W. R. 325.

**4. Defendant**—Scope of—Discovery of mines—Dates and places. *Crawford v. Crawford*, 8 O. W. R. 833.

**5. Defendant resident out of Ontario**—Con. Rule 477.]—The provision of R. S. O. 1897 c. 73, s. 16 (4), seems to contemplate only the attendance of witnesses at a trial, and is not applicable to the examination of a party for discovery merely.—A defendant resident in the province of Quebec cannot be compelled under Con. Rule 477 to attend for examination for discovery within the province of Ontario.—*Aliter*, where it is sought to examine a plaintiff.—*Meldrum v. Laidlaw*, D. C. 12th December, 1902 (not reported), followed.—*Smith v. Babcock*, 9 P. R. 97, not followed. *Lefurgey v. Great West Land Co.*, 11 O. L. R. 617, 7 O. W. R. 738.

**6. Officer of defendant company**—Defamation—Evidence—Circular—Names of recipients—Source of information.]—In an action for damages alleged to have been sustained by reason of the sending out by the defendants of a circular stating that they had been "advised that the plaintiffs had decided to discontinue their separator business," the manager was ordered to give on his examination for discovery the names of the persons to whom the circular had been sent and the name of the person who had "advised" the defendants of the fact alleged:—*Held*, affirming the decision of MABEE, J., 11 O. L. R. 227, 7 O. W. R. 59, that the order was proper, both items of information being relevant to the defence set up of qualified privilege, and the latter being also important on the question of damages. *Massey-Harris Co. v. DeLaval Separator Co.*, 11 O. L. R. 91, 7 O. W. R. 682.

**7. Officer of defendant company**—Information not in personal knowledge of officer—Memorandum prepared by others—Refusal to vouch for accuracy—Duty of officer to investigate for himself. *Fraser v. Canadian Pacific R. W. Co.* (Man.), 4 W. L. R. 525.

**8. Officer of defendant company**—Refusal to answer—Remedy—Master in Chambers.]—The Master in Chambers has no power to strike out the defence of a company defendant for refusal of an officer to answer questions upon his examination for discovery, nor to order him to attend again to make answer; the plaintiff's remedy, if he wishes to have the questions answered, is by motion to commit the officer.—*Badgerow v. Grand Trunk R. W. Co.*, 13 P. R. 132, and *Central Press Association v. American Press Association*, *ib.* 353, applied and followed. *McWilliams v. Dickson Co. of Peterborough*, 10 O. L. R. 639, 6 O. W. R. 424.

**9. Officer of defendant company**—Senior assistant engineer—Chief engineer a defendant—Officer put forward by company. *Barry v. Toronto and Niagara Power Co.*, 7 O. W. R. 700, 770.

**10. Officer of defendant municipal corporation**—Member of municipal council.]—A member of a municipal council, other than the head, is not examinable for discovery as an "officer" of the corporation under Con. Rule 439 (a). *Davies v. Sovereign Bank*, 12 O. L. R. 557, 8 O. W. R. 443.

**11. Officer of defendant street railway company**—Motorman—Foreman of repair shop—Inspection of car—Affidavit on production—Particulars. *King v. Toronto R. W. Co.*, 7 O. W. R. 37.

**12. Party**—Order for examination—Ex parte order—Irregularity as to place of examination and person of examiner—Setting aside order—Practice. *Crowforth v. Gummerson*, 8 O. W. R. 799.

**13. Party**—Time for examining—Inscription for trial.]—The trial of a suit begins with the inscription mentioned in art. 203, C. C. P., and after the latter is filed, an application to examine the opposite party for discovery comes too late. *Hétu v. French*, Q. R. 28 S. C. 397.

**14. Person for whose benefit action defended**—Rule 440—Manager of assignor company. *Carter v. Lee*, 8 O. W. R. 499.

**15. Plaintiff**—Libel—Absence of justification—Qualified privilege—Honest belief—Relevancy of questions.]—In an action for libel, in which the defendant has pleaded qualified privilege, to which the plaintiff has replied malice, the defendant, although he has not pleaded justification, is not precluded, on examination of the plaintiff for discovery, from asking questions which are relevant to the issue of the defendant's honest belief, as tending to shew the absence of malice, although they may incidentally prove the truth of the libel. *McKergow v. Comstock*, 11 O. L. R. 637, 7 O. W. R. 197, 273, 449, 558.

**16. Plaintiff**—Scope of inquiry—Relevancy of questions. *Torrance v. Hamilton, Grimsby, and Beamsville R. W. Co.*, 7 O. W. R. 46.

**17. Servant of defendant**—Con. Rules 439 (a), 440, 441. *Van Koughnet v. Toronto Towel Supply Co.*, 8 O. W. R. 683.

See APPEAL, V. 6 — COSTS, V. 13 — CRIMINAL LAW, III. 27—DISMISSAL OF ACTION, 1 — EVIDENCE, I. 4 — PARLIAMENTARY ELECTIONS, II. 6.

## II. INSPECTION.

**Inspection of motor car**—Allegation of uselessness. *Young v. Hyslop*, 7 O. W. R. 581.

See ante, I. 1.

## III. INTERROGATORIES.

**Answers**—Exceptions. *Boynton v. Givan*, 1 E. L. R. 482.

## IV. PRODUCTION OF DOCUMENTS.

**1. Affidavit**—Letters—Solicitor and client—Privilege.]—In an action on a policy on the life of the plaintiff's husband, the defendants filed an affidavit on production, but objected to produce certain letters between a local and the head office, on the ground "that they are privileged, being of a confidential nature and disclosing certain legal points in connection with the defence of this action." On a motion to compel production, the defendants' manager in an affidavit stated that "it is my custom, in the course of business, frequently to write to the head office on matters involving points of law; the head office confer with their general solicitors, receive legal advice from them, and then communicate with me. The letters (in question) are of the same nature as those between solicitor and client, and are, as I am advised and believe, privileged for that reason."—*Held*, not sufficient, and that the affidavit should state that the letters "came into existence for the purpose of being communicated to the solicitor, with the object of obtaining his advice or enabling him to defend an action." *Southwark and Vauxhall Water Co. v. Quick*, 3 Q. B. D. 315, followed. *Thomson v. Maryland Casualty Co.*, 11 O. L. R. 44, 7 O. W. R. 15.

**2. Affidavit**—Partnership—Master and servant—Agreement to share profits—Statement furnished by master—Fraud.]—*Held*, by ANGLIN, J., in Chambers, that, notwithstanding the language of s. 3 of R. S. O. 1897 c. 157, a statement of profits furnished by a master to his servant, where there is an agreement to share profits, is impeachable for fraud;

and fraud being alleged by the plaintiffs (servants) in an action (*inter alia*) for an account of profits, the plaintiffs were entitled to discovery of a document in the possession of the defendant (master) shewing the basis of the statement of net profits furnished by the defendant:—*Held*, by a Divisional Court, upon appeal, not passing upon the questions with regard to the statute, that production of the document was properly ordered, having regard to the general rules relating to discovery and the other claims made in the action. *Cutten v. Mitchell*, 10 O. L. R. 734, 6 O. W. R. 497, 552, 629.

**3. Affidavit of documents made by officer of defendant company**—Cross-examination on—Claim of privilege—Documents procured in contemplation of litigation—Right of plaintiff to full information—Duty of officer to inform himself—Disclosing names of witnesses. *Savage v. Canadian Pacific R. W. Co.* (Man.), 3 W. L. R. 124.

**4. Books of company**—Affidavit on production—Privilege—Relevancy. *McPhee v. McPhee Automatic Co.*, 7 O. W. R. 609, 771.

**5. Breach of contract**—Damages—Loss of profits in business—Books and documents pertaining to business—Postponement of trial. *Playfair v. Turner*, 7 O. W. R. 332, 379.

**6. Motion for further affidavit**—Practice—Examination—Costs. *Barwick v. Radford*, 7 O. W. R. 237.

**7. Privilege**—*Reports of officers of company—Examination of officer—Duty to obtain information.*—1. When an affidavit on production of documents is made by an officer of a company, any other examinable officer of the company may be examined upon it, and his answers may be used to impeach the affidavit on an application to compel the filing of a further and better affidavit.—2. If such last-mentioned officer on his examination states that he does not know whether or not certain documents exist which, by the rules of the company, should be in existence, he will be ordered to inquire and obtain the information necessary to enable him to answer fully and explicitly.—3. Reports of the various officials and servants of a railway company upon the occurrence of a fire alleged to have been caused by sparks from a locomotive, and as to the condition of the locomotive, if made in the regular course of duty under the rules of the company, are not privileged from production.—4. The fire having occurred on the 20th day of the

month, the officer was ordered to produce all reports on the condition of the locomotive from the first to the last day of the month. *Bain v. Canadian Pacific R. W. Co.*, 15 Man. L. R. 544, 2 W. L. R. 235.

**8. Privilege**—Sale of patent rights—Letters before sale. *Outerbridge v. Oliphant*, 8 O. W. R. 494.

See COSTS, III. 6 — HUSBAND AND WIFE, VII. 5.

## DISCRIMINATION.

See MUNICIPAL CORPORATIONS, XIV. 10.

## DISMISSAL OF ACTION.

**1. Motion to dismiss for failure of plaintiff to attend for examination for discovery**—Illness of plaintiff—Medical evidence as to—Undertaking to proceed to trial—Excuse for delay—Increased security for costs. *Appleyard v. Mulligan*, 8 O. W. R. 500, 624.

**2. Want of prosecution**—Cause of action—Abatement—No question but that of costs remaining. *Sheard v. Menge*, 8 O. W. R. 449.

**3. Want of prosecution**—End of cause of action—Dispute as to—Summary jurisdiction to dispose of costs in Chambers. *Holdsworth v. Gaunt*, 8 O. W. R. 428.

**4. Want of prosecution**—Refusal to dismiss—Terms—Change of venue—Speedy trial—Costs. *Patterson v. Todd*, 8 O. W. R. 868.

**5. Want of prosecution**—*Form of motion—Equity practice—Company—Winding-up.*—An objection on a motion to dismiss for want of prosecution a bill by a shareholder and the company, which subsequently to the commencement of the suit went into liquidation, that the motion should have been for an order that, unless the plaintiff obtained leave to proceed within a limited time, the bill should stand dismissed overruled. *Partington v. Cushing*, 3 N. B. Eq. 322, 1 E. L. R. 493.

**6. Want of prosecution**—Delay—Motion to vacate order—Relief—Terms—Costs. *Connce v. Lake Superior Printing Co.*, 7 O. W. R. 610.

**7. Want of prosecution**—Frivolous or vexatious action. *Clark v. Nisbet*, 7 O. W. R. 361.

**8. Want of prosecution**—Rule 433—Application, where action brought down to trial and new trial ordered. *Diamond Harrow Co. v. Stone*, 7 O. W. R. 685.

**9. Want of prosecution**—Order for new trial—Failure of plaintiff to set down—Remedy of defendants—Rule 234—Jury. *Sorenson v. Smith*, 7 O. W. R. 725.

See APPEAL, VI. 1—COMPANY, III. 1—COURTS, III.—JUDGMENT, IV. 9—NOTICE OF ACTION, 2—PEREMPTION—TIMBER, 3.

## DISMISSAL OF SERVANT.

See MASTER AND SERVANT.

## DISORDERLY HOUSE.

See CRIMINAL LAW, III. 19.

## DISQUALIFICATION.

See CANADA TEMPERANCE ACT—JUSTICE OF THE PEACE, 4. 5. 14 — LIQUOR LICENSE, 2, 3 — MALICIOUS PROSECUTION AND ARREST, 2—MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS, III. 1—REFERENCE.

## DISSUADING WITNESS.

See CRIMINAL LAW, III. 11.

## DISTRACTION.

See COSTS, VI. 1.

## DISTRESS.

**Arrears of taxes**—Notice of sale—Time—Illegal sale—Trespass *ab initio*—Damages—Lien.]—The provision in s. 88 of the Assessment Act directing that the collector of taxes shall give at least ten days' public notice of the time and place of sale of goods for delinquent taxes, means "ten clear days," and the party making a distress on less notice becomes

a trespasser *ab initio*.—Section 87 does not create the relationship of landlord and tenant between the parties; nor does it give a lien upon goods such as the preferential charge upon lands under s. 80.—The notice of sale being bad, the defendants in an action for illegal distress were trespassers *ab initio*, and the measure of damages was the value of the goods, with additional moderate damages for the bare trespass. *Canadian Canning Co. v. Fagan*, 12 B. C. R. 23, 3 W. L. R. 38.

See ASSESSMENT AND TAXES, 16—FISHERIES, 4—ILLEGAL DISTRESS—LANDLORD AND TENANT, 2-9—MORTGAGE, 3—TRIAL, II 1.

## DISTRIBUTION OF ESTATES.

**Legatee not heard of for 7 years**—*Presumption of death*—*Burden of proof*.]—A testator, dying in 1895, gave his estate (subject to his wife's life interest) to his brothers and sisters, share and share alike. One brother was living in 1885, but had not been heard of for more than 7 years before the death of the testator. There was no evidence that he was in fact dead, nor that he survived the testator. Letters of administration to his estate were granted in 1903, upon the presumption that he was dead:—*Held*, that the onus of proof that he survived the testator lay upon those who claimed under him; and, there being no evidence that he survived, the administrator of his estate failed to establish any right to share in the testator's estate; and distribution among the other legatees or their representatives was ordered, subject to their undertaking to refund should it be established at some future time that the absentee or his representative was entitled. *Re McNeil*, 12 O. L. R. 208, 7 O. W. R. 563.

See ADMINISTRATION ORDER, 1—BANKRUPTCY AND INSOLVENCY—CONTRACT, VI. 5—FAMILY ARRANGEMENT—WILL.

## DISTRICT COURT.

See COSTS, IV. 5.

## DISTURBING RELIGIOUS MEETING.

See CRIMINAL LAW, III. 12.

**DITCHES AND WATERCOURSES.**

See MUNICIPAL CORPORATIONS, II., V. 6  
—WATER AND WATERCOURSES, 6.

**DITCHES AND WATERCOURSES ACT.**

**1. Award—Reconsideration—Construction of ditch—Charge for engineer's services—Letting work—Breach of contract—Re-letting.]**—By virtue of s. 36 of the Ditches and Watercourses Act, the township engineer, on the reconsideration of an award, may make any award which might have been made in the first instance. In accordance with the provisions of s.-s. 2 of s. 4 of the same Act, the council by by-law fixed the charges to be made by the engineer for his services at the rate of \$5 a day, and under s. 29 the engineer certified to the clerk that he was entitled to \$45 for fees and charges for his services:—*Held*, that his certificate established *prima facie* the validity of his claim for \$45, and the onus was on the plaintiff, objecting to the award, to shew its incorrectness, which she had not done:—*Held*, also, that under s.-s. 4 of s. 28 work under an award not performed as contracted for, may be re-let. Judgment of County Court of Ontario reversed. *Cuddahee v. Township of Mara*, 12 O. L. R. 522, 8 O. W. R. 423.

**2. Cost of construction — Charge on land—"Owner"—Award.]**—Moneys paid by a municipality under the provisions of the Ditches and Watercourses Act, R. S. O. 1897 c. 285, for the construction of a ditch under that Act, when placed upon the collector's roll, become, by virtue of s. 30, a charge upon the lands traversed by the ditch in the hands of the respective owners for the time being, though different from the owners at the time of the initiation of the proceedings under the Act. *Wicke v. Township of Ellice*, 11 O. L. R. 422, 7 O. W. R. 425.

**DIVIDENDS.**

See FRAUD AND MISREPRESENTATION, 2.

**DIVISION COURTS.**

See COURTS, V.—STATUTES, 6.

**DIVISIONAL COURTS.**

See APPEAL, VI.

**DIVORCE.**

See HUSBAND AND WIFE.

**DOCUMENTS.**

See DISCOVERY, IV.—EVIDENCE.

**DOMESTIC FORUM.**

See BENEFIT SOCIETY.

**DOMICILE.**

**Election of by plaintiff in action—Statement in writ of summons—Curator ad hoc.]**—A plaintiff is at liberty to choose his own domicile, and even if he describes himself wrongly in the writ of summons, the defendant can suffer no prejudice thereby, especially if he is represented by a curator *ad hoc*, whose domicile is well established and not contested. *Cantlie v. Cantlie*, 7 Q. P. R. 346.

See BANKRUPTCY AND INSOLVENCY, 8  
—COURTS, IX. 2, 6, 8, 9 — EXECUTORS AND ADMINISTRATORS, 3, 7 — HUSBAND AND WIFE, V. 9, VII. 10—PEREMPTION, 3—WILL, III. 6.

**DOMINION ELECTIONS ACT.**

See CRIMINAL LAW, III. 1 — PARLIAMENT ELECTIONS.

**DOMINION LANDS.**

See CONSTITUTIONAL LAW, 7, 10.

**DOMINION LANDS ACT.**

See HOMESTEAD.

**DONATIO MORTIS CAUSA.**

See GIFT, 1, 2.

**DOWER.**

**1. Assignment of — Possession by widow, adverse to heir—Right of entry—**



*Statute of Limitations.*]—An assignment of dower by oral agreement is valid, and under such assignment the widow may take any part or even the whole of the descendent lands.—Where the heirs-at-law permits the widow of the owner of the fee to occupy the whole of the estate during her life under an oral arrangement with the heir understood to be in lieu of dower, but with no definite agreement or understanding to that effect, the widow's possession is not adverse to the heir-at-law, and the Statute of Limitations will not run against the right of entry. *Lloyd v. Gillis*, 37 N. B. R. 190.

**2. Lands subject to charge for maintenance** — Exchange for other lands—Conveyance to chargee—Recital—Evidence to contradict—Right to dower subject to charge and to lien for improvements—Costs. *Smith v. Smith*, 8 O. W. R. 654.

See HUSBAND AND WIFE, IV., IX. 5—WILL, I. 4, 13, 26.

## DRAINAGE.

See MUNICIPAL CORPORATIONS, II.

## DRAINAGE REFEREE.

See MUNICIPAL CORPORATIONS, II.

## DRUGGIST.

See NEGLIGENCE, 3.

## DURESS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 12—MORTGAGE, 4.

## DYING DECLARATION.

See CRIMINAL LAW, III. 22.

## EASEMENT.

**1. Light** — Air—Ventilation—Private way—Prescription—Proof — Injunction—Damages—Costs. *Dauids v. Newell*, 8 O. W. R. 297.

**2. Light—Servitude—Right of view—Deed — Reservation—Way — Rights in common.]—A conveyance of lands fronting on public highways with the right of passage merely over a private lane, does not create a servitude that can entitle the grantee to make windows and openings in walls which are built upon the line of the lane.—A reservation in a deed of partition to the effect that lanes through subdivided lands should be held in common by the proprietors *par indivis*, or their representatives, must be construed as reserving the rights in common only to the co-proprietors, and their heirs or the persons to whom such rights in the lanes might be conveyed.—Judgment in *Goné v. Lespérance*, Q. R. 14 K. B. 168, affirmed. *Lespérance v. Goné*, 25 Occ. N. 138, 36 S. C. R. 618.**

**3. Light — Servitude—View—Indirect view.]—A view over a contiguous tenement from a platform or gallery, of which the front parallel to the division line is closed, obtained by leaning over the side-rails that are at right angles to the division line, is not a direct view, within the meaning of art. 536, C. C. *De Bellefeuille v. Auger*, Q. R. 28 S. C. 532.**

**4. Water privilege—Origin in grant—Prescriptive title—Evidence—Referee's deed—Proof of decree.]—In 1854 R. B., owner of lot 8, conveyed the northern part thereof to M., together with the privilege of taking water thereto through a pipe, which M. was empowered to build, from a spring on the southern part of the lot. By mesne assignments M.'s lot, with the water privilege, became vested in T. B. In 1871 he executed to S. for 21 years, with covenant for renewal, a lease of the spring, with a right to lay a pipe therefrom through the southern part of lot 8 to lot 9. The ownership of the southern part of lot 8 was then in H., and in 1905 became vested in the defendant. In 1872 S. built a pipe from the spring across H.'s land to lot 9, and it has been in uninterrupted use ever since, a period exceeding 20 years. In 1904 lot 9 with the lease was assigned to the plaintiffs. The plaintiffs' predecessors in title always rested their right to the easement on the lease and not upon adverse user:—*Held*, that a prescriptive title to the easement could not be set up.—A deed of a referee in equity, though purporting to have been made under a decree of the Court, is not admissible in evidence without proof of the decree. *Logie v. Montgomery*, 26 C. L. T. 465, 3 N. B. Eq. 238.**

See ARCHITECT, 1—CONTRACT, III. 7—INJUNCTION, 8—LICENSE — LIMITATION

OF ACTIONS, I. 10—RAILWAY, IX. 5—  
VENDOR AND PURCHASER, II. 1, 2—  
WATER AND WATERCOURSES, 6, 25—  
WAY, VI.

### EJECTMENT.

**1. Change of ownership—Notice to tenant.]**—The plaintiff in an action of ejectment must prove the change of ownership of the land, and notice thereof given to the tenant. *Valiquette v. Kennedy*, 7 Q. P. R. 409.

**2. Equitable defence—Verdict for defendant — Legal title—Costs.]**—In an action of ejectment, where the defendant pleads that he is entitled to possession on equitable grounds, and the Judge trying the case without a jury finds that the plea is proved, it is proper under s. 134 of C. S. N. B. 1903 c. 111, to order a verdict for the defendant, although the legal title and right to possession is in the plaintiff, and the effect of the verdict is to deprive the plaintiff of the costs of the ejectment. *Nouci v. Ouillette*, 37 N. B. R. 393, 1 E. L. R. 356

**3. Issue as to position of house—**Abandonment of, by defendant at trial—Judgment for possession—Mesne profits—New trial—Costs. *Little v. Pelletier* (N. W.T.), 3 W. L. R. 67.

**4. Pleading—Defence—Deed given as security—Amendment—Parties.]**—To an action by the plaintiffs, as executors and heirs of W., to recover possession of land which it was alleged the defendant had entered into possession of and was withholding, the defendant pleaded that the land in question was conveyed to W. by M. by a deed which, though absolute in form, was given by way of mortgage to secure a sum of money; that W. executed a bond to reconvey the land upon payment of the amount secured with lawful interest; that M. died intestate and since his death the land in question had been in possession of H., one of the heirs-at-law of M., and had never been in possession of the defendant; and that before action brought the full amount of principal and interest was tendered to the plaintiffs. This paragraph of the defence having been struck out as disclosing no reasonable answer to the action, or, in the alternative, as tending to prejudice, etc., the fair trial of the action:—*Held*, that the paragraph should be restored and amended in such a way as to shew that the heir of M., in whose possession the land was alleged to be, was the defendant's wife, and that the plaintiffs, if they

wished, should have leave to add H. as a defendant. *Whitman v. Hiltz*, 38 N. S. R. 174.

**5. Right of action—Lease—Reversioner.]**—An owner of land may bring an action to recover possession, although he has previously given a lease of it to a third party. *Penner v. Winkler*, 15 Man. L. R. 428, 1 W. L. R. 403.

See LIMITATION OF ACTIONS, I. — PLEADING, VIII. 6.

### ELECTION.

See BANKRUPTCY AND INSOLVENCY, 6—COURTS, IX. 2, 8—CRIMINAL LAW, II. 6, III. 35, IV. 4, 15—DOMICILE—INSURANCE, III. 4—LIMITATION OF ACTIONS, I. 4—MISTAKE—RAILWAY, X. 8—SUBSTITUTION, 1—WILL, I. 13, 26.

### ELECTIONS.

See MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS—PENALTY, 4—SCHOOLS.

### ELECTRIC RAILWAYS.

See STREET RAILWAYS.

### ELECTRIC WORKS, WIRES, AND APPLIANCES.

See MASTER AND SERVANT, II. 22—MUNICIPAL CORPORATIONS, III.—NEGLIGENCE, 4, 5, 6, 8, 28—NUISANCE, 1, 2.

### EMBEZZLEMENT.

See EXTRADITION, 2.

### ENGINEER.

See CONTRACT — DITCHES AND WATERCOURSES ACT, 1 — MUNICIPAL CORPORATIONS, II.—STREET RAILWAYS, I. 5, 6, III. 6—WATER AND WATERCOURSES, 18.



**EQUITABLE ASSIGNMENT.**

See CHOSE IN ACTION, ASSIGNMENT OF.

**EQUITABLE EXECUTION.**

**1. Action for—Judgments Act—Lien on land — Equitable interest—Infant—**  
—Judgment against—Registration — Interest of infant in undivided share of deceased wife in intestate succession—Personal representative — Parties. *McDougall v. Gagnon* (Man.), 3 W. L. R. 387, 4 W. L. R. 425.

**2. Judgment debtor's interest in land — County Court judgment—Lien—Sale under registered certificate—Cancellation of agreement for sale—Consideration — Crop-payments — Assignment — County Courts Act—Redemption.]—**The binding effect of the registration of a certificate of a County Court judgment against the lands of the judgment debtor, under s. 213 of the County Courts Act, R. S. M. 1902 c. 38, is not nearly so extensive as in the case of a registered judgment of the Court of King's Bench under the Judgments Act, R. S. M. 1902 c. 91; and, when the only interest or estate of the judgment debtor in the land in question is under an agreement of purchase providing for payment by delivery of one-half of each year's crop and in no other way, the judgment creditor, having only a registered County Court judgment, does not acquire all the rights or position of an assignee of the benefits of the agreement, and is not necessarily entitled to notice of a cancellation of the agreement by the vendor, in pursuance of a stipulation contained therein, or to insist on taking the place of the purchaser in all respects or to redeem the vendor, nor is he entitled to an order for the sale of the land after such cancellation. When the vendor in such a case declares the agreement forfeited and cancels the same by notice under one of its terms, whether or not the purchaser could get relief in equity against the forfeiture, the judgment creditor has no standing to claim such relief. *McGregor v. Withers*, 15 Man. L. R. 434, 1 W. L. R. 429.

See RECEIVER, 1.

**EQUITABLE JURISDICTION.**

See PARENT AND CHILD, 1.

**EQUITABLE MORTGAGE.**

See REGISTRY LAWS, 3.

**ESCAPE.**

See CRIMINAL LAW, IV. 4.

**ESTATE.**

See DEED, 3—SUBSTITUTION — SUCCESSION—WILL.

**ESTOPPEL.**

**1. Accounts of municipal treasurer—**Giving credit for balance due to municipality from estate of former treasurer — Recovery from municipality of moneys paid by treasurer out of his own pocket—Statements of account—Audit—Dividends on insolvent estate of former treasurer — Neglect to proceed against sureties — Laches — Inquiry as to loss—Reference. *Leslie v. Township of Malahide*, 8 O. W. R. 511.

**2. Charge on land—Lien memorandum — Consideration—Representation as to ownership — Subsequent conduct—Extension of time for payment—Registered judgment—Homestead exemption.] —**Action to recover balance due for a threshing outfit sold and delivered by the plaintiff company to the defendants, C. H., and his wife, E. H., under a written agreement signed by the defendants, which provided that promissory notes were to be given on approved security for the amounts payable at the dates mentioned. When the machinery had been delivered at the defendants' farm, the plaintiffs' agent called there to take settlement for it. The defendants then signed the notes asked for, and the agent demanded a lien on the farm as security for the notes, and, relying on the representations of both defendants then made, that the wife owned the land, accepted a lien on the land for the amount, signed by E. H. in the presence of her husband, and did not insist, as he might have done, that the husband should also sign it. It appeared that the title to the land was then actually in the husband, and had remained so ever since. Renewal notes had been given by the defendants, and the original periods of credit considerably extended, and during this time the husband wrote several letters, in which the wife was spoken of as the actual owner. The chief contention at the trial was as to whether the plaintiffs were entitled to a lien on the land for the debt as against the defendant C. H.:—*Held*, that there was ample consideration for the giving of the lien, as the plaintiffs might have removed the machinery and refused to carry

out the transaction if it had been refused.—2. That the defendant C. H. was estopped by the representations he had made, and subsequently repeated, from denying that the land in question was his wife's property and from claiming it as his own as against the plaintiffs. *Freeman v. Cooke*, 2 Ex. 654, followed.—3. C. H. was also thereby estopped from asserting that the land was exempt, as land occupied by him, from proceedings under a registered judgment.—Judgment declaring that the lien claimed formed a valid charge on the land for the plaintiffs' claim and costs. *John Abell Co. v. Hornby*, 15 Man. L. R. 450, 1 W. L. R. 3.

See ASSESSMENT AND TAXES, 21—ATTACHMENT OF DEBTS, I. 1—BANKRUPTCY AND INSOLVENCY, 11, 12—BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 3, II. 2, III. 9—BILLS OF SALE AND CHATTEL MORTGAGES, 5—COMPANY, II. 1, 4, 8, 9, III. 12, IV. 3, 4 — CONVERSION, 1 — CROWN, 5—CROWN LANDS, 6—DEED, 8—EVIDENCE, I. 1—INFANT, 2—INSURANCE, III. 2, 9—MECHANICS' LIENS, 12—MORTGAGE, 4 — PATENT FOR INVENTION, 9—PRINCIPAL AND AGENT, 10 — SALE OF GOODS, II. 4—SCHOOLS, 3—TIMBER, 2—VENDOR AND PURCHASER, I. 23.

### ESTREAT.

See CRIMINAL LAW, IV. 3.

### EVICTIION.

See VENDOR AND PURCHASER, II. 5.

### EVIDENCE.

- I. ADMISSION OR REJECTION.
- II. DOCUMENTARY EVIDENCE.
- III. FOREIGN COMMISSION.
- IV. MISCELLANEOUS.

See AFFIDAVITS—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 10—BILLS OF SALE AND CHATTEL MORTGAGES, 1—CANADA TEMPERANCE ACT, 15 — CHOSE IN ACTION, ASSIGNMENT OF, 4—CHURCH—CONFLICT OF LAWS—CONTRACT, III. 4, 5, V. 2, 3, VIII. 4, 11, X. 11, 12—CRIMINAL LAW, I., III. 10, 13-16, 20, 22, 23, 29, 31-34, 36, 42, IV. 14—CROWN LANDS, 1—DAMAGES, 4—DEED, 1, 5, 7, 9, 10—DEFAMATION, 3, 7—DISCOVERY—DISTRIBUTION OF ESTATES—EASEMENT, 4—EXECUTORS AND ADMINISTRATORS, 4, 5, 7—EXTRADITION, 2, 6 — FIRE, 2 — FRAUD

AND MISREPRESENTATION, 2 — FRAUDULENT CONVEYANCE, 1—GIFT — HUSBAND AND WIFE, IX. 3—INDIAN—INTERPLEADER, 5—JUDGMENT DEBTOR, 2—JUSTICE OF THE PEACE, 2, 3, 14—LANDLORD AND TENANT, 22, 28 — LIMITATION OF ACTIONS, I. 6 — LIQUOR LICENSES, 9 — MASTER AND SERVANT, I. 5, 9, II. 24—MEDICAL PRACTITIONER, 3—MINES AND MINERALS, 3, 13—MORTGAGE, 5—MUNICIPAL CORPORATIONS, XIV. 2 — NEGLIGENCE — PARTICULARS — PARTNERSHIP, 1, 6—RAILWAY, X. 4—REGISTRY LAWS, 6—SALE OF GOODS, I. 7, 8—SEDUCTION, 2—SHIP, 1, 24—TRESPASS TO LAND, 13—TRUSTS AND TRUSTEES, 1, 4, 6, 8, 11—VENDOR AND PURCHASER, I. 8, 13, 28, 30, 35—WATER AND WATERCOURSES, 14, 16, 17—WAY, VI. 2, 3—WILL, I. 11, 17, III. 2, 3, 5, 6.

#### I. ADMISSION OR REJECTION,

**1. Admissions — Commencement of proof in writing — Parol evidence—Estoppel—Vendor and purchaser—Contract for sale of land—Part performance.]—**The admission by a party to a suit, examined as a witness, that he had entered into an agreement to sell certain immovable property, under the condition that it was to pass only on payment of the price, coupled with further admissions, that he had subsequently allowed the intending purchaser to take possession of it and that he had received from him a sum of money, at a time when nothing else could be due him but the price of sale in question or part of it, affords a commencement of proof in writing, and entitles the purchaser to prove payment of the price in full by parol testimony.—2. The party who makes the above admissions, independently of complete proof of the payment of the price, is estopped from ignoring the agreement and treating it as non-existent, and a petitory action brought by him to revendicate the property from the purchaser's *ayant-cause*, without offering to return the amount received under the agreement, will be dismissed. *Filiatrault v. Guilbault*, Q. R. 28 S. C. 486.

**2. Business books — Consent—Irrelevancy—New trial.]—**To an action for the price of goods sold and delivered, the defence was that the goods were received by the defendant as the plaintiffs' manager and not otherwise. There was a verdict at the trial in favour of the plaintiffs, which was set aside by the Supreme Court of Nova Scotia and a new trial directed (37 N. S. R. 361), on the ground that the plaintiffs' books of account were improperly received in evi-

dence against the defendant. The Supreme Court of Canada reversed this decision and restored the verdict at the trial, holding that the books were received on the taking of evidence under commission by the express consent of both parties, and their reception could not afterwards be objected to on the general grounds that they were irrelevant and immaterial to the issue. *Carstens v. Muggah*, 36 S. C. R. 612.

**3. Deposition — Contradicting witness.]**—A deposition tendered in evidence for the purpose of contradicting a witness, held to be improperly received where the attention of the witness was not called to the writing before it was tendered. *Blois v. Midland R. W. Co.*, 39 N. S. R. 242.

**4. Deposition on discovery of ex-officer of plaintiff banking company — Non-admissibility—Proof of admissions by stenographer as witness — Rule 439 (a)—Promissory note — Wife indorsing for benefit of husband—Improper admission of evidence — New trial.** *Bank of Montreal v. Scott*, 7 O. W. R. 496.

**5. Oral testimony — Contradicting deed — Pleading—Absolute deed—Security.]**—An allegation in a pleading that a deed, in form a deed of sale, is in reality a pledge, allows the opposite party to prove by oral evidence that the deed is of a different nature, e.g., a certificate of deposit for the benefit of a firm. *Whitney v. Joyce*, Q. R. 14 K. B. 406.

**6. Oral testimony — Contradicting deed — Redemption — Payment of sum named—Oral evidence to vary amount—Inadmissibility.]**—The vendor or his representative, who, in the exercise of the right of redemption, pays to the purchaser the sums agreed upon, executes a deed of re-purchase in which such payment is stated, and by a subsequent document, although of the same date, protests against the amount of such payment, will not be allowed to prove by witnesses that there has been a mistake in the amount. Accordingly, his action for recovery of part of the sum paid, supported by that kind of evidence only, will be dismissed. *Saint-Onge v. Chopin*, Q. R. 28 S. C. 206.

**7. Oral testimony—Interruption of prescription — Agreement — Indemnity.]**—The interruption of the short prescription of actions for damages resulting from torts or quasi-torts, cannot be proved by witnesses, any more than an agreement to pay an indemnity exceeding \$50. *McLennon v. McKinnon*, Q. R. 28 S. C. 536.

**8. Oral testimony — Party to cause Promissory notes — Possession of.]**—A party to a cause may be examined as a witness in order that he may be made to explain how he came into possession of certain promissory notes, and on what conditions they were accepted. *Sauvé v. Charlebois*, 7 Q. P. R. 442.

**9. Oral testimony—Matter of public order—Consent to admission—Proof of.]**—The exclusion of oral testimony, except in cases provided for by art. 1233, C. C., is a matter of public order. Therefore, where such testimony has been adduced in a case where the principal sum demanded exceeds \$50, the Court cannot take it into consideration, even if the opposite party in interest does not oppose its being considered.—Upon the supposition that such exclusion of oral evidence is not of public order, the renunciation of the party against whom the evidence is taken of the right to invoke art. 1233 can be inferred only from facts incompatible with the intention of objecting and leaving no doubt as to the consent of the party. *Gervais v. McCarthy*, Q. R. 14 K. B. 420.

**10. Oral testimony — Replevin — Ownership—Proof of—Defence—Tenancy — Rebuttal — Exclusion — Nonsuit set aside.]**—In an action of replevin, the plaintiff proved ownership and rested his case. The defendant then moved for a nonsuit, the decision on which was reserved until he had presented his case. The plaintiff offered evidence in rebuttal to meet the case made by the defendant, which was rejected, on the ground that evidence to prove the non-existence of the tenancy alleged would be merely confirmatory of the plaintiff's case, and the action was disposed of by allowing the defendant's application for a nonsuit:—*Held*, that, in the circumstances, the rejection of the evidence tendered by the plaintiff in rebuttal could be sustained only on the ground that the onus of proof on the issues to which it related was at the outset of the case on the plaintiff; and that the course adopted by the trial Judge admitted the evidence for the defendant to and excluded the evidence for the plaintiff from review by the Court of Appeal. *McAdam v. Kickbush*, 11 B. C. R. 488.

**11. Oral testimony—Varying document—Improper admission at trial—Party adducing it complaining on appeal.]**—Oral evidence of false representations to contradict or change the terms of a writing validly executed, is inadmissible, but the party who adduces such evidence at the trial cannot be allowed

to assert its nullity upon appeal. *Brownlee v. Hyde*, Q. R. 15 K. B. 221.

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## II. DOCUMENTARY EVIDENCE.

**1. Certified copy of document—***Notice — Requisites — Trial—Specification of sittings.*]—A notice of intention to offer in evidence a certified copy of a document need not state the particular court at which the document will be offered; it is sufficient if it states generally that the document will be offered at the trial of the cause, and it is good until the cause is tried. *Smith v. Smith*, 37 N. B. R. 7.

**2. Marriage registry—Legitimacy—***Pedigree—Declarations by deceased parent and others ante litem.*]—A. was married at St. Paul's Church, Halifax, in 1809. In the entry of the marriage in the church's marriage registry his name appears with the addition "bachelor"—a contraction for bachelor. There was nothing to shew by whom the entry of the addition was made, or that it was made in pursuance of a duty prescribed by statute:—*Held*, that the registry, while admissible in proof of the marriage, could not be received as evidence that A. had previously not been married.—To prove that C. was the legitimate son of A. by an alleged previous marriage, it was shewn that he resided for two or three years at A.'s home, previous to departing to learn a trade, and at a subsequent time for a few months; that he addressed him as "father," was treated as a member of the family, was treated by A.'s wife as his son, and by children by her as their brother; that after his removal to the United States he wrote letters to A., in one of which he informed him of his (C.'s) marriage; that subsequently to his death D., a son of A., corresponded with a son of C., during which he referred to C. as a half-brother; and that in an oral declaration by A. in the hearing of a witness, who was a neighbour of the family, he referred to the christian name of his former wife, and to her personal appearance.—*Held*, that C.'s legitimacy had been proved.—*Quære*, whether declarations in letters written *ante litem motam*, between D., a son of A., and G., a son of C., in which D. recognized C.'s relationship to him, were admissible in D.'s lifetime; but, *semble*, that where *prima facie* evidence of C.'s legitimacy had been given, declarations in G.'s letters, he being dead, were admissible. *Johnston v. Hazen*, 26 C. L. T. 317, 3 N. B. Eq. 147.

**3. Proof of foreign judgment —***Certificate—Seal—Canada Evidence Act.*]—A document purporting to be a transcript of the judgment roll of the Circuit Court for Walworth County, South Dakota, was tendered in evidence. The seal affixed was engraved "Clerk of the Circuit Court, Sixth Judicial District, South Dakota, Walworth County;" the certificate appended under the hand of the clerk of the Court stated, "I have hereunto set my hand and affixed the seal of the said Court:"—*Held*, that the certificate, signed by the officer who would ordinarily have the custody of the seal of the Court, was *prima facie* proof that the seal was that of the Court; and that the judgment purported to be under the seal of the Court as required by s. 10 of the Canada Evidence Act, 1893. *Beebe v. Tanner*, 6 Terr. L. R. 13.

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**1. Absent witness—Time—Adjournment of trial—Refusal of commission—Reversal on appeal.**]—A defendant who has an apparently serious defence, and who counted upon the presence at the trial of his principal witness, who lives abroad, may obtain, even after the proper time therefor has expired, a commission to examine such witness, if there has been no negligence on his part.—A judgment which improperly refuses a motion for a commission will be reversed on appeal. *Nash v. Baie des Chaleurs R. W. Co.*, 7 Q. P. R. 381.

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husband, and the other against the husband alone. Shortly afterwards they removed to the North-west Territories to take up their permanent residence there. The actions were respectively for an account of moneys intrusted to the solicitor for investment and to set aside assignments of life insurance policies:—*Held*, reversing the decisions of a Divisional Court and of a Judge and the Master in Chambers, that, in the circumstances shewn by affidavits, the defendants should be allowed to have their evidence taken on commission in the Territories, as witnesses on their own behalf, for use at the trial of the actions, but upon terms advantageous to the plaintiff as to the expense of executing the commission. *Ferguson v. Millican*, 11 O. L. R. 35, 6 O. W. R. 661.

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## EXCHEQUER COURT OF CANADA.

**1. Admiralty jurisdiction—Action by ship-builders for price of ship—Counterclaim for moneys expended in repairs.]**—The plaintiffs built a ship in Scotland for a company in Vancouver, B.C. On her way out certain repairs were made, which cost £3,638. The first instalment of the price of construction not being paid, this action was commenced in the Exchequer Court of Canada by seizure of the ship. The Vancouver company counterclaimed for the sum mentioned, the expenditure whereof, as they alleged, was rendered necessary by the defective work and material in her construction and equipment:—*Held*, on motion, that the counterclaim must be struck out, for it was not within the Admiralty jurisdiction of the Court. *Bow, McLachlan, & Co., Limited, v. The "Camosun."* 12 B. C. R. 283, 4 W. L. R. 113.

**2. Ship—Appeal—Interlocutory order—Different motion on appeal—Rehearing.]**—Where a motion made on appeal was a different one from that made to the Court below, and the matter was one in which relief could still be given in the Court below, the Court on appeal refused to entertain the motion, although in such cases the appeal is by way of rehearing. *Bow, McLachlan, & Co., Limited, v. Union S. S. Co. of British Columbia*, 26 C. L. T. 779.

See RAILWAY, III. 1—SHIP, 3, 16, 17.

## EXECUTION.

**1. Seizure of crops grown on land transferred by execution debtor—Labour and means of transferee—Ownership of crops—Interpleader.]**—The sheriff seized crops grown on property of the claimant, son of the defendant. Part of the property was the defendant's homestead transferred to the claimant, and part was the property of the defendant's wife, leased by him orally to the claimant, under authority from the wife. The claimant purchased the seed grain, hired and paid for the help, and paid for twine and harvesting. The defendant did a small amount of work on the farm:—*Held* that the question of *bona fides* of the transfer from father to son did not materially affect the ownership of the crops: that on the evidence the claimant was entitled to the crops.—*Kilbride v. Cameron*, 17 C. P. 373, followed. *Massey-Harris Co. v. Moore*, 6 Terr. L. R. 75, 1 W. L. R. 215.

**2. Sheriff's sale—Opposition—Security—Default—Chose jugée—Appeal.]**—In proceedings for the sale of lands under execution, the appellants filed an opposition to secure a charge thereon, and under the provisions of art. 726, C. P. Q., a Judge of the Superior Court ordered that the opposants should, within a time limited, furnish security that the lands, if sold subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On failure to give the security as required, the opposition was dismissed, and, on appeal to the Supreme Court of Canada, the judgment dismissing the opposition was affirmed: 35 S. C. R. 1. Subsequently the proceedings in execution were continued, and, on the eve of the date advertised for the sale by the sheriff, the opposants filed another opposition to secure the same charge, offered to furnish the necessary security, and obtained an order staying the sale:—*Held*, that the judgment dismissing the opposition on default to furnish the required security was *chose jugée* against the appellants, and deprived them of any right to give such security or take further proceedings to secure their alleged charge on the lands under seizure.—*Per TASCHEREAU, C.J.*—In a case like the present an appeal to this Court might be quashed as being taken in bad faith. *Fontaine v. Payette*, 25 Occ. N. 138, 36 S. C. R. 613.

See ATTACHMENT OF DEBTS—ATTACHMENT OF GOODS—ATTACHMENT OF PERSON—BANKRUPTCY AND INSOLVENCY, 18—COMPANY, III. 29, IV. 4—CONVERSION, 2—COURTS, V. 2, 7—EQUITABLE EXECUTION—FRAUDULENT CONVEYANCE—HUSBAND AND WIFE, VIII. 2—INDIAN, 3—INTERPLEADER—JUDGMENT—JUDGMENT DEBTOR—MALICIOUS PROSECUTION AND ARREST, 2—OPPOSITION—REGISTRY LAWS, 3.

## EXECUTION CREDITORS.

See COSTS, VIII. 3—CREDITORS' RELIEF ACT.

## EXECUTION OF WILL.

See WILL, III.

## EXECUTORS AND ADMINISTRATORS.

**1. Account—Action—Petition.]**—An account can only be demanded from a testamentary executor by action at law, in-



stituted by means of a writ of summons, and not by petition. *O'Borne v. Lemay*, 7 Q. P. R. 333.

**2. Account—Judgment—Maladministration — Loss of assets — Pleading — Amendment.]**—Neglect to have an inventory made with due diligence, failure to sell movable property and allowing it to deteriorate and depreciate in value, carrying on an unprofitable business instead of winding it up, neglect to collect moneys due, and, generally, negligence and maladministration resulting in the loss or shrinkage of the assets of an estate, are legal grounds of contestation of an account rendered by executors of their executorship, pursuant to a judgment in an action to account.—When the conclusions of a contestation of an account are that the accounting party be condemned to pay the contestant a sum stated to be the balance of the account, the Court, at the final hearing, has power, on motion of the contestant, to allow him to amend them by adding thereto a prayer that the judgment declare the account illegal and false, that no substitution exists of the movable property, and that its proceeds should be distributed, and that the accounting party was guilty of negligence and maladministration causing loss to a stated amount, which should be refunded to the interested parties. Such an amendment does not change the nature of the demand, and does not, therefore, come within the prohibition of art. 522, C. C. P. *Blackwood v. Mussen*, Q. R. 28 S. C. 170.

**3. Action against executors — Domicile—Jurisdiction — Service of process—Secretary—Office.]**—The expression "persons having the capacity of testamentary executors," etc., in art. 143, C. P. C., refers to persons who have their domicile abroad—Service of process upon testamentary executors domiciled in Quebec, made at an office which they have opened, by leaving a copy of the writ and declaration with their secretary, is irregular and void. *Pattle v. Horsfall*, Q. R. 27 S. C. 427.

**4. Action by physician against executrix of deceased patient—Remuneration for professional services — Account — Evidence — Corroboration—Costs.** *Wilson v. Bedson*, 8 O. W. R. 446.

**5. Action for board of and services to testator — Evidence—Costs.** *Stoddart v. Allan*, 7 O. W. R. 750.

**6. Action for criminal conversation—Death of plaintiff—Revivor—Trustee Act, s. 10—Appeal to Court of Appeal**

**—Issue of order from High Court—Indorsement—Rule 399.]**—The provisions of s. 10 of the Trustee Act, R. S. O. 1897 c. 129, apply to an action for criminal conversation; and where the plaintiff dies *pendente lite* the action may be continued in the name of his personal representative.—Where at the time of the abatement an appeal to the Court of Appeal is pending, an order of revivor may, nevertheless, issue from the High Court of Justice. — The absence of the indorsement on the order of revivor required by Con. Rule 399, notifying the opposite party of the time within which to apply to discharge the order, will not be regarded as a ground for setting aside the order upon a motion for that purpose made within the proper time. *C. v. D.*, 10 O. L. R. 641; *S. C., sub nom. Milloy v. Wellington*, 6 O. W. R. 437.

**7. Administration de bonis non—Contest as to grant—Evidence — Domicile—Next of kin.]**—In a contest for administration *de bonis non* between the next of kin of the deceased administrator, the husband of the intestate, and the next of kin of the intestate, whose status as a petitioner depended on the domicile of the intestate, the Judge of Probate disregarded the fact that letters of administration had been issued out of his Court to the estate of the intestate as domiciled in New Brunswick, the petition upon which the letters were granted not having been put in evidence or the statements therein relied upon, and he refused to consider as evidence a statement in the unsworn petition of a trust company applying for administration as the representative of the next of kin of the deceased administrator, that at the time of her death the intestate was domiciled in New Brunswick:—*Held*, on appeal, that the decision was right, and that administration was properly granted to the representative of the next of kin of the intestate. *In re Forester*, 37 N. B. R. 209.

**8. Administrator pendente lite—Powers of High Court and Surrogate Court as to appointment of—Removal of cause from Surrogate Court into High Court.** *Re Gooderham*, 8 O. W. R. 685.

**9. Administrator's bond — Breach of condition—Liability of sureties.]**—The defendant applied for and obtained administration of his father's estate upon giving the statutory bond (R. S. N. S. 1900 c. 158, p. 565) to administer according to law. Subsequently he applied to the Court of Probate for the settlement and distribution of the estate, and obtained a decree for payment of the balance of the

estate to himself as next of kin, without disclosing the fact that the estate was indebted to the estate of C., of which he and his father were executors and trustees, for moneys of that estate received and not accounted for:—*Held*, GRAHAM, E.J., dissenting, that there had been a breach of the condition, for which the sureties were liable in an action on the bond. *Colford v. Compton*, 39 N. S. R. 247.

**10. Administrator's compensation—Particular fund—Will.]—**A testatrix by her will, after the bequest of certain legacies, directed that the residue of her estate should be divided into four equal shares, three of which she directly disposed of, and the fourth share she devised to her son, not to be payable to him until ten years after her death, and in the meantime he was to be entitled to the income. The son died shortly after his mother, having made a will and appointed executors. On his death an order was made directing the administrators, with the will annexed, of the testatrix's estate, to pass their accounts relative to the son's share, and to hand it over to his executors. On a question being raised as to the compensation payable to such administrators:—*Held*, that such compensation should be paid out of the son's estate, and not that of the testatrix. *Re Church Estate—Athole Church Trust*, 12 O. L. R. 18, 8 O. W. R. 983.

**11. Conversion—Evidence.** *Ferguson v. McDonald*, *Ferguson v. Garden*, *Ferguson v. Moxon*, 1 E. L. R. 496, 497, 498.

**12. Damages recovered by administratrix for benefit of herself as widow and of her children under Fatal Accidents Act—**Judgment recovered against her as administratrix—Garnishment—Different rights. *McEwan v. Spekt* (N.W.T.), 4 W. L. R. 325.

**13. Foreigner appointed executor by will—**Letters of administration with will annexed granted to trust company—Surrogate Court—Powers of. *Re Kehoe*, 7 O. W. R. 825.

**14. Passing administrator's accounts before Judge of Probate—**Reference to clerk—Exceptions to report—Right of administrator to retain moneys to answer claim against estate—Agreement with intestate—Parent and child—Work done and materials supplied—Statute of Limitations—Claim of daughter-in-law for services to intestate. *Re Easton* (N.W.T.), 4 W. L. R. 23.

**15. Personal action—Abatement of—Trespass by testator—Suggestion of death—Liability of executors—Amendment—Money had and received.]—**Where one converts to his own use and sells the goods of the plaintiff, and dies after writ issued, but before declaration, the action may be continued against his executors, and they are liable on a count for money had and received.—In the above case the declaration was in trespass and for conversion, and upon the argument of the motion for a new trial, application was made to add a count for money had and received:—*Held*, per HANINGTON, LANDRY, and GREGORY, JJ., that, as the only fact in dispute, namely, the existence of a tenancy between the parties, had been passed upon by the jury in favour of the plaintiff, and as no possible injustice could be done to the defendants, the amendment should be allowed.—Per BAKER and MCLEOD, JJ., that, as the proposed amendment introduced a new form of action, to which there were on the record no suitable pleas, and upon which there was no issue joined or damages assessed the amendment proposed was improper and should not be allowed at that stage of the case. *Frederick v. Gibson*, 37 N. B. R. 126.

**16. Resignation of executors in foreign country—Administration de bonis non there—Ancillary probate in Ontario.]—**A testator who died domiciled in Michigan, U.S., leaving property there and in this province, appointed certain persons executors, making them also trustees of four-sixths of his estate, and the proper Probate Court in Michigan granted probate to them in 1900. In 1903 they tendered to that Court their resignation as executors, though not as trustees, and requested and obtained the appointment of a trust company as administrators de bonis non with the will annexed in their place. In 1904, however, they resumed an application, which had remained suspended since 1900, to the Surrogate Court of the county of Essex for ancillary probate, which was opposed by the beneficiaries of the estate in Ontario, who asked for administration de bonis non to be granted to the trust company or its nominee:—*Held*, that the Court here ought to follow the Michigan grant to the trust company, and could not look into any of the circumstances which led up to it. *In re Medbury*, *Lothrop v. Medbury*, 11 O. L. R. 429, 7 O. W. R. 890.

**17. Seisin of movable property—Rents of immovable property—Agreement with tenants.]—**The seisin of movable property of successions by testamentary executors, under art. 918, C. C., carries

with it the right to collect, during the year and a day of its duration, the revenues of the immovable property. Hence, in an action for rent and damages, under a lease, by the legatees of the lessor against the lessee, the latter may lawfully plead matter of agreement respecting such rent and damages between himself and the testamentary executors of the lessor, during the period of seisin of the latter. *Saint-Aubin v. Crevier*, Q. R. 28 S. C. 392.

See ACCOUNT, 4—ADMINISTRATION ORDER, 2—CHOSE IN ACTION, ASSIGNMENT OF, 6—COSTS, VI. 3—COURTS, IV., VI. —GIFT, 1—INTERPLEADER, 3, 4—JUDGMENT, IV. 1—MASTER AND SERVANT, II. 6, 7—MINES AND MINERALS, 2—MORTGAGE, 2—PARENT AND CHILD, 2—PARTIES, I. 14—WILL.

### EXEMPTIONS.

See ASSESSMENT AND TAXES—ATTACHMENT OF DEBTS, II.—ATTACHMENT OF GOODS, 4—INDIAN, 3—INTERPLEADER, 5—MUNICIPAL CORPORATIONS, XIII. 1—STATUTES, 7.

### EXHIBITS.

See OPPOSITION, 4—PARTITION.

### EXPERT WITNESSES.

See EVIDENCE, IV. 1.

### EXPORT OF TIMBER.

See STATUTES, 8.

### EXPRESS COMPANY.

See BAILMENT—CARRIERS, 5.

### EXPROPRIATION.

See CROWN, 4—LICENSE—MUNICIPAL CORPORATIONS, IV., V. 7, VIII. 2, XI. 2—NOVA SCOTIA PROVINCIAL EXHIBITION—RAILWAY, IX., X. 2—WATER AND WATERCOURSES, 5, 6, 7, 19.

### EXTRA-PROVINCIAL CORPORATIONS.

See COMPANY, IV. 10—CONSTITUTIONAL LAW, 8.

### EXTRADITION.

1. **Discharge of prisoner**—New information and warrant—Re-arrest of prisoner — *Habeas corpus*—Rule nisi. *Re Harsha*, 7 O. W. R. 155.

2. **Embezzlement**—Identity of accused—Extraditable offence—Evidence of offence—Admissions—Business books—*Prima facie* case. *Re Latimer* (N.W. T.), 3 W. L. R. 81.

3. **Forgery**—Evidence of commission of offence—Identification of document—Irregularities in proceedings before Extradition Judge — Discharge of prisoner—*Fresh proceedings* — Proof of foreign law.]—The prisoner was committed by a Judge for extradition to a foreign state for the offence of forging tickets of admission to an entertainment. The evidence before the Judge consisted of a certified copy of the indictment of the prisoner in the foreign state, the information of a police detective taken before the Judge himself, and five depositions or affidavits sworn in the foreign state, consisting in great part merely of hearsay statements made by other persons to the deponents, not in the presence of the prisoner. These depositions proved some relevant facts, and raised a strong suspicion against the prisoner of having forged something, of having committed an offence which, if committed in Canada, would be forgery at common law, as well as under the Criminal Code, ss. 419, 421, 423; but neither a genuine ticket nor one of those with the forging of which the prisoner was charged was produced with any of the depositions, nor produced or identified before the extradition Judge:—*Held*, MEREDITH, J.A., dissenting, that there was no proper evidence of the commission of the alleged offence; and the prisoner was entitled to his discharge upon *habeas corpus*. Decision of TEETZEL, J., reversed.—*Semble*, per OSLER, J.A., that there were grave irregularities in the proceedings before the Extradition Judge; his warrant for the apprehension of the accused was issued without any information or complaint taken in this country, or a foreign warrant duly authenticated, having been before him; the prisoner was arrested on the strength of a telegram, and the depositions on which

he was committed were not forthcoming pending their authentication until the day upon which the order was made remanding him for extradition; and s. 6 (2) of the Extradition Act could not have been complied with.—*Semble*, also, that there was nothing to prevent fresh proceedings being taken against the prisoner upon his discharge.—*Semble*, also, that, in the present state of the authorities, an Extradition Judge should require proof that the crime is an extradition crime as well by the laws of the demanding state as by our own. *Re Harsha*, 11 O. L. R. 494, 7 O. W. R. 97.

**4. Habeas corpus — Re-arrest for same offence after discharge—*Res judicata*—Affidavit on information and belief.]**—An application was made for a *habeas corpus* in an extradition matter, on the grounds: (1) that the prisoner was arrested a second time for the same offence after his release on a *habeas corpus*; (2) that the matter was *res judicata*; (3) that the complaint against him was on information and belief only; (4) that no evidence was received by the Judge; and (5) that neither information and complaint nor the warrant was transmitted to the Minister of Justice:—*Held*, that, although the prisoner had been discharged from custody on the ground that there was no proper evidence of the commission of the alleged offence or identifying the alleged forged document, he could be re-arrested when further and new evidence had been discovered and was forthcoming to supply the deficiencies; and that the doctrine of *res judicata* or of former jeopardy or of *autrefois acquit* was inapplicable to such an inquiry.—The Habeas Corpus Act, 31 Car. II. c. 2, s. 6, does not apply to extradition proceedings.—*Held*, also, that an affidavit upon which the arrest was made, being on information and belief, was sufficient.—*Held*, further, that the other objections should not be investigated on appeal, as the inquiry was still pending and was to be prosecuted before the Extradition Judge.—*Quære*, whether the Divisional Court would have acted as on an appeal if objection had been taken to its jurisdiction. *Re Harsha*, 11 O. L. R. 457, 7 O. W. R. 293.

**5. Kidnapping or child-stealing —Extradition crime—Possession of child —One parent taking child from the other.]**—When the custody of a child has been assigned by competent judicial authority to one of its parents, to the exclusion of the other, the latter is guilty of the crime of kidnapping or child-stealing in taking it away from the control and possession of such parent.—2. The crime of kidnapping or child-stealing

is committed by one who takes and removes a child under the age of 14 years, so as to keep or conceal it from the person to whom the lawful charge of it is judicially assigned, even though such person has not, nor has had, the actual possession of it.—3. The offence of kidnapping or child-stealing, as above described, is an extraditable crime under the extradition treaty between Great Britain and the United States. *Ex p. Lorenz*, Q. R. 14 K. B. 273.

**6. Order of committal — Form — Extradition commissioner — Duty of—Extraditable crimes—Evidence — Copies of Depositions—Habeas corpus—Powers of Judge—Review of evidence.]**—The order of committal for the extradition of fugitives is sufficient, if made in the form given in the schedule to the Extradition Act, s. 20 of which declares expressly that a committal so made is to be deemed valid. As a consequence, it need not state that the charges laid have been inquired into, that they relate to extradition crimes, that *prima facie* proof of guilt has been made, nor provide specifically for the discharge or surrender of the prisoner.—2. The commissioner for extradition, in dealing with the information and evidence in the case, is governed by the same rules as the magistrate before whom a preliminary investigation in respect of an indictable offence is held; he issues his warrant for committal upon evidence that would justify the magistrate in committing for trial, and, as the latter may commit for an offence or offences different from those for which the accused was arrested, so also a variance between the charge in the information and the crime or crimes (whether one or more is of no consequence) stated in the committal as the ground for extradition, provided they are extraditable, is immaterial.—3. Participation in fraud by an agent, participation in embezzlement, and the receiving of moneys knowing the same to have been fraudulently obtained, are extraditable crimes.—4. Copies of the depositions of witnesses taken by means of stenography in the Courts of New York, duly certified and authenticated by the competent officers of such Courts, though not read over to nor signed by the witnesses, constitute legal evidence of the facts therein.—5. The Judge to whom application is made for *habeas corpus* on behalf of the fugitive committed for surrender, has no power to review the decision of the extradition commissioner as to the sufficiency of the evidence adduced before him. *Greene v. Vallée*, Q. R. 14 K. B. 261.

**7. Perjury — Formalities of oath—Warrant of committal — Form of—Ex**

*tradition (Commissioner — Criminal procedure — Extradition crime — Laws of foreign state.)*—(1) Perjury is an extradition crime within the meaning of the Treaty and the Act.—(2) Where the alleged crime is perjury, it is sufficient if the oath was administered in compliance with the formalities of the demanding country.—(3) A warrant of committal remanding a prisoner for extradition is sufficient if it states the offence for which he is committed.—(4) Such warrant, issued by an Extradition Commissioner, under the authority conferred by the Extradition Act, is valid if issued in the form prescribed by the Act.—(5) The ordinary technicalities of criminal procedure are applicable to proceedings in extradition to only a limited extent.—(6) Where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way.—(7) Where the demanding country is one of the States of the United States of America, it is sufficient if the imputed crime be a crime according to the law of that State, although not an offence against the general laws of the United States. *In re Windsor*, 6 B. & S. 522, commented upon.—(8) One test of determining whether the evidence is such as would justify committal of the accused for trial if the crime had been committed in Canada, is to conceive the accused pursuing the conduct in question in this country, and then to transplant along with him his environment, including, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting the law supplying the definition of the crime which is charged. *In re Collins*, 11 B. C. R. 436, 2 W. L. R. 164.

**8. Warrant** — Form — Persons to whom addressed—Forgery—Statement of offence in warrant—Intent to defraud—Proof that offence charged is a crime in foreign country — Complaint—Information and belief. *Re Harsha*, 7 O. W. R. 398, 471.

**9. Warrant**—Refusal of demanding State to act under—Discharge of prisoner. *Re Latimer* (N. W. T.), 3 W. L. R. 485.

See CONSTITUTIONAL LAW, 9—CRIMINAL LAW, IV. 1.

## EXTRAS.

See CONTRACT, II.—SET-OFF, 1.

## FACTORIES ACT.

**Meaning of "factory"** — Application of Act to tailor shop—Sanitary conveniences — Neglect to provide—Duty of owner of building leased for shop—Duty of lessee as employer — Construction of Act—Conviction of owner. *Re v. Ferguson*, 8 O. W. R. 957.

See MASTER AND SERVANT, II.

## FACTORS ACT.

See SALE OF GOODS, II. 3.

## FACTORY.

See LANDLORD AND TENANT, 18.

## FAITS ET ARTICLES.

**Order for — Terms.**—An order for *faits et articles* must contain the full name; description, and residence of the defendant. *Valiquette v. Kennedy*, 7 Q. P. R. 400.

## FALSE ARREST AND IMPRISONMENT.

**1. Arrest without warrant**—*Oral charge*—*Probable cause*—*Liability of officer making arrest and of municipal corporation.*—A constable or peace officer, in a case of homicide, is justified, upon the verbal charge of the daughter of the deceased, in arresting, without a warrant, a person found in his bed, at his home, a short distance away, whose blood-stained hands and clothes lend colour to the charge.—2. The officer, and the city, in whose police service he is employed, incur no liability for false imprisonment, through the arrest and detention of the party as aforesaid. *Hubbard v. City of Montreal*, Q. R. 28 S. C. 221.

**2. Termination of criminal prosecution.**—In an action for damages for false arrest it is not necessary to allege that the prosecution has been terminated, or that the plaintiff has been acquitted. *McDowell v. United States Thread Co.*, 7 Q. P. R. 325.

**3. Want of reasonable and probable cause**—Functions of Judge and jury — Malice — Misdirection — Non-direction—Improper relation of evidence



—Character of plaintiff—Damages. *Sinclair v. Ruddell* (Man.), 3 W. L. R. 532.

See MALICIOUS PROSECUTION AND ARREST, 7—MUNICIPAL CORPORATIONS, X. 3.

### FALSE REPRESENTATIONS.

See DAMAGES, 7—FRAUD AND MISREPRESENTATION — HIRE OF CHATTELS—HUSBAND AND WIFE, VII. 8—SALE OF GOODS, I. 12.

### FALSE STATEMENTS.

See BANKS AND BANKING, 5 — FRAUD AND MISREPRESENTATION, 2.

### FAMILIES COMPENSATION ACT, B.C.

See STATUTES, 4.

### FAMILY ARRANGEMENT.

**Agreement for division of estate of intestate** — *Consideration—Absence of fraud.*]—J. H. died intestate possessed of property worth about \$40,000, and survived by his widow, two sons, and three daughters. Part of his property consisted of lumber lands worth \$21,000, which it had been his intention, known to all the members of the family, to give to the sons, who were associated with him in his business as a lumberman. A few days before his death, in discussing with his solicitor the terms of a will he intended to make, he stated that he wanted his lumber lands and mill property to go to the sons, who should continue his business and pay his debts, and that he did not intend making any provision for the daughters. At a meeting of the family held after his death, they were informed of these wishes; that performance of an outstanding contract by the deceased for the delivery of a quantity of lumber was being pressed, and that his liabilities were \$15,000 or \$20,000, though in fact they were \$22,000. It was agreed for the purpose of giving effect to the deceased's intentions that the sons should assume the debts; that the daughters should convey all their interest in the estate to the sons; that the sons should pay to the plaintiff \$500, to another daughter \$600, and should join in a conveyance to the third of land given to her by her father, but unconveyed by him.

At the time the exact condition of the estate was unknown. Before the deed to the sons was executed, the solicitor of the deceased present at the meeting explained to the daughters their legal rights and the effect of the deed. On the true condition of the estate being subsequently ascertained, the plaintiff sought to have the conveyance set aside:—*Held*, that the agreement as a family arrangement, entered into for the purpose of giving effect to the intentions of the deceased, without fraud or misrepresentation, should be upheld. *Sears v. Hicks*, 3 N. B. Eq. 281, 1 E. L. R. 451.

### FAMILY BURIAL GROUND.

See CEMETERY.

### FAMILY COUNCIL.

See LUNATIC, 1—TUTOR.

### FARM CROSSINGS.

See RAILWAY, 5.

### FARMERS' SONS.

See SCHOOLS, 6.

### FATAL ACCIDENTS ACT.

**1. Action for death of husband and father** — *Bar — Renunciation in lifetime.*]—The renunciation of a workman of his right of action against his employer for possible tort or negligence causing him injury, is not an answer to an action to recover damages for his death, brought by his widow and children under art. 1056 C. C.—the cause of action being a different one. *Laplante v. Grand Trunk R. W. Co.*, Q. R. 27 S. C. 456.

**2. Indemnity to parents and children**—*Only one action—Second action barred.*]—In case of death caused by a tort, no more than one action can be brought against the tort-feasor in behalf of those entitled to indemnity, and such an action brought by one of them, even though the judgment rendered therein does not determine the proportion of the indemnity which the others are to receive, is a bar to a subsequent action

brought by one of the latter. *Bouthillier v. Central Vermont R. W. Co.*, Q. R. 28 S. C. 472.

**3. Right of action—Persons entitled to sue.]**—By the terms of art. 1056, C. C., the only persons who have a right of action for the death of a person resulting from a quasi delict, are his consort, and ascendant or descendant relatives; the brothers and sisters have no such right of action. *Cohier v. Allan*, 8 Q. P. R. 129.

See DAMAGES, 2-3 — EXECUTORS AND ADMINISTRATORS, 12—MASTER AND SERVANT, II. — NEGLIGENCE, 3—RAILWAY, VIII.—STREET RAILWAYS, III. 4.

### FEDERAL COURT.

See CONSTITUTIONAL LAW, 9.

### FEES.

See ARCHITECT.

### FEES OF OFFICE.

See PORTWARDENS.

### FENCES.

See MUNICIPAL CORPORATIONS, XIV. 7- . NEGLIGENCE, 11—RAILWAY, I., VIII. 8, X. 5—TRESPASS TO LAND, 2, 8.

### FIDUCIARY RELATIONSHIP.

See GIFT, 5—LIMITATION OF ACTIONS, I. 5—TRUSTS AND TRUSTEES, 6.

### FIEF.

See FISHERIES, 1.

### FILIATION ORDER.

See INFANT, 11.

### FINES.

See CANADA TEMPERANCE ACT.

### FIRE.

**1. Damage by—Action against person at fault—Interest of plaintiff—Compensation by insurance — Pleading.]**—A defendant sued for damages alleged to have been suffered by the plaintiffs from a fire alleged to have been caused by the defendants' fault, cannot plead want of interest of the plaintiffs, because they have been compensated for their loss by insurance moneys received by them. *Burritt v. Pillow and Hersey Manufacturing Co.*, 7 Q. P. R. 461.

**2. Damage to property — Escape from railway engine—Evidence—Absence of direct proof—Inference from facts—Liability of railway company—Parties—Joinder of plaintiffs—Waiver of objection by pleading — Costs.** *Tait v. Canadian Pacific R. W. Co.*, *Bain v. Canadian Pacific R. W. Co.*, *Kellett v. Canadian Pacific R. W. Co.* (Man.), 3 W. L. R. 452.

**3. Damage to property by prairie fire—Origin of fire—Evidence — Negligence.** *Holliday v. Bussian* (Man.), 4 W. L. R. 577.

See CONTRACT, VIII. 3—CROWN, 11—HIRE OF CHATTELS—LIMITATION OF ACTIONS, II. 4 — NEGLIGENCE, 6, 8, 10—RAILWAY, X. 4.

### FIRE INSURANCE.

See INSURANCE, II.

### FISHERIES.

**1. Crown grant — Fief—Exclusive rights.]**—The grant *à titre de fief* of a "tract of land situate on the Baie des Chaleurs of a league and a half in front by two in depth, to be reckoned from the seigneurie du Grand Pabos belonging to the Sieur René Hubert, proceeding from the coast of cape Espoir towards Percée island, with right of hunting, fishing, and treaty with the savages in the whole tract granted," does not give to the grantee and his assigns the exclusive right of fishing in the gulf of St. Lawrence opposite the *fief*. Therefore, the owner of this *fief* has no right of action against persons who spread nets at the place mentioned to restrain them from so doing or for damages. *Cabot v. Carbery*, Q. R. 15 K. B. 124.

**2. Fisheries Act—Summary conviction—Right of appeal — Jurisdiction of**

County Court—Recognizance — Fish illegally caught — Innocent purchaser—Offence of having fish in possession. *Rea v. Butterfield* (B.C.), 4 W. L. R. 537.

**3. Territorial waters — Lease — Powers of Chief Commissioner.]** — The provisions of s. 41 of the Land Act, as enacted in 1901, do not confer on the Chief Commissioner of Lands and Works authority to grant leases of the bed of the sea in territorial waters. *Capital City Canning and Packing Co. v. Anglo-British Columbia Packing Co.*, 11 B. C. R. 333, 2 W. L. R. 59.

**4. Unlawful canning of lobsters** — Imprisonment in default of payment of fine—No prior distress—Costs of conveyance to gaol—Evidence of unreasonableness of amount. *Rea v. Berrigan*, 2 E. L. R. 88.

See CONSTITUTIONAL LAW, 11—CROWN LANDS, 1—NEGLIGENCE, 20—SHIP, 10, 18, 19, 24—WATER AND WATERCOURSES, 17.

### FIXTURES.

**Property in building separate from soil**—*Land belonging to substitution—Building erected by grevé—Seizure by creditors.]*—The property in a building may be in a person other than the owner of the soil upon which it is built. Article 415, C. C., establishes a different rule from that of the Roman law, *ædificium solo cedit*, which is no longer in force. Therefore a house built by a *grévé de substitution* upon land belonging to the substitution and declared *insaisissable*, belongs to him and may be seized and sold at the suit of creditors. *Lacombe v. Brunet*, Q. R. 14 K. B. 465.

See ASSESSMENT AND TAXES, 9—LANDLORD AND TENANT, 1, 12, 31—RAILWAY, IX. 7.

### FORCIBLE ENTRY.

See CRIMINAL LAW, III. 13.

### FORECLOSURE.

See MORTGAGE, 8, 11, 17.

### FOREIGN COMMISSION.

See EVIDENCE, III.

### FOREIGN COMPANY.

See COSTS, V. 5, 8, 11—WRIT OF SUMMONS, 25.

### FOREIGN COMPANIES ORDINANCE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 3 — COMPANY, IV. 3.

### FOREIGN JUDGMENT.

See JUDGMENT, I.

### FOREIGN LAW.

See BILLS OF SALE AND CHATTEL MORTGAGES, 1—CONFLICT OF LAWS—EXTRADITION.

### FOREIGN PATENT.

See PATENT FOR INVENTION, 5.

### FOREIGN VESSEL.

See SHIP.

### FORESHORE OF HARBOUR.

See CONSTITUTIONAL LAW, 10.

### FORFEITURE.

See COMPANY, II., III., IV. 1 — CONTRACT, III. 12, X. 9 — INSURANCE, III. 2—LANDLORD AND TENANT, 2—LIQUOR LICENSES, 13—MINES AND MINERALS, 14—SHIP, 27—TIMBER, 3—VENDOR AND PURCHASER, I. 8.

### FORGERY.

See BANKS AND BANKING, 1, 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 1, 2, III. 16, 17—CRIMINAL LAW, III. 14, 15, 16—EXTRADITION, 2, 8.



**FRACTION OF DAY.**

See RAILWAY, IV. 1.

**FRANCHISE.**

See STREET RAILWAYS, I. 2.

**FRAUD AND MISREPRESENTATION.**

**1. Inducement of contract—*Fraud of third person—Remedy—Damages.***—Fraud practised by a third party, even when it produces in the mind of one of the contracting parties a mistake as to the nature of the contract, cannot be invoked by that party as a cause of nullity as against the person with whom he contracts. He has no remedy except against the author of the fraud for damages. Therefore, a person, who, deceived by the fraudulent practices of a third person, signs a security when he believes that he is signing a contract of insurance, is bound to fulfil the obligations of it. *Imperial Life Assurance Co. v. Laliberté*, Q. R. 29 S. C. 183.

**2. President of incorporated company — *False statement of earnings to directors—Payment of dividends—Damages—Evidence—Credibility of witness—Statutory declaration.***—In an action by an incorporated company to recover from the executors of the deceased president of the company damages alleged to have been suffered by the company by reason of false and fraudulent representations made by the deceased:—*Held*, upon the evidence, that the statement of approximate earnings laid before the directors of the company by the deceased on the 15th December, 1902, and the annual statement presented by him to the directors on the 27th January, 1903, and afterwards to the shareholders, were untrue to his knowledge, and that the earnings for 1902 were wilfully misrepresented by him in order that the directors might be induced to declare dividends which they would not have declared had they been made aware of the true earnings, and that the directors acted upon the misrepresentations made to them in declaring five per cent. half-yearly dividends in January and July, 1903.—*Held*, also, that the plaintiffs, the company, had suffered damages by reason of the payment of the dividends, notwithstanding that the payment was not made out of the actual fixed capital and was not *ultra vires* of the company, and notwithstanding that it was made to the persons who were then the shareholders of the company; the company having parted with sums of money

which, but for the misrepresentations, would still have been at the company's credit.—Damages were assessed against the estate of the deceased in the sum of \$34,500, made up by taking the amount of the misrepresentation at the end of December, 1902, to have been roundly \$30,000, and adding three years' interest at five per cent.—It was urged by the defendants against the credibility of the principal witness for the plaintiffs, that having, at the instance of the plaintiffs, though before this action was brought or contemplated, and while the president was still alive, made a statutory declaration as to the truth of the facts which he afterwards deposed to at the trial, he was *in vinculis*, and was not free to vary from it except at the risk of a prosecution for perjury:—*Held*, that the taking of unnecessary statutory declarations is a practice which should be avoided, and in this case a simple signed statement would have been as effectual; but the witness was entitled to credit, against this objection, his testimony being given with fairness and candour, and no motive for falsehood being apparent. *Northern Navigation Co. v. Long*, 11 O. L. R. 230, 6 O. W. R. 982.

See ARREST, 3, 11—ASSESSMENT AND TAXES, 17 — BANKRUPTCY AND INSOLVENCY—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 2, 18, 22, 23, 26—BILLS OF SALE AND CHATTEL MORTGAGES—COMPANY, I. 2, 4, 5, II. 2, 3, 5, 10, III. 9—CONTRACT, VI. 2, 5, IX. 5, X. 5—COSTS, VIII. 2—COURTS, VI. 1—DISCOVERY, IV. 2—EVIDENCE, III. 2—FAMILY ARRANGEMENT — INTERPLEADER, 5—JUDGMENT, III. 3—LANDLORD AND TENANT, 3—LIQUOR LICENSES, 14 — MINES AND MINERALS, 1 — PARTNERSHIP, 9—PLEADING, VIII. 8, 21, IX. 5—PRINCIPAL AND SURETY, 3—SALE OF GOODS, III. 1—SCHOOLS, 5—TRUSTS AND TRUSTEES, 6, 7, 13—VENDOR AND PURCHASER, I. 7, 14, 18, 24, 29.

**FRAUDULENT CONVEYANCE.**

**1. Action to set aside—*Evidence—New trial—Conspiracy—Costs—Parties—Damages.***—In an action by creditors to set aside as fraudulent and void a conveyance of land and a bill of sale made by an insolvent debtor to his sister-in-law, there was judgment for the plaintiffs at the trial, but on appeal by the defendants, the Court of Appeal, deeming the evidence unsatisfactory, ordered a new trial, upon payment by the defendant grantee of the costs of the former trial and of the appeal, notwithstanding the danger which attends the opening up of a case after the attention of the parties has been directed to the defects in their proofs.—A brother of the debtor was

made a defendant, as well as the debtor and his grantee, it being alleged by the plaintiffs, who sued on behalf of themselves and all creditors, that all the defendants entered into a conspiracy to defeat and defraud the creditors:—*Held*, that the plaintiffs could not succeed upon the conspiracy claim, for they could shew no special damage accruing to them, and could not recover damages on behalf of a class.—And that claim failing, there was no ground for making the debtor's brother a party, and he could not be ordered to pay costs, but the plaintiffs should pay his costs.—Judgment of TEETZEL, J., reversed. *Canada Carriage Co. v. Lea*, 11 O. L. R. 171, 6 O. W. R. 633.

**2. Action to set aside—Gift to son—Absence of evidence of insolvency.]—**A donation of property can only be avoided in an action *pauliana*, upon clear evidence that the donor became thereby insolvent. When therefore the latter retains in his hands immovable property purchased for a price of \$7,000 on which he has paid \$2,000, the vendor to whom the balance of \$5,000 is due has no action to annul a donation made by his debtor to his son of his other homestead property. *Laporte v. Bernard*, Q. R. 15 K. B. 243.

**3. Action to set aside—Insolvency of grantor—Intent to defeat creditors—Failure to prove—Husband and wife—Husband going into business—Absence of hazard.** *Farquharson v. Dowd*, 7 O. W. R. 411.

**4. Consideration—13 Eliz. c. 5.]—**In 1891 E. S., a farmer, since deceased, agreed with two of his sons, in consideration of their remaining on the farm and supporting him and their mother, and paying to their two sisters \$1,000 each, that the farm and his personal property should be theirs. The farm consisted of adjoining pieces of land, each worth about \$3,200. Subsequently the sons paid more than \$3,000 in paying off balance of purchase money due on the farm, paid \$2,000 to the sisters, and supported the father and mother. On the 19th July, 1899, the father conveyed the farm to the sons for an expressed consideration of \$1. At that time he was not in debt, but he was surety with others for loans amounting to \$14,000 to a company, of which he and they were directors, the last loan being for \$3,000, made on the 7th June, 1899. On the 3rd May, 1901, the company went into liquidation, and the amount for which the directors were sureties was paid by them, except E. S. A suit by them to set aside the conveyance as fraudulent and void under 13 Eliz. c. 5, was dismissed. *Baird v. Slipp*, 26 C. L. T. 467, 3 N. B. Eq. 258.

**5. Fraudulent transfer of personal property—Action to set aside—Following proceeds—Equity of redemption in land—Status of judgment creditor as plaintiff—Expiry of execution—Laches in bringing action—Absence of fraudulent intent.** *Scott v. Griffin*, 7 O. W. R. 441.

**6. Husband and wife—Parent and child—Gift—Absence of insolvency and fraudulent intent—Business carried on by wife—Attempt to have stock in trade declared available for husband's creditors—Remedy—Sheriff—Interpleader.** *White v. Campbell*, 7 O. W. R. 146, 612.

**7. Issue—Determination in favour of validity—Appeal—Evidence that conveyance made as security only—Refusal to give relief.** *Schuel v. Hamilton*, 8 O. W. R. 563.

**8. Statute of Limitations—Amendment after cause of action barred—Promissory note—Negotiable instrument—13 Eliz. c. 5—County Court judgment—Registration of certificate.]—**1. An instrument in the form usually called a lien note is not a negotiable promissory note (*Bank of Hamilton v. Gillies*, 12 Man. L. R. 495), and the right of action upon it is barred by the Statute of Limitations in 6 years from the due date of it, without adding any days of grace.—2. A voluntary conveyance of land cannot be successfully attacked under 13 Eliz. c. 5, on the basis of a debt due at the time of the conveyance, but barred by lapse of time before the commencement of the action to attack. *Struthers v. Glennie*, 14 O. R. 726, followed.—3. A voluntary conveyance of land, if meant to be absolute as between the parties, so that the grantee holds it free of trust for the grantor, leaves no interest to him which can be affected by the registration of a certificate of a subsequently recovered County Court judgment against the grantor.—A debt of the grantor, though owing at the time of the making of such voluntary conveyance, became afterwards barred by the Statute of Limitations before the creditor sued the grantor upon it. The grantor neglected to plead that statute, and judgment was recovered against him:—*Held*, that, as against the grantee, such judgment did not relate back to the original debt so as to form the basis for an action under 13 Eliz. c. 5. The grantee, having once gained the right to plead the Statute of Limitations in such last named action, can not be deprived of that right by the act or omission of the grantor. *Keddy v. Morden*, 15 Man. L. R. 629, 2 W. L. R. 373.

See **BANKRUPTCY AND INSOLVENCY—COLLECTION ACT, 2 — HUSBAND AND WIFE, VIII.—PARTIES, II. 7.**

### **FREIGHT.**

See **CARRIERS, 4—CROWN, 5—SHIP, 1, 2.**

### **FRENCH TITLE.**

See **CROWN LANDS, 3.**

### **FRUIT MARKS ACT.**

See **SALE OF GOODS, VI. 3.**

### **FUNERAL EXPENSES.**

See **HUSBAND AND WIFE, VI. 1.**

### **FUTURE RIGHTS**

See **COURTS, IX. 5 — HUSBAND AND WIFE, V. 4.**

### **GAMING.**

See **BROKER—CONTRACT, X. 2—JUDGMENT, II. 1.**

### **GARNISHMENT.**

See **ATTACHMENT OF DEBTS.**

### **GIFT.**

**1. Donatio mortis causa**—Deposit in savings bank—Bank book handed to donee—Executors and administrators—Bank entitled to have administrator joined in action by donee—Costs. *Adams v. Union Bank of Halifax*, 1 E. L. R. 317, 561.

**2. Donatio mortis causa** — *Evidence — Delivery for safe-keeping.*]—A person on his death-bed handed to his wife, out of a satchel which he kept in a closet of his bedroom, \$2,000 in bonds and \$1,550 in cash, telling her to "take them and put them away; wrap them up

and lock them up 'in your trunk." At the same time he handed to her a pocket book containing \$150, saying that it was for present expenses. A few minutes later he handed to his business partner remaining contents of satchel, consisting of \$1,000 belonging to the firm. Subsequently he made a will bequeathing to his wife \$3,000, a horse, two carriages, and all his household effects; to his partner his interest in partnership property; to two grand-nephews \$500 each; and to nieces and nephews the residue of his estate. His private estate was worth about \$8,000. When giving directions for the drafting of his will, on the amount of the legacies to his wife and grand-nephews being counted up, he said, "There is more than that." *Held*, that there was not a *donatio mortis causa* to the wife, the deceased intending no more than a delivery for safe-keeping. *Eastern Trust Co. v. Jackson*, 26 C. L. T. 386, 3 N. B. Eq. 180.

**3. Promissory note**—Want of consideration—Promise to pay—Indorser—Action against maker.] — *Semble*, that where the payee (deceased) on indorsing a promissory note for the accommodation of the maker promises without consideration to pay it, and the holder compels payment by the payee's estate, an action for the recovery of the amount lies by the estate against the maker. *Johnston v. Hazen, Re Woodford Claim*, 3 N. B. Eq. 341; *Hazen v. Woodford*, 2 E. L. R. 25.

**4. Revocation**—Demand—Period of limitation—Bar to action—Pleading — *Judicial notice.*]—The period of one year, counting from the breach imputed to the donee, during which a demand for revocation of a gift on the ground of ingratitude must be made, is peremptory, and the law forbids an action after such time has passed. Consequently, according to the terms of art. 2188, C. C., the tribunal seised of such a demand must apply such prescription of its own motion if the defendant does not invoke it. *Farand v. Paulos*, Q. R. 28 S. C. 200.

**5. Undue influence**—Fiduciary relationship — Transaction between trustee and beneficiary. *Wright v. Kaye*, 2 E. L. R. 47.

**6. Universal gift** — *Liability for debts of donor*—Several liability of both donor and donee — *Prescription—Interruption—Acknowledgment by donor—To whom credit given.*]—The effect of art. 797, C. C., in declaring an universal donee personally liable for the whole of the debts of the donor is to make them both jointly liable for such debts. There-

fore, an acknowledgment by a promissory note signed by the donor subsequent to the gift interrupts the prescription of the debt as against the donee.—The vendor of goods and merchandise for the common use of a father and son, who live together, has the right to recover the price of them from the son, who has become the universal donee of the father, although the vendor has entered them in his books in the name of the father, according to the practice which he had adopted before the gift. *Ellard v. Barbe*, Q. R. 29 S. C. 165.

See FRAUDULENT CONVEYANCE, 2, 6—HUSBAND AND WIFE, VIII. 1, 4—LIMITATION OF ACTIONS, I. 1—OPPOSITION, 8—PARENT AND CHILD, 1—WILL.

### GOLD COMMISSIONER.

**Jurisdiction**—Grant of water privileges—Water regulations—Construction—"Protest"—Mining recorder — Mining regulations—Appeal—Costs. *Graves v. McDonnell* (Y.T.), 3 W. L. R. 329.

See MINES AND MINERALS, 9.

### GOODWILL.

See CONTRACT, VI. 2—ILLEGAL DISTRESS—TRUSTS AND TRUSTEES, 10.

### GOVERNMENT RETURNS.

See BANKS AND BANKING, 5.

### GRAND JURY.

See CONSTITUTIONAL LAW, 6—CRIMINAL LAW, IV. 11, 16—MALICIOUS PROSECUTION AND ARREST, 5.

### GREAT LAKES.

See CONSTITUTIONAL LAW, 12.

### GROSS NEGLIGENCE.

See WAY, III. 13.

### GUARANTY.

**1. Liability of surety**—Guaranteeing purchase price of goods—Absence of writing—Agreement to indemnify against loss—Statute of Frauds—Failure to prove agreement—Liability of guarantor as purchaser. *Fraser v. Heaslip* (Man.), 4 W. L. R. 520.

**2. Scope of — Appropriation of payments—Security.**—Security given for a time certain, as a guaranty of a debt overdue and of a credit to be opened, cannot be considered as a general guaranty and applicable to all the sales which are made to the debtor during the time covered by the guaranty; it must be restricted to the debt overdue and to the limited credit mentioned in the agreement; and the surety is entitled to appropriate against these two special debts the amounts paid by the debtor after the security is given. *Borgfield v. La Banque d'Hochelaga*, Q. R. 28 S. C. 344.

See MORTGAGE, 4—PRINCIPAL AND SURETY—TRESPASS TO LAND, 1.

### GUARDIAN.

See INFANT, 1, 12, 13, 15.

### HABEAS CORPUS.

**1. Intervention—Contestation—Irregularities in procedure.**—The contestation of an intervention being a defence to such intervention, the petitioner for *habeas corpus* may with his contestation, even at the hearing of the cause, and without having put his grounds in writing, point out and rely upon all the irregularities in the proceedings by which his liberty has been restrained. *Piché v. Gareau*, 7 Q. P. R. 331.

**2. Petition for—Territorial jurisdiction—Sentence of competent Court—Certiorari in aid.**—The Judges of the Superior Court for the district or division within which a person is detained in custody are competent to entertain his petition for a *habeas corpus*. —The remedy by *habeas corpus* not being open to one who is detained in custody by virtue of the judgment or sentence of a competent Court, he cannot demand a writ of certiorari in aid to produce the record of the proceedings in which the judgment or sentence has been pronounced. *Es p. Goldsberry*, Q. R. 27 S. C. 430.

**3. Refusal — Appeal — Right of—Amendment of conviction and warrant**

of commitment to cure defect—"Wilfully."—The prisoner was convicted under s. 177 (b) of the Criminal Code, 1892, for an indecent exposure of his person, and sentenced to three months' imprisonment. Neither the conviction nor the warrant of commitment stated, although the evidence tended to shew, that the act had been done wilfully. He then applied for a writ of *habeas corpus*:—*Held, per MATHERS, J.*, following *Re Plunkett*, 1 Can. Crim. Cas. 365, that the prosecution should be permitted, on the hearing of the application, to substitute new conviction and warrant containing the omitted word: and, the substitution having been made, that the application should be refused, but without costs.—*Held, also*, by the full Court, that no appeal to the full Court lies in this province from the decision of a single Judge refusing a *habeas corpus* application, though a prisoner may make successive applications for the writ to one Judge after another, or he may make a direct application to the Court *en banc*. *Ex p. Woodhall*, 20 Q. B. D. 832, referred to. *Res v. Barré*, 15 Man. L. R. 420, 2 W. L. R. 376.

See CRIMINAL LAW, II. 4. III. 43, IV. 1, 2, 8—EXTRADITION—INFANT, 4-7, 9, 14—LIQUOR LICENSES, 1.

## HARBOUR.

See CONSTITUTIONAL LAW, 10—NEGLIGENCE, 9.

## HAWKERS AND PEDLARS.

**Summary conviction**—Ordinance respecting auctioneers, hawkers, and pedlars—"Goods, wares, or merchandise"—Books—Proof of offence—Goods to be afterwards delivered—Patterns or samples—Quashing conviction—Costs. *Res v. Wolfe* (N.W.T.), 4 W. L. R. 553.

See MUNICIPAL CORPORATIONS, VII. 1.

## HIGH COURT OF JUSTICE FOR ONTARIO.

See APPEAL, VI., VII.—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 20—COURTS, VI. 3—EXECUTORS AND ADMINISTRATORS, 6, 8—MINES AND MINERALS, 7.

## HIGH SCHOOLS.

See SCHOOLS, 4.

## HIGHWAY.

See MUNICIPAL CORPORATIONS, V.—NEGLECT—NUISANCE, 1, 2, 4—RAILWAY—STREET RAILWAYS—TREES—WAY.

## HIGHWAY CROSSINGS.

See RAILWAY, VII., X. 6.

## HIRE OF CHATTELS.

**1. Contract—Condition — Breach — Nullity of lease—False representations—Patented articles.]**—A lessee of machines for making boots and shoes, who undertakes to use them only for making boots and shoes entirely completed with the machines of the lessor, and who is sued for violation of this undertaking, may set up in answer the nullity of the lease for false representations of the lessor that his machines are patented, whereas they are not so or he has been deprived of the benefit of the patent. *United Shoe Machinery Co. of Canada v. Brunet*, Q. R. 15 K. B. 187.

**2. Revendication — Insurance — Supposed destruction by fire—Receipt of insurance moneys.]**—The owner of a chattel leased upon condition that the lessee will insure it for the benefit of the lessor, who receives the amount of the insurance after a fire in which it is supposed to have been destroyed, held to have thereby renounced his right of property in the chattel: and he cannot revendicate it subsequently from a third person, especially when he does not offer to reimburse the latter the price he has paid. *United Shoe Machinery Co. v. Caron*, Q. R. 14 K. B. 437.

## HIRING.

See MASTER AND SERVANT.

## HOMESTEAD.

**Dominion Lands Act — Agreement to assign interest before patent—Illegal—**



ity.]—1. Under s. 42 of the Dominion Lands Act, R. S. C. c. 54, as re-enacted by s. 5 of 60 & 61 V. c. 29 (D.), an agreement made by a homesteader, before issue of the patent and before procuring a certificate of recommendation for patent from the local agent, to assign and transfer an interest in the homesteaded land to another person, though made in good faith and for an adequate consideration, is absolutely null and void, and cannot be enforced at the suit of such other person.—*Abell v. McLaren*, 13 Man. L. R. 463, not followed.—2. Since the case of *Aubert v. Maze*, 2 B. & P. 371, there has been no distinction between *malum prohibitum* and *malum in se* as to anything forbidden by statute.—*Cannan v. Bryce*, 3 B. & Ald. 179, and *Wetherell v. Jones*, 3 B. & Ad. 221, followed. *Cumming v. Cumming*, 15 Man. L. R. 640.

## HOMESTEAD EXEMPTION.

See ESTOPPEL, 2.

## HOMOLOGATION.

See WAY, V. 1, 2.

## HUSBAND AND WIFE.

### I. ALIMONY.

### II. BREACH OF PROMISE OF MARRIAGE.

### III. COMMUNITY.

### IV. MARRIAGE CONTRACT.

### V. PARTIES TO ACTIONS.

### VI. PROPERTY AND SEPARATE ESTATE OF WIFE.

### VII. SEPARATION AND DIVORCE.

### VIII. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

### IX. MISCELLANEOUS.

See ATTACHMENT OF DEBTS, II. 2—BANKRUPTCY AND INSOLVENCY, 2—CHOSE IN ACTION, ASSIGNMENT OF, 6—CONTRACT, VI. 1, X. 14—CRIMINAL LAW, III. 26—DAMAGES, 8—EVIDENCE, I. 4—EXECUTORS AND ADMINISTRATORS, 6—FRAUDULENT CONVEYANCE, 3, 6—INFANT—INSURANCE, III. 7, 11—LIEN, 6—MASTER AND SERVANT, II. 9—RECEIVER, 1—SALE OF GOODS, I. 11—VENDOR AND PURCHASER, I. 22.

### I. ALIMONY.

1. **Conduct of husband**—Wife leaving husband—Justification—Right to

*alimony*.]—A wife whose husband by his conduct makes their living together impossible has a right to leave the conjugal domicile and exact an alimony allowance without being obliged to have recourse to a demand for divorce or *séparation de corps*. To obtain alimony it is sufficient for her to establish that her husband does not provide for her a suitable dwelling place and is not in a position to guarantee her safety and dignity. *Gravel v. Lahoulière*, Q. R. 14 K. B. 385.

2. **Costs in alimony action**—Solicitor and client—Rule 800. *Mellor v. Mellor* (B.C.), 3 W. L. R. 34.

3. **Cruelty**—*Insufficient evidence of—Non-revival of prior condoned acts.*]—The Courts scrutinize very closely retaliatory acts of alleged violence and cruelty on the part of the husband arising out of the wife's headstrong and irritating conduct, and will refuse unless such acts are accompanied by intemperate and excessive violence to call them acts of cruelty, and so effective in reviving prior condoned acts of cruelty and misconduct.—In 1895 the plaintiff and defendant, who prior thereto had been living together, were married, but thereafter only lived together at intervals, the plaintiff living apart from defendant, and carrying on what she called a hospital for pregnant women. In 1904, on the defendant insisting on it, the plaintiff returned to the defendant's house, everything going on satisfactorily until the plaintiff desired to carry on the alleged hospital business in the house, which the defendant refused to consent to. The plaintiff then rented a house for herself, and, during the defendant's temporary absence, stripped the defendant's house of nearly all the furniture, removing it to her own house. This greatly incensed the defendant, and on the plaintiff using foul and abusive language to him, he committed, as the plaintiff alleged, an aggravated assault on her, and by his conduct rendered it unsafe for her to live with him, and revived prior condoned acts of cruelty and misconduct: — *Held*, that the defendant's acts were not of such an excessive and intemperate a character as would render it unsafe for the plaintiff to live with him, and revive the prior condoned acts, for not only did it appear that the alleged assault was grossly exaggerated but was brought on by the plaintiff herself, whose whole object was to goad the defendant into acts of violence which would justify an action for alimony. *Payne v. Payne*, 10 O. L. R. 742, 6 O. W. R. 428.

4. **Cruelty**—Wife leaving husband—Justification—Conduct amounting to

*cruelty — Apprehension of violence.*] — Where a husband's persistent course of harsh conduct towards his wife, a woman of delicate constitution, created mental distress sufficient to impair her health, and did in fact injure it appreciably during their married life together, and where his language of threat and menace and his habitual demeanour were such as to create a well-founded apprehension that she would suffer worse and more injurious treatment and hardship if she did not submit implicitly and submissively to anything he might choose to do or say:—*Held*, STREET, J., dissenting, that this conduct and the cumulation of circumstances detailed in the evidence amounted to matrimonial cruelty, although no bodily violence was inflicted; and the wife was justified in leaving her husband, and was entitled to alimony.—Judgment of BOYD, C., affirmed. *Lovell v. Lovell*, 11 O. L. R. 547, 7 O. W. R. 303, 8 O. W. R. 517.

**5. Interim order—Jurisdiction—Divorce.**]—The Supreme Court of British Columbia has jurisdiction to grant interim alimony pending an action for divorce. *Mellor v. Mellor*, 11 B. C. R. 327.

**6. Interim order—Petition.**]—A petition on the part of a wife for interim alimony during the progress of an action against her husband for alimony, will be granted. *Duckett v. Turgeon*, 7 Q. P. R. 457.

**7. Misconduct of wife before marriage—Condonation — Property in chattels.**] — 1. Unchastity before marriage and concealment of it from the husband until the birth of a child is not sufficient to make the marriage null and void or to disentitle the wife to alimony.—*Swift v. Kelly*, 3 Knapp 293, *Moss v. Moss*, [1897] P. 263, *Nelligan v. Nelligan*, 26 O. R. 8, and *Aldrich v. Aldrich*, 21 O. R. 447, followed.—2. Under s. 30 of the King's Bench Act, R. S. M. 1902 c. 40, a wife will be entitled to alimony if, by the law of England as it stood on the 15th July, 1870, she would have been entitled to a decree for the restitution of conjugal rights. By that law nothing but cruelty or adultery on the part of a wife after marriage would be a bar to an order for such restitution or entitle the husband to a judicial separation.—*Scott v. Scott*, 4 Sw. & Tr. 113, and *Russell v. Russell*, [1897] A. C. 395, followed.—3. Resumption of cohabitation is a necessary ingredient of condonation by the husband of any matrimonial offence committed by the wife, such as would prevent him from relying upon it as a defence to an alimony suit.—*Keats v. Keats*, 1 Sw. & Tr. 334, followed.—4. A wife abandoned by

her husband is entitled to the engagement ring which he had given her before marriage, unless she had absolutely surrendered it to him; but she is not, in ordinary circumstances, entitled to demand and recover possession of wedding presents given by friends of the husband at the time of the marriage. *A. v. A.*, 15 Man. L. R. 483, 3 W. L. R. 113.

## II. BREACH OF PROMISE OF MARRIAGE.

**Delictual fault—Liability of parents of infant — Damages — Pleading.**] — A breach of promise to marry is a delictual, and not a contractual, fault, and liability for the consequences is the same as for those of a tort. When, therefore, the party committing it is a minor child, the parent incurs liability for it in the manner and under the conditions set forth in art. 1054, C. O.—The damages recoverable by the disappointed suitor properly include all expenses incurred on the strength of the promise of marriage, as well as the value of time lost.—The reiteration of allegations of fact, the expression of opinions, and the setting out of irrelevant, if otherwise innocuous, matter, in a declaration, do not afford grounds of demurrer, but rather of exception to the form or of motion to reject. *Inter-noscia v. Bonelli*, Q. R. 28 S. C. 58.

See SEDUCTION, 1.

## III. COMMUNITY.

**1. Action by husband to recover debt due to wife before marriage—Pleading—Evidence.**]—A debt due to a woman before her marriage becomes due to her husband only in his capacity of head of the community, and therefore in an action brought by him to recover the amount from the debtor he must allege the marriage and the community of property which results from it. An action founded upon this obligation as if it had been contracted with the husband, and supported only by evidence of the creation of the obligation and of the marriage, will be dismissed. *Massicotte v. Pronovost*, Q. R. 28 S. C. 44.

**2. Saisie gagerie conservatoire—Affidavit—Service.**]—A *saisie gagerie conservatoire* issued by a married woman, common as to property, against the goods of the community, is governed by the ordinary procedure in matters of *saisie gagerie*, and the plaintiff is not bound to serve, within three days from the ser-

vice of the writ and declaration, a copy of the affidavit filed by her for the purpose of issuing the writ of *saisie gagerie conservatoire*. *Chartier v. Larivière*, 8 Q. P. R. 131.

**3. Saisie gagerie conservatoire—“Movable effects”—Petition to quash.]**—The meaning of the words “movable effects of the community,” in arts. 204 and 205 of the Civil Code, is not limited to the furniture which furnishes the common domicile, but includes all the movable property which belongs to the community, of whatever nature it may be.—Whether a *saisie gagerie conservatoire* could have been made under the provisions of art. 204, C. C., or not, if the same is justified by the provisions of law concerning the issue of writs of seizure before judgment, a petition to quash the *saisie gagerie* will be dismissed. *Lachapelle v. Gagné*, 8 Q. P. R. 18.

#### IV. MARRIAGE CONTRACT.

**Construction—Stipulation of dower—Claim by children—Renunciation of succession.]**—A stipulation of dower in a marriage contract executed before the Civil Code came into force, of a sum *une fois payée et sans retour*, meant that, if children were born of the marriage, the wife, in case of survival, should have the usufruct and the children the ownership of the dower-money.—2. Children, in order to claim their dower, are not bound to renounce the succession of their father, when it has devolved by his will on a universal legatee, who has accepted it. *Kirkpatrick v. Birks*, Q. R. 14 K. B. 287.

#### V. PARTIES TO ACTIONS.

**1. Action against spinster—Marriage before service of process—Motion to dismiss action—Addition of husband as party.]**—An action directed against a woman, described as a “*filie majeure*,” will not be dismissed on exception to the form because, between the issuance and the service of the writ, the defendant contracted marriage, if the plaintiff was not made aware of her change of status.—The Court will, however, allow the plaintiff to call in the defendant’s husband as a defendant, as head of the community. *Meloon v. Coffey*, 7 Q. P. R. 436.

**2. Action against wife—Exception—Authorization of husband.]**—A married woman, separate as to goods and carry-

ing on business as a public merchant, may, without being authorized by her husband, file in answer to the claim in an action a declinatory exception when an act of simple administration is in question. *Bernstein v. Synck*, 7 Q. P. R. 443.

**3. Action against wife—Exception on ground of want of authorization—Necessity for authorization to file exception.]**—A married woman, common as to property, who has appeared separately from her husband, who is also made a defendant and served, and who pleads by way of exception to the form that no authorization has been obtained for bringing her before the Court, cannot, by such exception, unless authorized and assisted by her husband, plead and invoke such want of authority. *Boistioiti v. Bargdadi*, 8 Q. P. R. 44.

**4. Action by husband for rent and damages—Plea that wife is real lessor—Séparation de biens—Head of community—Future rights—Removal of action from Circuit Court.]**—A defendant, being sued for the sum of \$20, to wit, \$10 rent and \$10 damages, pleaded that he rented the premises from the wife, separate as to property, of the plaintiff, and that the action should have been brought by her: he also demanded the removal of the cause from the Circuit Court to the Superior Court:—*Held*, that the defendant, pleading that he had leased the premises from the wife, without saying how and by virtue of what title she was separate as to property, would be bound in spite of such plea to pay his rent to the plaintiff, the head of the community.—Such defence does not involve the affecting of future rights in such a way as to authorize the removal of an action for \$20 for rent and damages. *Clarke v. Wilson*, 7 Q. P. R. 422.

**5. Action by husband—Slander of wife.]**—The husband being *dominus* of actions *mobilières* and *possessoires* of his wife, an action for damages for slander of a married woman subject to community of property must be brought by the husband alone, and the Court will not authorize the wife to bring such an action. *Gagnon v. Daigneault*, 8 Q. P. R. 32.

**6. Action by widow—Second marriage pendente lite—Legal community—Réprise d’instance—Right of action—Amendment.]**—The widow of a man who was injured, as alleged, by reason of the negligence of the defendants, and died from his injuries, brought an action against the defendants to recover damages for the death, suing as well on her



own behalf as in her capacity of tutrix to her infant children, issue of her marriage with the deceased. While the action was pending and before judgment on the merits, she married again, and became common as to property with her second husband, under the law respecting legal community, and she and her second husband were subsequently appointed joint tutors to the aforesaid infants. By the judgment of the Superior Court of Quebec the action was maintained, and the defendants were condemned to pay damages, \$300 to the original plaintiff and \$2,700 to herself and her husband as joint tutors to the children. This judgment was affirmed by the Court of Review. The defendants appealed to the Supreme Court of Canada, and there raised an objection not taken below, that the original plaintiff upon her second marriage was deprived of her right of action for the recovery of the damages claimed by her personally, and in respect to this part of the action there had been no *réprise d'instance*. The Supreme Court dismissed the appeal on the facts, and, of its own motion, under ss. 63 and 64 of the Supreme and Exchequer Courts Act, ordered that the record should be amended so as to shew that the \$300 was payable to the husband and wife as *communs en bien*. *North Shore Power Co. v. Duguay*, 37 S. C. R. 624.

**7. Action by wife—Second marriage before dissolution of first—Authorization of *de facto* husband.]**—A second marriage contracted in good faith, before the dissolution of the first, produces civil effects, and, until it is declared null, the wife cannot appear in judicial proceedings (*ester en justice*) without her *de facto* husband, or his authorization. An action brought by her alone and unauthorized will therefore be dismissed on exception to the form. *Fitzallen v. Ricard*, Q. R. 27 S. C. 296.

**8. Appeal by wife—Necessity for authorization by husband—Inscription—Setting aside.]**—A married woman, separate as to property, cannot appeal from a judgment rendered against her upon hypothecary claims, without the authorization of her husband. An inscription of such a judgment for review made by her alone will be rejected, on motion. *Renaud v. Lebeau*, Q. R. 27 S. C. 360.

**9. Opposition by wife—Domicile of husband—Pleading.]**—The matrimonial status of husband and wife being established by the law of the domicile of the husband at the time of the marriage, the wife in asserting an opposition to a seizure must allege her husband's domicile, and no other, and, if she alleges another

domicile in her reply to the contestation of her opposition, it will be struck out on motion. *Lemieux v. Lionais*, 7 Q. P. R. 341.

## VI. PROPERTY AND SEPARATE ESTATE OF WIFE.

**1. Estate of deceased wife—Liability for funeral expenses.]**—A husband is liable for the funeral expenses of his wife, and cannot claim indemnity therefor out of her separate estate. *Constantinides v. Welsh*, 15 N. E. Rep. 631, not followed. *In re Sea*, 11 B. C. R. 324, 1 W. L. R. 460.

**2. Joint purchase of land by wife and another person — Possession — Principal and agent—Account—Agency of husband — Partnership.]**—Where a person purchases immovable property jointly with a married woman, and leaves her in possession of it, the relation of principal and agent is not thereby established between them. So, if the husband of the joint purchaser assumes the administration of the property, he is solely responsible as agent, and no action to account as such lies against the wife:—*Quere*, would an action *pro socio* lie against her? *Marson v. Martin*, Q. R. 28 S. C. 539.

**3. Marriage before 1859—Right of wife to dispose by will of property acquired after marriage.** *Jordan v. Frogley*, 8 O. W. R. 265.

## VII. SEPARATION AND DIVORCE.

**1. Action by husband for separation—Desertion of wife—Time—Return—Custody of child.]**—An action for separation from bed and board by the husband against his wife on the ground of desertion, will not lie if brought four days only after the departure of the wife, while she was ill.—The Court will then fix a delay within which the wife should return to her husband, and in the meantime no adjudication will be made for the custody of the child. *Tessier v. Bélanger*, 7 Q. P. R. 335.

**2. Action by husband for separation—Order for interim disbursements.]**—It is only in exceptional cases that a husband may demand a provisional order for costs in an action for separation; if he has need of money to obtain the services of a special agent to search for witnesses, or obtain information as to accusations brought against him, which he denies, or to get information about

the facts. *Lecavalier v. Labelle*, 7 Q. P. R. 472.

**3. Action by wife—Separation, contractual or judicial.]**—It is not necessary to allege in an action begun by a married woman, separate as to property, whether the separation is contractual or judicial. *Davignon v. Chevalier*, 8 Q. P. R. 104.

**4. Appointment of referee—Prescription.]**—An understanding between husband and wife to avoid the nomination of a referee in an action for *séparation de corps* and of property, is illegal. The right to name such a referee is prescribed only by 30 years' lapse of time. *Brière v. Marcotte*, 7 Q. P. R. 352.

**5. Discovery—Affidavit of documents—Adultery.]**—In a petition for dissolution of marriage, the respondent applied for an affidavit of documents: — *Held*, that, on the respondent filing an affidavit shewing that discovery was not sought for the purpose of proving the adultery of the petitioner, but for the purpose of discovering documents relating to the matters in question, other than the misconduct of the petitioner, the discovery ought to be ordered. *Levy v. Levy*, 12 B. C. R. 60, 3 W. L. R. 514.

**6. Dissolution of community—Inventory—Referee—Costs.]**—The husband, defendant in an action brought by his wife, who has neglected to make an inventory of the property of the community at the time of its dissolution, will be ordered to pay the costs of a referee afterwards appointed, even where the plaintiff makes no claim. *Brière v. Marcotte*, 7 Q. P. R. 405.

**7. Execution of judgment—Time—Inventory.]**—A married woman may, at any time before the death of her husband, cause to be executed a judgment to give effect to a decree for separation of property, unless she has been deprived of it by a judgment of the Superior Court.—The community having been dissolved on the day of the demand for separation, the property to be divided is that existing at that date, and it is the inventory of that property which must be homologated. *Brière v. Marcotte*, 7 Q. P. R. 376.

**8. Liability of husband for debts of wife — Public trader—Loan—False representations—Judgment of separation—Revocation—Power of Court.]**—A wife, common as to property, who is a public trader and as such procures a loan by means of false representations, binds her husband to the payment of the debt.—When, under such circumstances, the

wife obtains a judgment of separation as to property from her husband, renounces the community, and the report of the *praticien* is homologated, the Court adjudicating on the suit of the lender, has power, so far as may be necessary to give effect to its judgment, to revoke the judgment in separation, the renunciation to the community, and the homologation of the report of the *praticien*. *Samson v. Pelletier*, Q. R. 28 S. C. 394.

**9. Petition — Recrimination—Trial.]**—It is no answer to a petition for a writ in separation from bed and board for the husband to allege that his wife is keeping a disorderly house, etc., etc.; every consort is entitled to take such action, and questions of mutual recrimination must be left to the merits of the trial. *Arcand v. Charruau*, 8 Q. P. R. 25.

**10. Residence of wife pendente lite — Conjugal domicile—Community—Exclusion of husband.]**—In an action for *séparation de corps* brought by a wife against her husband, the plaintiff must allege that she is separate as to property to be authorized to dwell *pendente lite* in the conjugal domicile, and thus to force her husband to quit it.—The husband, head of the community, has the enjoyment of the property of the wife, including the house and furniture: he cannot be deprived of this right by the institution of an action for *séparation de corps*. *Gagnier v. Lasablonnière*, 8 Q. P. R. 37.

#### VIII. TRANSACTIONS BETWEEN HUSBAND AND WIFE.

**1. Land purchased by husband—Conveyance taken in name of wife—Gift or settlement—Intention—Evidence—Improvidence—Absence of relation of confidence — Undue influence not shewn—Want of independent advice.** *Jarris v. Jarvis*, 8 O. W. R. 902.

**2. Moneys borrowed on insurance policy on life of husband of which wife is beneficiary — Separate property of wife—Business of wife—Interest of husband—Moneys derived from business — Execution against husband as member of partnership—Property liable to satisfy execution—Declaratory judgment — Inquiry — Reference — Costs.** *Hogaboom v. Hül*, 352, 815, 979.

**3. Purchase by wife—Presumption as to title.** *Thereseau v. Sabine*, 1 E. L. R. 100.

**4. Purchase in wife's name—Gift.]**—Where property purchased by a

husband as a home for himself and wife was, by his direction, conveyed to her, so that the title might be in her in case of his death, it was held that a gift was intended, to take effect upon his death if she should survive him. *Evans v. Evans*, 26 C. L. T. 386, 3 N. B. Eq. 216.

#### IX. MISCELLANEOUS.

**1. Action by wife against husband for necessaries supplied to children.** *Park v. Park* (B.C.), 3 W. L. R. 281.

**2. Agreement to live apart—**Provision that wife shall have custody of infant child—Attempt to enforce—Illegal contract—Dismissal of action. *Barrett v. Barrett* (N.W.T.), 4 W. L. R. 7.

**3. Criminal conversation — Abandonment — Separation — Hearsay evidence — Damages.]—**Appeal by the defendant and cross-appeal by the plaintiff from the judgment of a Divisional Court reported 8 O. L. R. 308. The appeal was dismissed on the ground that the evidence did not shew such abandonment by the plaintiff of his wife as deprived him of his right of action, and the cross-appeal on the ground of improper reception of evidence at the trial and excessive damages. *Patterson v. McGregor*, 28 U. C. R. 280, observed upon. *C. v. D.*, 12 O. L. R. 24; *S. C. sub nom. Milloy v. Wellington*, 7 O. W. R. 298, 862.

**4. Debts of wife before marriage —**Property of wife received by husband —Right to apply on indebtedness of wife to him—Necessaries purchased by wife after marriage—Husband not liable when credit given to her personally. *Lockett v. Cress*, 2 E. L. R. 3.

**5. Dower—Dispensing with release—***Husband and wife living apart—Alimony —Release.]—*A husband whose wife has been living apart from him for two years, and who for valuable consideration has released and discharged him from all claims for alimony present and future, is not entitled, under s. 12 of R. S. O. 1897 c. 164, to an order dispensing with the concurrence of his wife to bar dower in a conveyance, for, although barred by contract from claiming, she cannot be said to be living apart "under such circumstances as by law disentitle her to alimony." *Re Tolhurst*, 12 O. L. R. 45, 7 O. W. R. 780.

**6. Nullity of marriage — Impotence.]—**Where consummation of the mar-

riage is, on the part of the husband, a practical impossibility, the wife is entitled to a decree of nullity of marriage. *P. (otherwise C.) v. P.*, 11 B. C. R. 369.

#### HYPOTHEC.

See MORTGAGE — REGISTRY LAWS, 8—  
VENDOR AND PURCHASER, II. 6.

#### ICE.

See NEGLIGENCE, 9.

#### ILLEGAL CONTRACT.

See CONTRACT, IV.

#### ILLEGAL DISTRESS.

**Damages—**Violation of agreement for suspension — Trespass — Conversion—Measure of damages—Seizure and sale of stock of business — Interference with business—Goodwill, allowance for—Chattel mortgage—Acceleration of payment—Chattel mortgagee distraining as landlord—Appropriation of payments. *Stone v. Brooks*, 7 O. W. R. 463, 732.

See DISTRESS — LANDLORD AND TENANT, 2-9—TRIAL, II. 1.

#### ILLEGAL EXPENDITURE.

See MUNICIPAL CORPORATIONS, VI.—  
PARLIAMENTARY ELECTIONS.

#### IMMIGRATION ACT.

**"Passenger"—***Resident of Canada.]—*A resident of Canada, returning from a visit abroad, is not a "passenger" or an immigrant who is subject to the provisions of the Immigration Act. *In re Chin Chee*, 11 B. C. R. 400, 2 W. L. R. 237.

See ALIENS—CONSTITUTIONAL LAW, 1.

#### IMMORAL CONSIDERATION.

See VENDOR AND PURCHASER, I. 4.

**IMPOTENCE.**

See HUSBAND AND WIFE, IX. 6.

**IMPRISONMENT.**

See BANKRUPTCY AND INSOLVENCY, 18—CANADA TEMPERANCE ACT — CARRIERS, 2—CRIMINAL LAW — FALSE ARREST AND IMPRISONMENT—FISHERIES, 4—INDIAN, 1—INFANT, 11, 14 JUSTICE OF THE PEACE, 11—LIQUOR LICENSES, 1, 2—MALICIOUS PROSECUTION AND ARREST, 7—MUNICIPAL CORPORATIONS, X. 3.

**IMPROVEMENTS.**

**Demand of possession—Subsequent improvements — Mistake of title—Delay in bringing action — Lien.]**—The defendant and a life tenant of certain lands lived together thereon, the defendant *bona fide* believing that the land was or would be hers on the life tenant's death. After the life tenant's death the defendant continued living on the land and made improvements thereon. About a year and a half after the life tenant's death the defendant was served with a notice demanding possession, and stating that unless possession was given within a reasonable time a writ would be issued. No action was taken upon the demand, and the defendant, who was an illiterate woman, remained in possession, and under such belief of title continued to make improvements; and it was not until some seven years afterwards, when another notice has been served on her, that an action was brought to recover possession, the bulk of the improvements having been made during the period between the two notices:—*Held*, that under the circumstances the defendant was entitled to the value of her improvements. *Corbett v. Corbett*, 12 O. L. R. 268, 8 O. W. R. 88.

See DOWER, 2 — LAND ACT, B.C.—LANDLORD AND TENANT, 22—LIEN, 1—PARENT AND CHILD, 1—PARTNERSHIP, 6—RAILWAY, IX. 7—TRUSTS AND TRUSTEES, 11—VENDOR AND PURCHASER, I. 33—WATER AND WATERCOURSES, 11.

**IMPROVIDENCE.**

See CONTRACT, VI. 2, 5 — CROWN, 7—HUSBAND AND WIFE, VIII. 1.

**INCIDENTAL DEMAND.**

See PEREMPTION, 2.

**INCOME TAX.**

See ASSESSMENT AND TAXES, 1, 10, 11, 12.

**INCUMBRANCES.**

See VENDOR AND PURCHASER, I. 6—WILL, I. 7.

**INDEMNITY.**

See ATTACHMENT OF DEBTS, I. 1—CONTRACT, III. 5—EVIDENCE, I. 7—FATAL ACCIDENTS ACT — GUARANTY—PARTIES, III. — PLEADING, VIII. 14 — RAILWAY, VIII. — TRESPASS TO LAND, 1—VENDOR AND PURCHASER, II. 1, 5 — WATER AND WATERCOURSES, 6—WAY, III. 8.

**INDEPENDENT CONTRACTOR.**

See CARRIERS, 1—MASTER AND SERVANT, II. 29—TRESPASS TO LAND, 3.

**INDIAN.**

**1. Indian Act**—Conviction for selling liquor—Sentence of imprisonment — Appeal to County Court Judge—Reduction of term of imprisonment in prisoner's absence. *Rex v. Johnston*, 1 E. L. R. 163.

**2. Sale of intoxicating liquor to —Quarter-breed alleged to follow Indian life—Indian Act—Mens rea—Conviction —Notice of appeal.]**—A quarter-breed is as much entitled to purchase intoxicating liquor as a white man, provided he does not come within the amendment to the Indian Act by 57 & 58 V. c. 32, s. 6.—The defendant was convicted for selling intoxicating liquor to an Indian, but the evidence shewed that N., the alleged Indian, was a quarter-breed, and there was nothing to shew that the defendant knew or had reason to suspect that N. was reputed to belong to a particular band, or followed the Indian mode of life:—*Held*, that the conviction must be quashed.—*Held*, also, that the notice of appeal was sufficient, being in accordance with s. 879 et seq. of the Code, which governed in

the absence of any provision in that behalf in the Indian Act. *Rea v. Hughes*, 12 B. C. R. 290, 4 W. L. R. 431.

**3. Status of — Proof—Indian Act—Execution—Exemption.]**—The status of an Indian as such may be proved by his certificate of birth, his general reputation, his residence in the reserve, or his election as a municipal councillor.—The real and personal property of Indians inside the reserve is exempt from seizure under execution. *Charbonneau v. Lormier*, 8 Q. P. R. 115.

See CRIMINAL LAW, I. 3, III. 36, 37—JUSTICE OF THE PEACE, 10.

### INDIAN AGENT.

See CRIMINAL LAW, I. 3, III. 37.

### INDICTMENT.

See WAY, III. 1.

### INDUSTRIAL ESTABLISHMENT ACT, QUE.

See MASTER AND SERVANT, II. 28.

### INDUSTRIAL FARM.

See MUNICIPAL CORPORATIONS, I. 1.

### INFANT.

**1. Action by—Procedure—Necessity for tutor—Waiver — Continuance of action after majority—Exception to form.]**—When an action is brought by a minor who comes of age pending suit and before plea filed, the defendant cannot at the hearing on the merits ask for its dismissal on that ground. The provision of law that the actions of minors are brought in the name of their tutors is for the protection of the minors, who can cure such a departure from it by continuing the suit after coming of age. At most, a defendant can take advantage of it by exception to the form; it is too late to do so after issue joined on the merits. *Daoust v. Daoust*, Q. R. 28 S. C. 356.

**2. Contract—Bill of sale—Purchase of horse—Necessaries—Repudiation—Estoppel—Costs.]**—The defendant advanced

to the plaintiff, who, to his knowledge, was an infant under the age of 21 years, a sum of money to be employed in the purchase of a horse, taking as security for the loan a bill of sale, which was properly executed and filed in the office of the registrar of deeds. The defendant, hearing that the plaintiff was about to sell the horse, took possession under the bill of sale and sold to a third party:—*Held*, that the plaintiff was entitled to recover in an action for conversion; that the repudiation of the bill of sale by the infant avoided it; and that the defendant had no protection under it for the act which he committed; that the ownership of a horse by one in the plaintiff's circumstances did not come within the term "necessaries;" that the fact that the plaintiff stood by and allowed the horse to be sold without objection, did not assist the defendant, as an infant could no more estop himself by conduct of this sort than he could contract.—The trial Judge having deprived the plaintiff of costs, on the ground that he had sworn falsely during the course of the trial, his discretion in this particular was not interfered with. *Meyers v. Blackburn*, 38 N. S. R. 50.

**3. Contract—Services—Desertion of employment—Conviction — Certiorari—Injury to infant by lack of advice when contracting.]**—An infant may make a formal contract for his services without being represented by a guardian, or by his father or mother, and is entitled to relief in such a case only upon the ground of prejudice. A demand by the infant for certiorari to remove his conviction for deserting his employment will be dismissed unless it is alleged and proved that the infant was injured or prejudiced in making the contract with his employers by the want of proper assistance. *Verrier v. Mulvena*, 7 Q. P. R. 414.

**4. Custody—Habeas corpus—Application by married woman living abroad—Necessity for authorization by husband.]**—The writ of *habeas corpus*, in a civil matter, in this case the custody and guardianship of an infant, can only be issued when the infant is deprived of its liberty.—A married woman, under the dominion of her husband, living in a foreign country, in the absence of proof of the law of the state where she lives, must be authorized by her husband; if she is not, she will not be heard in Court, and proceedings instituted by her will be set aside; the presumption being that she must be authorized to appear before the Court. *Garcin v. Croteau*, Q. R. 27 S. C. 198.

**5. Custody—Habeas corpus—Dispute between parents.]**—The interest of an in-



fant of tender years must be the sole guide to the Judge in awarding the custody of the infant on *habeas corpus*.—In this case the father was sued for a separation by his wife on account of ill-treatment, and the child was only 17 months old. The custody was given to the mother. *Leduc v. Beauchamp*, 7 Q. P. R. 441.

**6. Custody—*Habeas corpus*—Removal from legal custody — Interest of child—Rights of parents living apart.]**—The unauthorized removal of a minor of tender years from legal custody is equivalent to confinement and restraint of liberty, and *habeas corpus* will lie to restore it to its proper guardians.—A girl of 9 years of age is too young to exercise a controlling right of choice between her father and mother, who live apart, and it lies within the discretion of the Judge to hand her over to whichever of the parents he thinks best in her interest. *Lorenz v. Lorenz*, Q. R. 28 S. C. 330.

**7. Custody — *Habeas corpus* — Restraint on liberty — Costs.]**—A *habeas corpus* will not be granted to a mother who claims an infant who has arrived at years of discretion, and who is in no wise constrained in her liberty. If the respondent, upon such a *habeas corpus*, claims the right to keep the infant, and thus gives ground for believing that the latter is deprived of her liberty, the *habeas corpus* will be quashed but without costs. *Pickering v. Caloran*, 7 Q. P. R. 350.

**8. Custody—Parent's agreement to relinquish custody—Agreement in consideration thereof to pay annual allowance not enforceable.** *Chisholm v. Chisholm*, 2 E. L. R. 207.

**9. Custody — Preference — *Habeas corpus*—Rights of father.]**—Where an intelligent child of 7 years declares a preference for living with its grandfather, the father cannot obtain the custody by means of a writ of *habeas corpus*. *Rousseau v. Lapointe*, 8 Q. P. R. 43.

**10. Custody—Rights of father—Fitness—Religious faith—Temporal welfare of child—Abandonment.]**—Upon an application by the father of a girl of 11 years for an order against the maternal grandmother for delivery of custody, it was shewn that the mother of the child was dead, that the child had lived with the grandmother since she was 3 years old, and had been brought up as a Protestant, while the father had become a Roman Catholic and desired to educate the child in that faith:—*Held*, upon the evidence, that the applicant was not

an unfit person to have the custody of his daughter; that there was no agreement that the child should remain with the grandmother always or until her death, and the father had not abandoned his parental rights; that the child herself had no serious religious convictions; that she would have a better home and a better education in her father's house than with her grandmother; that it would be for her advantage to be brought up in the same home with her only brother; and that no case had been made out which would justify a refusal to give effect to the father's right to the custody of his child.—While the welfare of the infant is in one sense paramount, the paternal right to custody and control is supreme, unless a very extreme case can be made out shewing that it is imperative for the protection of the child that the Court should interfere with that right.—The reluctance of the Court to separate brothers and sisters is very great.—It is the duty of the Court to enforce the wishes of the father as to the religious education of his children, unless there is strong reason for disregarding them. The Court has jurisdiction to interfere, even against the father's wishes, to prevent the religious convictions of his child being interfered with; but the circumstances must be such as to satisfy the Court that there has been an abandonment or abdication of the paternal right, or at least that the training of the child has imbued it with such deep religious convictions that to disturb them would be clearly dangerous to its moral welfare.—The Children's Protection Act, R. S. O. 1897 c. 259, has no application to the case of a child situated as this one was. *Order of ANGLIN, J.*, affirmed. *Re Faule*, 12 O. L. R. 245, 7 O. W. R. 759, 867.

**11. Filiation order—Imprisonment for failure to obey—Form of commitment—Ambiguity.** *Rex v. Duff*, 1 E. L. R. 320.

**12. Guardian—Married woman.]**—A married woman will not be appointed sole guardian of the person and estate of an infant. *In re Freese*, 26 C. L. T. 385, 3 N. B. Eq. 172.

**13. Guardian—Removal.]**—It is a ground for the removal of the guardian of the persons of infant children that he has removed out of the jurisdiction of the Court. *In re Lawton Infants*, 3 N. B. Eq. 279, 1 E. L. R. 201.

**14. *Habeas corpus*—Paternal authority—Confinement.]**—An infant has a right to petition for *habeas corpus* where his liberty is restrained.—Paternal authority over a child as to discipline

and the choice of a school or institution in which to educate, or even temporarily confine, the child, is absolute; and the Court will not interfere by *habeas corpus* on the child's behalf. *Macdonald v. Macdonald*, Q. R. 14 K. B. 330.

**15. Loan to — Debt to tutor—Authorization—Nullity.]** — A contract of loan to minors for the purpose of paying a debt due by them to their tutor, effected with the authorization of the prothonotary, on the petition of the tutor, is null and void. *Hyde v. Mount*, Q. R. 28 S. C. 385.

See DAMAGES, 2, 3, 4 — EQUITABLE EXECUTION, 1—EXTRADITION, 5—HUSBAND AND WIFE, II., VII. 1—MASTER AND SERVANT, I. 8, II. 26—MORTGAGE, 8—NEGLIGENCE, 10, 14, 15—NUISANCE 1, 2—PARENT AND CHILD, 2 — PAYMENT INTO COURT—RAILWAY, X. 5—TRUSTS AND TRUSTEES, 7.

## INJUNCTION (INTERIM.)

**1. Absence of notice to defendant — Motion to dissolve injunction—Grounds available—Inscription for hearing with action.]**—Where the defendant has not received notice of the presentation of a petition demanding the issue of an order for an interlocutory injunction, he may, after the issue of such order, make available as against the issue thereof all the grounds which he could have set up if he had received notice of the presentation of the petition: art. 966.—A party cannot inscribe for hearing at the same time the principal action and a motion made under art. 966, C. P. C. *Cushing v. City of Montreal*, 8 Q. P. R. 55.

**2. Application before action — Concurrent issue of writs—Grounds for injunction—Breach of contract—Illegal clauses—Agreement to use only certain machines—Monopoly.]** — It is sufficient to issue the writ of interlocutory injunction at the time the action is begun; therefore the petition may be presented before the issue of the writ of summons, provided that the Court, in granting the injunction, is satisfied that the writ is issued, and that it will be served at the same time as the injunction.—The admission by a party that he has violated certain clauses of his contract, giving for an excuse that the clauses are illegal, constitutes a *prima facie* case for an interlocutory injunction; the Court not being bound, at this preliminary stage, to inquire into the legality or illegality of these clauses.—In a commercial contract

it is lawful to impose certain restrictions upon individual liberty, for example, to use only certain machines, to the exclusion of all others, and such restrictions cannot be interpreted as interfering with freedom of trade, even when they have the effect of creating a monopoly in favour of him who imposes them. *United Shoe Machinery Co. of Canada v. Burnet*, Q. R. 27 S. C. 200.

**3. Balance of convenience —** Restraint of trade. *Covert v. Lewis*, 1 E. L. R. 319.

**4. Breach of contract—**Ability of defendant to respond in damages—Affidavit sworn before issue of writ of summons—Dissolution of injunction. *Northern Construction Co. v. Swanson*, 8 O. W. R. 267.

**5. Building wharf—**Mandatory order. *Huntley v. Jeffers*, 1 E. L. R. 385, 434.

**6. Discretion—Balance of convenience — Contract—Damages.]**—An agreement not to sign an engagement for the exercise of one's art or profession (in this case that of comedian) is distinct from one not to exercise such art or profession. A violation of it by the signing of an engagement does not afford ground for an interlocutory injunction, where nothing can hinder such violation taking place, and the remedy of the bargainee is in damages. *La Société Anonyme des Théâtres v. Lombard*, Q. R. 27 S. C. 476. (See the next case.)

**7. Discretion—Balance of convenience—Contract—Damages.]**—An injunction is a provisional proceeding and accessory to the principal action, which it is in the discretionary power of the Judge to grant or refuse according to circumstances. In the exercise of this power regard must be had to the inconveniences which may result from it to one or more of the parties, and even third persons, and when the issue of the injunction may cause more harm to one of these than the refusal of it to the plaintiff, the motion will be refused. *La Société Anonyme des Théâtres v. Lombard*, 1 Q. R. 15 K. B. 267.

**8. Interference with ancient lights—**Erection of building — Speedy trial. *London and Canadian Loan and Agency Co. v. National Club*, 8 O. W. R. 291.

**9. Irreparable injury—Company—Sale of property by directors.]**—A writ of injunction is an exceptional proceeding, an extreme remedy, which will be

granted only in case of urgency, where it offers the only means of preventing a serious or irreparable injury. Consequently, when the directors of an industrial company take proceedings, in pursuance of resolutions of the shareholders adopted at a general meeting, to sell the property of the company, the motion of a shareholder opposing the resolution for an injunction to prevent them from doing so, and which does not come within the above conditions, will be dismissed. *Plamondon v. Blouin*, Q. R. 28 S. C. 149.

**10. Object of suit attained—Discontinuance—Costs — Expense of complying with order.]—**A plaintiff, in an action of damages for a wrongful publication against the author of it, who obtains an interim injunction ordering the publisher, *mis en cause*, but not as a joint tort-feasor, to suppress the publication, and who, having attained his object by the execution of the order, discontinues his suit and pays the costs, is further liable to the publisher for the expense of so complying with the injunction. *Bell Telephone Co. v. Canada Asbestos Co.*, Q. R. 29 S. C. 104.

**11. Sale by sheriff—**Withdrawal by execution creditor. *Silver v. Rudolf*, 1 E. L. R. 138.

**12. Sheriff's title—**Adverse claimant—Balance of convenience. *Kaulbach v. Boylan*, 1 E. L. R. 136.

**13. Time for service—Costs.]—**A party who, upon petition, has obtained leave to issue a writ of injunction, has the same time to serve the writ as if he had obtained it *de plano*. — Before launching a motion for adjudication upon the costs reserved on a petition for a writ of injunction, the defendant should proceed under art. 150, C. P., to compel the plaintiff to serve the injunction. *Gauvreau v. Hauterive*, 7 Q. P. R. 483.

See APPEAL, X. 5—ARBITRATION AND AWARD, 5 — BANKRUPTCY AND INSOLVENCY, 7—BILLS OF SALE AND CHATTEL MORTGAGES, 3—CLUB, 1—CONSPIRACY, 2—CONSTITUTIONAL LAW, 14—CONTEMPT OF COURT, 1—CONTRACT, X. 5, 8—COPYRIGHT, 3—COSTS, VIII. 2—COURTS, V. 2—COVENANT, 2 — DAMAGES, 6—EASEMENT, 1—LANDLORD AND TENANT, 25, 30 — LIMITATION OF ACTIONS, I. 10 — MINES AND MINERALS, 10—NOVA SCOTIA PROVINCIAL EXHIBITION—NUISANCE, 3—PARTIES, II. 5—PATENT FOR INVENTION, 4—PEREMPTION, 5—PLEADING, VIII. 12—RESTRAINT OF TRADE—SCHOOLS, 6, 9—STREET RAILWAYS, I. 6—SUBSTITUTION,

1—TIMBER, 3—TRADE UNION, 1—TRESPASS TO LAND, 1—TRIAL, I. 5—WATER AND WATERCOURSES, 2, 4, 13, 16, 19, 22

## INMATE OF BAWDY HOUSE.

See CRIMINAL LAW, IV. 9.

## INNKEEPER.

See CARRIERS, 1.

## INNUENDO.

See DEFAMATION.

## INSCRIPTION IN LAW.

See PLEADING, V.

## INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

## INSPECTION.

See DISCOVERY, II.

## INSPECTION OF METALLIFEROUS MINES ACT.

See STATUTES, 1, 2.

## INSURANCE.

1. ACCIDENT INSURANCE.
- II. FIRE INSURANCE.
- III. LIFE INSURANCE.

See ASSESSMENT AND TAXES, 2 — BANKRUPTCY AND INSOLVENCY, 20—INTEREST, 1—PRINCIPAL AND SURETY.

### I. ACCIDENT INSURANCE.

**Action on policy—**Application for policy—Untrue statement by insured—Findings of jury—No finding as to materiality—New trial—Costs. *Thomson v. Maryland Casualty Co.*, 8 O. W. R. 598.



## II. FIRE INSURANCE.

**1. Action to recover insurance moneys—Defence of insurers—Title of plaintiff — Incapacity to purchase property—Relative nullity not available to insurers.]**—The nullity of a sale resulting from incapacity to buy in the cases within art. 1484, C. C., is only relative, and cannot be invoked except by those for whose advantage it is introduced. The insurer of a house sold in contravention of the article, being sued by the purchaser to recover the insurance money after a fire, has no status to set up the nullity of the sale to the purchaser, the plaintiff. *Edgar v. North British and Mercantile Ins. Co.*, Q. R. 27 S. C. 299.

**2. Agent—Authority — Concealment of fact—Act of agent.]**—An insurer who acts in such a way as to make the insured believe that the broker soliciting the risk is his agent, cannot plead the nullity of the contract upon the ground that the insured has not disclosed a circumstance aggravating the risk, the withholding being the act of the broker, upon whom the insured relied for all the formalities. *Abousamra v. Equitable Mutual Fire Assurance Co.*, Q. R. 27 S. C. 252.

**3. Alterations in property — Increased risk—Onus.]**—Alterations made without notice by the owner in the property insured after the issue of a policy of fire insurance, which do not increase the risk, do not affect the policy, and the burden of establishing the increased risk is on the insurer. *Bachand v. Canadian Mutual Assurance Co.*, Q. R. 27 S. C. 500.

**4. Application—Answers by soliciting agent—Diagram of premises—Immaterial misdescription—Alteration in use of building — Unoccupied house.]**—A statement in an application for insurance that "if answers to the questions are made by the agent of the company, soliciting the insurance, he shall be considered for those purposes the agent of the applicant and not that of the company," must be construed strictly, and cannot therefore be extended to a diagram of the premises made by the agent on the back of the application.—2. A statement in an application that a diagram on the back of it disclosed the exact situation of the property insured, when it shewed another building as distant 30 feet instead of 23, and the company charged the premium at a higher rate, such as would have been charged had the distance been correctly given, is not a material misdescription sufficient to vitiate the policy.—3. When the owner, shortly before the

fire, left the house insured to work in the lumber shanties, and his wife during his absence went to reside with her parents, the policy containing no special prohibition in this respect, the fact that the house was unoccupied at the time of the fire, without notice to the company, did not amount to such an alteration in the use or condition of the premises insured as would vitiate the policy. *Mutual Fire Ins. Co. of Canada v. Mercier*, Q. R. 14 K. B. 227.

**5. Appraisement of loss — Agreement—Arbitration—Notice to parties—Necessity for — Award set aside.]**—An agreement for the ascertainment of the amount to be paid by an insurer to the insured, called an "appraisement bond," is in reality a submission to arbitration, and the rules prescribed by arts. 1431 et seq., C.P.C., are applicable to it, as well as to the subsequent proceedings of the appraisers, who are in reality arbitrators, and not *amiables compositeurs*. Therefore, the default by them to give notice to the parties or one of them of the time and place at which they will proceed with their appraisement is a violation of art. 1436, which involves the nullity of their award. Judgment in Q. R. 28 S. C. 68 reversed. *Town of Beauharnois v. Liverpool and London and Globe Ins. Co.*, Q. R. 15 K. B. 235.

**6. Arbitration as to loss—Award made on wrong basis—Subsequent award by one arbitrator and umpire without concurrence of other arbitrator—Assignment of claim by insured to creditor—Subsequent assignment to second creditor — Effect of re-assignment by first creditor to insured.** *Hall v. Queen Insurance Co.*, 1 E. L. R. 37.

**7. Breach of statutory condition —Subsequent insurance—Notice—Knowledge of sub-agent—Dismissal of action on policy—Refund of premium.]**—By a condition of a policy of fire insurance (statutory condition No. 8) the insurance company were not to be liable if any subsequent insurance were effected unless and until the company should assent thereto, etc. A subsequent insurance was effected by the insured, and no notice in writing thereof was given nor any communication made to the company nor to any agent having power to receive such notice, and the fact of the existence of the subsequent insurance was not disclosed to the company until after the insured premises were injured by fire:—*Held*, that the circumstances that the subsequent insurance was effected by a sub-agent of the company's general agent, who had also acted in procuring the prior insurance with the company, should

not be regarded as affecting the company with constructive notice of the subsequent insurance.—An action upon the policy being dismissed, the company were ordered to refund the last payment of premium, which was received in ignorance that the policy was no longer in force. *Imperial Bank of Canada v. Royal Insurance Co.*, 12 O. L. R. 519, 8 O. W. R. 148.

**8. Concurrent policies** — *Contribution to loss—General and special insurances.*—An insurer of a stock of merchandise under a general policy, who has to contribute to a loss with insurers under special policies, each upon a part of the same stock, is liable in proportion to the loss in each part. For this purpose the general policy is divided into as many parts as there are special insurances and proportionately to the losses on each, and each such part contributes ratably with the special insurances. *Bloomfield v. London Mutual Fire Ins. Co.*, 1 Q. R. 29 S. C. 143.

**9. Condition in policy**—*Notice and proof of loss—Waiver by insurer—Representations—Finding of trial Judge—Appeal.*—The condition in a policy of insurance against fire, that notice and proof of loss must be given within a stated delay, is not one of liability but of recovery, and is imposed in the interest of the insurer. The assured may therefore be relieved from it either expressly, or impliedly, e.g., by the insurer putting him off when applying for a settlement, on the ground that the insurer is himself investigating the circumstances of the loss.—2. The finding of the trial Judge, in such matters as the representations by the assured as to the value of the property insured and the extent of the loss, will not be interfered with on appeal when the evidence is contradictory. *Mount Royal Ins. Co. v. Benoit*, Q. R. 15 K. B. 90.

**10. Policy**—*Construction—Limitation clause — Repugnancy — Re-insurance — Existence of "other insurance"—Onus.*—A printed clause in a policy of insurance, which is repugnant to the intention of the parties, as shewn by the nature and purpose of the contract, is of no effect. A limitation of the right to recover under the policy, to one year from date of the fire, in a printed policy used to set out a contract of re-insurance, when negotiations between the first insurers and the insured might easily take up that time, is such a clause, and is no bar to an action brought 14 months after the fire.—Upon an action brought by insurers to recover the indemnity paid by them to the insured, from re-insurers

of a risk which included property for which the insured was liable, though belonging to another owner, "provided such owner had no other insurance thereon," the burden of proof of the existence of such "other insurance" is on the re-insurers, defendants, and the insurers, plaintiffs, are not bound to prove its non-existence. *Home Ins. Co. v. Victoria and Montreal Fire Ins. Co.*, Q. R. 27 S. C. 494.

**11. Standing timber—Property.**—The defendants, an insurance company, incorporated under the laws of Ontario, insured the plaintiffs, a railway company, having a branch line in the State of Maine, the policy stating the insurance to be "against loss or damage by fire . . . on property as follows: On all claims for loss or damage caused by locomotives to property located in the State of Maine not including that of the assured." By the statute law of Maine, when "property" is injured by fire communicated by a locomotive engine, the railway company is made responsible, and it is declared to have an insurable interest in the property along its line for which it is responsible:—*Held*, that the policy was a valid policy of fire insurance, but did not, under the insurance company's statutory powers, cover standing timber along the defendants' line of road; that the policy was not therefore ineffective, and the plaintiffs were not entitled to recover back the premiums, for there was abundance of other property covered by the policy in which the plaintiffs had an insurable interest.—*Judgment of CLUTE J.*, 9 O. L. R. 493, affirmed. *Canadian Pacific R. W. Co. v. Ottawa Fire Insurance Co.*, 11 O. L. R. 465, 7 O. W. R. 353.

**12. Subletting of premises** — Change in nature of risk—Notice to or knowledge of assured—Notice to insurance company — Knowledge of agent — Absence of notice in writing—Statutory conditions — Landlord and tenant — Control of landlord. *London and Western Trusts Co. v. Canadian Fire Ins. Co.*, 8 O. W. R. 273, 872.

See COMPANY, III. 18—CROWN, 3—FIRE, 1—HIRE OF CHATTELS—LANDLORD AND TENANT, 18—NEGLIGENCE, 8—WILL I. 9.

### III. LIFE INSURANCE.

**1. Assignment of Policy**—Assignee for value — "Beneficiary"—Insurance Act—Identification of policy—Equitable right—Creditors. *Thomson v. Macdonnell*, 8 O. W. R. 721.

**2. Benefit certificate**—Assessments—Non-payment—Suspension—Forfeiture—Negotiations—Reinstatement—Release—Estoppel. *Hamilton v. Mutual Reserve Life Ins. Co.*, 7 O. W. R. 430.

**3. Benefit certificate**—Attempt to change beneficiary—Necessity of consent—Trust—Application of existing law—Statutes—Retrospective operation.]—Under an insurance certificate for \$3,000 issued by a society in 1882, the insured's wife was made the beneficiary, and the certificate was delivered to her and always remained in her possession. In 1886 the husband purported to surrender the certificate, procuring another one to be issued in favour of his son and daughter, which was delivered to the daughter, who had always retained it. In 1887 the wife procured a divorce from her husband, which was admitted to be invalid; and in 1889 the husband went through a form of marriage with one E., when he purported to surrender the last mentioned certificate, procuring another one to be issued in E.'s favour, to whom it was delivered, and who always retained possession of it. On the husband's death a claim made by E. was settled, and the question was as to the rights of the wife and children under the respective certificates:—*Held*, that under the statute then in force, 47 V. c. 20 (O.), the first certificate became a trust in the wife's favour, over which, so long as she lived, the husband had no control except under ss. 5 and 6 of that Act, which, however, did not empower him to surrender and replace it by another, for this could be done only with the wife's consent under 48 V. c. 28, s. 1, s.-s. 3 (O.), and that the wife's rights were not affected by s.-s. 5 of s. 160, R. S. O. 1897, the assured not having availed himself of the power conferred by that section. *Cartwright v. Cartwright*, 12 O. L. R. 272, 8 O. W. R. 109.

**4. Benefit certificate**—Designation of beneficiary—Rules of society—Will—Statutes—Widow—Election. *Re Anderson* (Man.), 3 W. L. R. 127.

**5. Change in beneficiary**—"Instrument in writing"—Incomplete will—Operation of—Insurance Act.]—A will invalidly executed is not an "instrument in writing" effectual to vary the benefit of an insurance certificate, under R. S. O. 1897 c. 203, s. 160, s.-s. 1. *Re Jansen*, 12 O. L. R. 63, 8 O. W. R. 17.

**6. Condition of policy**—Payment of premium—Promissory note.]—When the renewal premium of a policy of life insurance became due, the assured gave the local agent of the company a note for

the premium, with interest added, which the agent discounted and had the proceeds placed to his own credit in a bank. The renewal receipt was not countersigned nor delivered to the assured, and the agent did not remit the amount of the premium to the company. When the note matured a part was paid and a renewal note given for the balance, which was unpaid at the time of the death of the assured. A condition of the policy declared that if any note given for a premium was not paid when due, the policy should cease to be in force.—*Held*, *DAVIES and MACLENNAN, JJ.*, dissenting, that the transaction between the assured and the agent did not constitute a payment of the premium in cash, and that the policy had lapsed on default to pay the note at maturity. *Manufacturers Accident Ins. Co. v. Pudsey*, 27 S. C. R. 374, distinguished.—*London and Lancashire Life Assurance Co. v. Fleming*, [1897] A. C. 499, referred to.—Judgment in 38 N. S. R. 15 affirmed. *Hutchings v. National Life Assurance Co. of Canada*, 26 C. L. T. 187, 37 S. C. R. 124.

**7. Designation of policy in favour of named person as "wife"**—*Claim by true wife.*]—The legitimate wife cannot demand payment to her of a policy of insurance upon the life of her husband made out in favour of a third person whom the insured has designated his wife, although she was really his mistress. *Deere v. Beauvais*, 7 Q. P. R. 448.

**8. Interest—Preferred beneficiaries**—*Survivorship—Onus of proof.*]—The insured in a policy effected by him in favour of his wife and two of his children, which had not been varied by him, perished with his wife in a storm on one of the great lakes, and there was no evidence of survivorship. The personal representatives of the wife claimed a third share of the policy moneys, which had been paid into Court:—*Held*, that, apart from the operation of s.-s. 8 of s. 159, R. S. O. 1897 c. 203, as amended, a preferred beneficiary under a policy within s.-s. 1 of that section, only acquires an interest contingent upon being alive when the insured dies; and that the wife's representatives, being unable to prove that she was living at the time her husband died, were not entitled to the share claimed by them.—Order made declaring the fund to be the property of the two children in equal shares. *Re Phillips and Canadian Order of Chosen Friends*, 12 O. L. R. 48, 7 O. W. R. 76.

**9. Payment of premium**—*Thirty days' grace—Estoppel—Beneficiary.*]—*Held*, affirming the judgment of a Divisional Court, 9 O. L. R. 611, 5 O. W.

R. 307, that, under the circumstances there fully set out, the plaintiff was a beneficiary under the contract and entitled to claim under the policy; that under R. S. O. 1897 c. 203, s. 148 (1), a policy is kept alive or renewed by payment of the premium by any one entitled to pay it within 30 days after default, although the insured may have died before payment during such period of grace, and that here the assured was "unable to pay" the renewal premium within the meaning of condition 5 of the policy, and that the company were estopped by their conduct from setting up the non-payment of the premium. *Tattersall v. People's Life Insurance Co.*, 11 O. L. R. 326, 6 O. W. R. 756. Affirmed by the Supreme Court of Canada: *People's Life Ins. Co. v. Tattersall*, 37 S. C. R. 690.

**10. Unmatured policy**—Mode of calculating present value of reversion. *Re Merchants' Life Association, Vernon's Claims*, 7 O. W. R. 631.

**11. Wife of assured designated as sole beneficiary**—Death of wife during lifetime of assured—Failure to make new designation—Children entitled in equal shares. *Re Henderson and Canadian Order of Odd Fellows*, 8 O. W. R. 117.

See HUSBAND AND WIFE, VIII. 2—PARTIES, I. 4, II. 8—PRINCIPAL AND SUBETY, 2.

## INTERCOLONIAL RAILWAY.

See CROWN, 5.

## INTEREST.

**1. Assignment of insurance policy in trust to secure debt and future premiums**—Contract for payment of interest—Construction—Rate and mode of computing interest—Interest Act—Application—Statute of Limitations—Trustee—Costs—Subrogation—Counsel fees—Question between defendants. *Robinson v. Aetna Ins. Co.*, 8 O. W. R. 949.

**2. Solicitor's bill**—Compensation for services—*Quantum meruit*. *Murphy v. Corry*, 7 O. W. R. 392.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 3, III. 9—BROKER, 5—COMPANY, III. 19, IV. 2—CONTRACT, VIII. 3—CROWN, 3—JUDGMENT, I. 2, V. 1—MASTER AND SERVANT, I. 6—MORTGAGE, 4, 10, 11—MUNICIPAL CORPORATIONS, VIII. 1—PLEADING, VIII. 3, 10,

—PRINCIPAL AND AGENT, 1—RAILWAY, IX. 9—STAY OF PROCEEDINGS, 1—STREET RAILWAYS, I. 1—TRUSTS AND TRUSTEES, 9—VENDOR AND PURCHASER, I. 17.

## INTERNATIONAL LAW.

See ALIENS, 2—CONSTITUTIONAL LAW, 12—PRIVATE INTERNATIONAL LAW.

## INTERPLEADER.

**1. Action for**—Previous refusal of summary application—Stay of proceedings in separate actions brought against interpleading parties. *Elgie & Co. v. Edgar, Edgar v. Elgie & Co., Clemens v. Elgie & Co.*, 8 O. W. R. 307.

**2. Application for order**—Stateholder—Chattel mortgage—Surplus in hands of mortgagee—Claim under order for payment of part of surplus—Claim under purchase from mortgagor. *Re Elgie, Edgar, and Clemens*, 8 O. W. R. 33, 299.

**3. Moneys deposited in bank**—Death of depositor—Will—Judgment establishing—Rights of executor—Adverse claim under agreement. *Re Dominion Bank and Kennedy*, 8 O. W. R. 755, 814.

**4. Money deposited in bank to credit of three executors**—Right of two to withdraw—Dispute—Right of bank to interplead—Bank Act. *Re Bank of Toronto and Dickinson*, 8 O. W. R. 323.

**5. Goods seized under execution**—Transfer to wife of execution debtor—Fraud—Evidence of—Admissibility—Exemptions.]—In an interpleader issue between the wife of the execution debtor and the execution creditors, in which the question was whether the goods seized by the sheriff were then the property of the wife as against the execution creditors, the trial Judge found, and the Court in banc sustained his finding, that the goods or their purchase price, being in reality the property of the husband, had been fraudulently transferred by the husband to the wife, and therefore were the property of the execution creditors against the wife:—*Held*, WETMORE, J., dissenting, that, notwithstanding the decision of the Supreme Court of Canada in *Donohoe v. Hull*, 24 S. C. R. 683, evidence of fraud as affecting the question of property was admissible on the issue.—*Per* RICHARDSON and MCGUIRE, JJ., that the decision in *Donohoe v. Hull* was not ap-

plicable; it was not intended or contemplated to apply where, as in an interpleader issue, the question is whether or not a sale or transfer of goods is a mere sham or device to defeat execution creditors.—*Per* SCOTT, J., that the decision in *Donohoe v. Hull* extends only to proceedings by way of attachment of debts, in which, in order to enable the judgment creditor to succeed, it must appear that a debt exists for which the judgment debtor might have brought an action against the garnishee.—Fraudulent transfer of exemptions discussed. *West v. Ames Holden & Co.*, 3 Terr. L. R. 17.

See BANKRUPTCY AND INSOLVENCY, 12—BILLS OF SALE AND CHATTEL MORTGAGES, 1—CHOSE IN ACTION, ASSIGNMENT OF, 3—COSTS, III. 11—EXECUTION, 1—FRAUDULENT CONVEYANCE, 6, 7—PARTIES, II. 8.

### INTERROGATORIES.

See DISCOVERY, III.

### INTERVENTION.

**Motion to strike out—Settlement.]**  
—An intervention will not be struck out upon motion for that purpose, even if it is alleged that the cause was settled between the parties at the time of the filing of the intervention; the question must form the subject of a contestation upon the merits. *Paquette v. Dominion Bridge Co.*, 7 Q. P. R. 391.

See HABEAS CORPUS, 1 — SUBSTITUTION, 3.

### INTOXICATING LIQUORS.

See CANADA TEMPERANCE ACT — CONTRACT, IV. 3—CRIMINAL LAW, III. 36, 37—INDIAN—JUSTICE OF THE PEACE, 2, 6, 10, 14—LIQUOR LICENSES—MUNICIPAL CORPORATIONS, IX.—PLEADING, VI. 8.

### INTOXICATION.

See VENDOR AND PURCHASER, I. 9.

### INVENTION.

See PATENT FOR INVENTION.

### INVENTORY.

See STAY OF PROCEEDINGS, 4.

### INVESTMENTS.

See MORTGAGE, 2.

### JOINDER OF CAUSES OF ACTION.

See PARTIES—PLEADING, VIII. 6, 14, 15—SUBSTITUTION, 1.

### JOINDER OF PARTIES.

See PARTIES.

### JOINT TORT-FEASORS.

See CONTRIBUTION — MASTER AND SERVANT, II. 6, 7—PARTIES, I. 7, III. 6—TRESPASS TO LAND, 3.

### JUDGE OF SESSIONS OF PEACE.

See PROHIBITION, 1.

### JUDGMENT.

- I. DEFAULT JUDGMENT.
- II. FOREIGN JUDGMENT.
- III. SETTING ASIDE OR VARYING JUDGMENT.
- IV. SUMMARY JUDGMENT.
- V. MISCELLANEOUS.

See ACCOUNT, 2, 4—ATTACHMENT OF DEBTS, I. 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 17—CARRIERS, 5—COMPANY, IV. 4—CONTRACT, VIII. 4, X. 7—COPYRIGHT, 3—COSTS, VIII. 6—COURTS, V. 7—DEED, 8—ESTOPPEL, 2—EXECUTORS AND ADMINISTRATORS, 2, 12—FRAUDULENT CONVEYANCE—HUSBAND AND WIFE, VII. 7, 8, VIII. 2—LIMITATION OF ACTIONS, I. 10—OPPOSITION—PLEADING, VIII. 16—PRACTICE, 1, 4—REGISTRY LAWS, 8—TRUSTS AND TRUSTEES, 11—VENDOR AND PURCHASER, I. 4.

### I. DEFAULT JUDGMENT.

**1. Irregularity**—Motion to set aside—Merits—Delay in applying—Question—



able defence—Counterclaim—Affidavits—Intituling—Misnomer—Re-swearing—Amendment. *Sandhoff v. Metzger* (N.W.T.), 4 W. L. R. 18.

**2. Issue as to validity of default judgment**—Motion to set aside judgment after 15 years—Service of writ of summons—"Signing judgment"—Sufficiency—Form of judgment—Special indorsement of writ—Price of goods sold—Stated account—Interest—Nullity of judgment—Irregularity—Setting aside judgment—Terms. *Green v. George*, 8 O. W. R. 247, 787.

**3. Judgment entered for more than amount claimed in writ.** *Fawcett v. Norton*, 2 E. L. R. 146.

**4. Motion to set aside**—Absence of seal—Alleged nullity—Irregularity—Costs—Failure to give notice of taxation—Striking out part of judgment—Application for leave to defend on merits—Defence—Failure to give credit. *American-Abell Engine and Thresher Co. v. Snider* (N.W.T.), 4 W. L. R. 542.

**5. Motion to set aside**—Defence—Merits—Leave to defend—Terms—Judgment standing as security—Costs. *Bank of Nova Scotia v. Ferguson*, 8 O. W. R. 907.

**6. Motion to set aside**—Irregularity—Computation of time for appearance—Delay in moving—Absence of explanation—Absence of merits—Dismissal of motion. *Scott v. Hoffner* (N.W.T.), 3 W. L. R. 247.

**7. Motion to set aside**—Irregularity in service of process—Waiver—Delay in moving—Dismissal of motion—Costs. *Piggott v. French*, 7 O. W. R. 679, 783.

**8. Setting aside**—Abatement of action—Delay. *Doble v. Frontenac Cereal Co.*, 7 O. W. R. 266.

**9. Writ of summons not specially indorsed**—Setting aside—Delay in moving—Issue of execution. *Hogaboom v. Hill*, 7 O. W. R. 873.

**10. Opening up**—Breach of faith—Merits.]—Where a judgment is entered in breach of good faith between solicitors, and without notice, and pending negotiations for a settlement, it is not necessary to disclose a good defence on the merits to have the judgment opened up. *Tupper v. Sutcliffe*, 38 N. S. R. 332.

See APPEAL, XIII. 2—Costs, VII. 5.

## II. FOREIGN JUDGMENT.

**1. Action on**—Defence that judgment recovered in respect of gambling transactions—Stock speculations—Broker—Action for differences—Proof of defence—Onus—Weight of evidence. *Hickey v. Le Gresley* (Man.), 4 W. L. R. 46.

**2. Action on**—Limitation of actions—Contract—Yukon Ordinance, c. 31 of 1890—Statute of James—Statute of Anne—Lex fori—Lex loci contractus—Absence of debtor beyond seas.]—Under the provisions of the Yukon Ordinance c. 31 of 1890, the right to recover simple contract debts in the Territorial Court of the Yukon Territory is absolutely barred after the expiration of six years from the date when the cause of action arose, notwithstanding that the debtor has not been for that period resident within the jurisdiction of the Court.—Judgment appealed from, 2 W. L. R. 471, reversed, GIROUARD and DAVIES, JJ., dissenting. *Rutledge v. United States Savings and Loan Co.*, 26 C. L. T. 852, 37 S. C. R. 546.

**3. Jurisdiction of foreign Court**—Proof of—Exemplification of judgment—Residence of defendants—Identification of defendants—Pleading—Amendment—Contract as to forum—Defence to original action—Sale of goods—Action for price—Warranty—Construction of contract—Knowledge of agent of vendor of purpose for which goods purchased—Implied condition—Counterclaim—Damages—Costs. *New Hamburg Manufacturing Co. v. Shields* (Man.), 4 W. L. R. 307.

See EVIDENCE, II. 3.

## III. SETTING ASIDE OR VARYING JUDGMENT.

**1. Action to set aside**—Superior Court—Territorial jurisdiction—Parties.]—A party cannot, in another cause, begun in another district, have annulled and set aside a judgment rendered by the Superior Court in a cause in which the parties were not identically the same as in the second cause. *Henderson v. Harbec*, 8 Q. P. R. 73.

**2. Inferior Court**—Res judicata—Collateral attack—Confession—Proof of execution.]—A judgment of an inferior Court signed on a confession obtained by fraud is void, and may be attacked collaterally.—A confession is not such a written instrument as is contemplated by C. S. N. B. 1903 c. 121, s. 35, and judgment cannot be signed on it in an in-

ferior Court without proof of its execution. *Rogers v. Porter*, 37 N. B. R. 235.

**3. Procurement by fraud and perjury**—*Right to attack in subsequent action—Fraudulent assignment—Action to set aside—Res judicata—Garnishing proceeding in Division Court.*—When it can be shewn that a judgment, whether foreign or domestic, has been obtained by fraud, it cannot be held binding upon the party against whom the fraud has been practised; and such fraud may be shewn although it may involve a reconsideration of the very facts upon which the former judgment was recovered, and although it may consist in the presentation to the Court of evidence that the judgment impeached was obtained by perjured evidence to which the Court upon the first trial gave credit. There is no distinction between the fraud which consists in presenting perjured evidence to the Court, and that which is collateral to the merits of the case.—In an action to set aside as fraudulent and void an assignment of salary by one defendant to the other, the defendants pleaded *res judicata*, upon which the plaintiff joined issue. At the trial the defendants proved a judgment of a Division Court, in a garnishee proceeding, to which the plaintiff and defendants were parties, and in which the validity of the same assignment was the question for determination. The trial Judge found that by suppressing material facts and by giving evidence that was wilfully false, the claimant in the Division Court proceeding, who was one of the defendants in the action, procured from the Judge in the Division Court an adjudication that the assignment was valid:—*Held*, that the plaintiff was entitled to impeach the judgment in the Division Court, though he had not directly attacked it, as he should have done by amendment when *res judicata* was pleaded; and, upon the evidence, that the assignment was fraudulent and void. *Abouloff v. Oppenheimer*, 10 Q. B. D. 205, and *Vadala v. Lawes*, 25 Q. B. D. 310, followed.—*Woodruff v. McLennan*, 14 A. R. 242, and *Hilton v. Guyot*, 159 U. S. 113, not followed.—Judgment of ANGLIN, J., reversed. *Johnston v. Barkley*, 10 O. L. R. 724, 6 O. W. R. 549.

#### IV. SUMMARY JUDGMENT.

**1. Action against executor**—Recovery of legacy—Assent—Admission of assets—Abatement. *McCarthy v. McCarthy*, 7 O. W. R. 749.

**2. Action on promissory notes**—Defences—Agreement for advances—Construction—Powers of company—Accommodation indorsers—Sureties—Discharge—Counterclaim—Damages—Accounting. *Ontario Bank v. Capital Power Co.*, 7 O. W. R. 180.

**3. Admission of part of claim**—*Set-off as to balance—Form of judgment—Stay of execution—Costs.*—In an action to recover an amount claimed for work and labour, where the defendant admitted the greater portion of the amount claimed, but pleaded a set-off for passage money paid and other expenditures made on behalf of the plaintiff, the plaintiff moved at Chambers to set aside the plea of set-off as false, fraudulent, and vexatious, and the Judge, treating the set-off as a counterclaim, ordered final judgment under O. 31, r. 6, for the plaintiff for the amount claimed, and stayed execution on payment into Court within a fixed time of the amount of the claim less the amount of the set-off:—*Held*, that this was error; that the proper form of order would have been for judgment for the plaintiff for the amount of his claim, less the amount of the set-off, with a provision for stay of execution on payment of the amount into Court; and that this order should be made, and that the defendant should be permitted to prosecute the claim to the set-off on payment into Court of the amount admitted to be due.—As both parties were wrong in their contentions, both at Chambers and on appeal, there should be no costs. *Fisher v. Grand River Lumber Co.*, 38 N. S. R. 180.

**4. Admissions**—*Payment into Court of part "in full satisfaction"—Payment out—Rules 419, 616.*—In an action for a balance alleged to be due in respect of a contract, the defendants paid money into Court with their statement of defence under Con. Rule 419, alleging it in their pleading to be "balance due in respect of all the said matters," and that they brought it "into Court in full satisfaction of the plaintiffs' claim herein:—*Held*, that the plaintiffs were not entitled, on motion under Con. Rule 616, to judgment with leave to proceed for the balance of their claim, and for payment out of the money paid in, for by so moving they accepted the statement of defence, and were not entitled to the benefit of it severed from the accompanying statement that the amount admitted was the entire sum due.—*Held*, further, that whatever discretion the Court may have under the words "subject to further order" in Con. Rule 419, it should not be exercised to enable the plaintiffs to take as payment on account moneys which the

defendants had offered only "in full satisfaction." *Barrie v. Toronto and Niagara Power Co.*, 11 O. L. R. 48, 6 O. W. R. 741, 935.

**5. Admissions in pleadings**—Judgment for amount admitted—Leave to proceed for amount not admitted—Charge on land—Declaratory judgment. *Ross v. McBride* (N.W.T.), 3 W. L. R. 561.

**6. Motion for—Delay—Con. Rule 603.**—The intention of Con. Rule 603 is that a motion for summary judgment shall be made within a reasonable time after the appearance of the defendant; and a motion for judgment in an action in which the writ was issued in June, the appearance entered in July, and the motion not launched until November—the delay not being explained—was refused.—*McLardy v. Slatcum*, 24 Q. B. D. 504, followed. *German American Bank v. Keystone Sugar Co.*, 12 O. L. R. 555, 8 O. W. R. 634.

**7. Motion for, after delivery of pleadings**—Delay—Onus—Defence. *Ontario Bank v. Farlinger*, 7 O. W. R. 315.

**8. Motion to strike out appearance and defence**—Affidavit in support—Status of deponent—Form of affidavit—Verification of cause of action. *Codville & Co. v. Smith* (N.W.T.), 3 W. L. R. 197.

**9. Powers of Referee in Chambers (Man.)**—Rescinding order—Appeal—Dismissal of action.]—1. The Referee in Chambers has no power to rescind his own order not made *ex parte*.—*Re St. Nazaire Co.*, 12 Ch. D. 80, and *Preston v. Allsup*, [1895] 1 Ch. 141, followed.—2. An appeal will not lie from the refusal of the Referee to rescind such an order.—3. The Referee has no jurisdiction, under Rule 449 of the K. B. Act or otherwise, even with the consent of the parties, to make an order for the entry of judgment for the defendant, after the action has been entered for trial. Such a judgment can then only be pronounced by a Judge sitting in Court.—4. The Referee would have power, under Rule 422 (*d.* of the Act, to dismiss an action by the consent of the parties. — 5. When the judgment entered in an action is unauthorized and unsupported by any order or pronouncement of the Court, an appeal will lie from the refusal of the Referee to set it aside on motion before him, although such motion also included an application to him to rescind his own order previously made not *ex parte* in the same action. *Walker v. Robinson*, 15 Man. L. R. 445, 1 W. L. R. 181.

**10. Rule 603**—Action on promissory note—Defence—Note given on conditional undertaking. *Hainca v. Yearsley*, 8 O. W. R. 856.

**11. Rule 603**—Defence—Failure to shew—Refusal of leave to file second affidavit—Conditional leave to defend—Payment into Court. *Crown Bank of Canada v. Bull*, 8 O. W. R. 8, 77.

**12. Rule 603**—Suggested defence—Bank—Account—Reference. *Montgomery v. Ryan*, 8 O. W. R. 430, 467.

**13. Rule 608**—Action for money demand—Effect of delay—Payment into Court. *Lakefield Portland Cement Co. v. E. A. Bryan Co.*, 8 O. W. R. 305.

See SMALL DEBT PROCEDURE. 1.

## V. MISCELLANEOUS.

**1. Arrest of defendant**—Unauthorized release—Action to revive judgment—Arrears of interest. *Conrad v. Simpson*, 2 E. L. R. 53.

**2. Clerical error**—Correction after appeal—[Claims made in action.]—Where a cause has been taken to appeal and the judgment simply confirmed, the Court which gave the judgment in the first instance is disseised of the cause, and is no longer competent to correct an error in its judgment, even a clerical error.—A judgment conformable to the rights of the parties and to the whole of the allegations in the action cannot be said to be affected by a clerical error because the claims made in the action do not include all that the party had the right to exact. *Robert v. Montreal and St. Lawrence Light and Power Co.*, 7 Q. P. R. 480.

**3. Persons affected by judgment**—[Right of appeal.]—Any person who has a real interest in a cause, though not a party to it, may appeal from the judgment rendered in the cause if it puts his interest in peril. *Prévost v. Prévost*, Q. R. 14 K. B. 309.

**4. Registration against land in which judgment debtor has interest**—Prior unregistered assignment not affected. *Mooney v. McDonald*, 1 E. L. R. 78.

**5. Transfer**—Execution in name of original plaintiff—Opposition—[Interest of opposant.]—The transferee of a judgment has a right to sue out an execution in the name of the original plaintiff.—An opposant



tion à fin d'annuler founded on the fact that the judgment was transferred for a consideration which was paid by the transferee, will be dismissed for want of interest in the opposant. *Deserres v. Atlantic and Lake Superior R. W. Co.*, 7 Q. P. R. 383.

### JUDGMENT CREDITORS.

See MONEY IN COURT.

### JUDGMENT DEBTOR.

1. **Examination of** — Examination of transferee—Disposition of costs. *Traviss v. Hales*, 8 O. W. R. 118.

2. **Motion to commit**—Non-payment of judgment—Contempt of Court—Disobedience of order—Preliminary objections—Practice—Evidence of amount of judgment—Examination of debtor for discovery in aid of execution — Service of copy of depositions—Rule 380 (3)—Admissibility of depositions on motion to commit—Service of order—Exhibiting original. *Fraser v. Kirkpatrick* (N.W. T.), 4 W. L. R. 1.

3. **Neglect or refusal to pay** — Means to pay—Evidence—Examination of debtor—Committal. *Fraser v. Kirkpatrick* (N. W. T.), 4 W. L. R. 317.

4. **Order and appointment for examination**—Failure to attend—Motion to commit—Insufficient payment of conduct money. *Douglas v. Omand* (N.W. T.), 4 W. L. R. 331.

See ARREST—ATTACHMENT OF DEBTS — ATTACHMENT OF GOODS — ATTACHMENT OF PERSON—BANKRUPTCY AND INSOLVENCY, 22—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 12—COLLECTION ACT—COSTS, III. 1—COURTS, V. 1—EQUITABLE EXECUTION—JUDGMENT, V. 4 — MALICIOUS PROSECUTION AND ARREST, 2—VENDOR AND PURCHASER, II. 5.

### JUDGMENTS ACT.

See EQUITABLE EXECUTION, 1.

### JUDICIAL COMMITTEE OF PRIVY COUNCIL.

See APPEAL, IX.

### JUDICIAL NOTICE.

See GIFT, 4—MUNICIPAL CORPORATIONS, XIII. 1.

### JUDICIAL PROCEEDING.

See LUNATIC, 2—RAILWAY, IV. 1.

### JUDICIAL SALE OF LAND.

1. **Decree authorizing sale of defendant's interest** — Sale of whole estate—Refusal to confirm. *Butler v. Forbes* (N.W.T.), 4 W. L. R. 579.

2. **Sheriff's sale** — *Rights of purchaser—Transfer of purchase—Contestation of collocation.*—A purchaser at a sheriff's auction sale, who has transferred his rights in the purchase, has no interest in the distribution of the moneys made at the sale by the sheriff, and has, therefore, the right to contest a collocation. *Eastern Townships Bank v. Arhill*, 8 Q. P. R. 109.

See CONTRACT, X. 4—RAILWAY, III. 1, 2.

### JURISDICTION.

See ALIENS, 1 — APPEAL—ARBITRATION AND AWARD, 5—ARREST, 8—ASSESSMENT AND TAXES, 1—ATTACHMENT OF DEBTS, II. 6—BAILIFFS — BENEFIT SOCIETY, 3—CANADA TEMPERANCE ACT—CERTIORARI — CLUB — CONSTITUTIONAL LAW—CONTEMPT OF COURT, 3, 4—CONTRACT, X. 1—COSTS, IV. 5. V.—COURTS — CRIMINAL LAW, II., III., IV. 1—EXCHEQUER COURT OF CANADA—EXECUTORS AND ADMINISTRATORS, 3—FISHERIES — GOLD COMMISSIONER — HABEAS CORPUS—HUSBAND AND WIFE, I. 5—JUDGMENT—JUSTICE OF THE PEACE—LAND ACT, B. C.—LIQUOR LICENSES—LUNATIC, 4 — MANDAMUS, 1—MASTER AND SERVANT, II. 13—MINES AND MINERALS, 1, 7, 9—PARLIAMETARY ELECTIONS, II. 3—PAYMENT INTO COURT—PENALTY, 1, 3—PLEADING, IX. 9—POLICE MAGISTRATE—PROHIBITION — PUBLIC HEALTH—RAILWAY, II., III. 1, V. 1, X. 7—REGISTRY LAWS, 5, 7—SCHOOLS, 7—SHIP, 3, 16, 17, 19, 27—SMALL DEBT PROCEDURE—SOLICITOR, 3 — STATUTES, 3—STAY OF PROCEEDINGS, 1—STIPENDIARY MAGISTRATE—WAY, I.—WRIT OF SUMMONS.

**JURY.**

See CONSTITUTIONAL LAW, 6—CRIMINAL LAW—NEGLIGENCE—NEW TRIAL—NUISANCE, 1, 2—TRIAL.

**JURY NOTICE.****JUS TERTII.**

See NEGLIGENCE, 10—TIMBER, 3.

**JUSTICE OF THE PEACE.**

**1. Conviction**—Jurisdiction not appearing—Certiorari—Right of appeal — Quashing conviction—Costs. *Johnston v. O'Reilly* (Man.), 4 W. L. R. 569.

**2. Conviction**—Liquor License Act —Weight of evidence—Review on motion to quash — Conduct of magistrates — Costs. *Rex v. McArthur*, 8 O. W. R. 694.

**3. Conviction** — Omission to take down evidence.]—The omission of the magistrate upon the summary conviction of a prisoner to have the evidence taken in writing is fatal to the conviction. *Rex v. McGregor*, 11 B. C. R. 350, 2 W. L. R. 378.

**4. Disqualification** — Bias—Litigation.]—A magistrate is not disqualified from trying the accused upon a charge under the Canada Temperance Act by reason of an action having been begun by the accused against the magistrate for alleged misconduct as a judicial officer, and the writ of summons therein being in the hands of the sheriff for service, it not having been actually served before the conviction was made. *Rex v. Byron*, *Ex p. O. A. Batson*, 37 N. B. R. 383; *Rex v. O. A. Batson*, 1 E. L. R. 364.

**5. Disqualification** — Relationship to accused.] — A conviction under the Canada Temperance Act made by two justices of the peace will not be quashed on the ground that one of them is related to the accused, within the ninth degree of consanguinity, if the justice was not aware of the relationship, and no objection was taken at the trial. *Rex v. Biggar*, *Ex p. McEwen*, 37 N. B. R. 372; *Rex v. McEwen*, 1 E. L. R. 352.

**6. Information**—Warrant for arrest—Canada Temperance Act — Suspicion.] — A sworn information stating that the complainant had just cause to suspect, and did suspect and believe, that the party charged had committed an offence against the Canada Temperance Act triable under ss. 558, 559, and 843 of the Criminal Code, 1902, will not authorize a justice to issue a warrant to arrest in the first instance. It is the duty of the justice before issuing a warrant to examine upon oath the complainant or his witnesses as to the facts upon which such suspicion and belief are founded, and to exercise his own judgment thereon. *Ex p. Boyce*, 24 N. B. R. 347, followed. *Rex v. Mills*, *Ex p. Coffon*, 37 N. B. R. 122.

**7. Information**—Warrant for arrest —Summary Convictions Act—Suspicion.] —A magistrate has no jurisdiction to issue a warrant on an information under the Dominion Summary Convictions Act without examining upon oath the complainant or his witnesses as to the facts upon which the information is based.—*Ex p. Boyce*, 24 N. B. R. 347, and *Rex v. Mills*, *Ex p. Coffon*, 37 N. B. R. 122, followed. *Rex v. Carleton*, *Ex p. Gundy*, 37 N. B. R. 389; *Rex v. Lizotte*, 1 E. L. R. 355.

**8. Irregular adjournment**—Jurisdiction—Prohibition.]—When an irregular adjournment of the hearing of a complaint under part LVIII. of the Criminal Code is made, the jurisdiction of the magistrate is ousted, he becomes *functus officio*, and prohibition will lie to restrain him from dealing further with the case. *Paré v. Recorder's Court of City of Montreal*, Q. R. 27 S. C. 424.

**9. Issuing warrant on application of relative**—Corrupt motives — Criminal information. *Rex v. Currie*, 2 E. L. R. 147.

**10. Jurisdiction** — Conviction — Indian Act — Supplying Treaty Indians with intoxicating liquor. *Rex v. Gray* (N. W. T.), 3 W. L. R. 564.

**11. Order for imprisonment for non-payment of costs**—No conviction —Absence of accused—Order quashing—Condition.]—After a magistrate had entered upon the hearing of a complaint of having used insulting and abusive language, the charge, at the complainant's instance, actuated apparently by compassion, was withdrawn, the accused to pay the costs. Subsequently, such costs not having been paid, the magistrate, in the absence of and without convicting the accused of any offence, made an or-

der directing the payment by her of the costs; and, in default of payment, directing that the same should be levied by distress, and, in default of sufficient distress, directing imprisonment. The costs were then paid by the accused, but before the launching of this application they were tendered back to the accused and refused:—Held, that the order was invalid and should be quashed without costs, but on condition under ss. 889 to 896 of the Criminal Code—made applicable by 1 Edw. VII. c. 13, s. 1 (O.)—that no action should be brought against the magistrate, etc.; otherwise the motion was to be dismissed with costs. *Rex v. Morningstar*, 11 O. L. R. 318, 7 O. W. R. 167.

**12. Proceedings to recover debt**—Defendant's travelling expenses—Certiorari. *McKeen v. Cameron*, 1 E. L. R. 315.

**13. Trespass**—Issue of search warrant — Subsequent issue of warrant to arrest without sworn information—Damages. *Melanson v. Lavigne*, 1 E. L. R. 520.

**14. Stipendiary magistrate**—Appointment of town clerk as magistrate—Incompatible offices — Automatic vacation of one—Canada Temperance Act—Prosecutor related to magistrate—Constitutionality of Nova Scotia Act preventing disqualification on this ground—Keeping liquor for sale—Previous conviction for same offence on previous day—Continuing offence—Evidence of liquor being the same—Magistrate's refusal to give evidence. *Rex v. Murray*, 2 E. L. R. 80.

See APPEAL, III. 2 — BANKRUPTCY AND INSOLVENCY, 19—CANADA TEMPERANCE ACT—CRIMINAL LAW, II., IV. 1—LIQUOR LICENSES—POLICE MAGISTRATE—PROHIBITION — STIPENDIARY MAGISTRATE.

## JUSTICE'S COURT, NOVA SCOTIA.

See COURTS, III.

## KEEPING BAWDY HOUSE.

See CRIMINAL LAW, II. 4, 5.

## KEEPING COMMON BETTING HOUSE.

See CRIMINAL LAW, III. 17, 18.

## KEEPING DISORDERLY HOUSE.

See CRIMINAL LAW, III. 19.

## KIDNAPPING.

See EXTRADITION, 5.

## LACHES.

See BANKRUPTCY AND INSOLVENCY, 9 12—COMPANY, II. 2, IV. 1 — COURTS, IV.—CROWN LANDS, 5—ESTOPPEL, 1 — FRAUDULENT CONVEYANCE, 5—IMPROVEMENTS—JUDGMENT, I. 1, IV. 6, 7, 13—MASTER AND SERVANT, I. 9—PEREMPTION—PRINCIPAL AND AGENT, 11—RECEIVER, 2—VENDOR AND PURCHASER, I. 8, 23.

## LACOMBE ACT.

See ATTACHMENT OF DEBTS, II.

## LAND ACT, BRITISH COLUMBIA.

**Pre-emption record—Improvements**—Non-occupation — Collusion—Cancellation of certificate—Jurisdiction of commissioner.] — Butters obtained a pre-emption record of the land in dispute in 1901. Bessette applied for a record in respect of the same land in 1904. In the year 1893, one Kitchen had obtained a pre-emption record of this land and made certain improvements thereon to the value of about \$1,000. In March 1900, Kitchen applied for and obtained a pre-emption record of certain other lands, and in April one Boutilier obtained a pre-emption record of a certain portion of the lands in question. Boutilier abandoned his pre-emption right, and Kitchen and Butters entered into an agreement whereby Kitchen agreed that Butters pre-empt the land on his paying for the improvements \$200 in cash and the balance when he should realize the same out of the land, and Kitchen, until so paid, should retain an interest in the land. Bessette's application, which set up non-occupation of the land by Butters, and collusion between Butters and Kitchen, was refused by the assistant commissioner, who found against the charge of collusion, and on that of non-occupation he came to the conclusion that there was no provision in the Land Act for cancelling a certificate of improvements when once issued: — *Held*, that the arrangement entered into between

Butters and Kitchen was, in the circumstances, not such as to preclude Butters from making the statement set forth in form 2 of the Land Act, as the term "collusion" as used in the form means collusion with somebody to defeat the provisions of the Act.—The legislature has refrained expressly from conferring upon the commissioner any jurisdiction to cancel a record on the ground that the original application for the record contains false statements of fact.—*Sem-ble*, it is a condition of the power conferred by s. 13 that the commissioner shall find a cessation of occupation in fact, and the section has no application to any question arising under s. 7 or s. 8. *Hereron v. Christian*, 4 B. C. R. 246, dissented from. *In re Bessette*, 12 B. C. R. 228.

## LAND REGISTRY ACT, BRITISH COLUMBIA.

See REGISTRY LAWS, 1, 2.

## LAND TITLES ACT.

See ASSESSMENT AND TAXES, 19 — CONTRACT, X. 5 — CROWN, 7 — MORTGAGE, 20—PLEADING, IX. 5—REGISTRY LAWS, 3, 4, 5, 7—TRUSTS AND TRUSTEES, 13—WILL, I. 7, 19.

## LANDLORD AND TENANT.

**1. Chattels left on premises by tenant**—Abandonment — Fixtures—Detinue—Overholding tenant — Notice to quit—Bona fide belief in right to retain possession—Double the yearly value of premises—Breach of covenant to repair—Taxes. *Dundas v. Osment* (N.W.T.), 4 W. L. R. 116.

**2. Distress for rent**—Goods of sub-tenant — Replevin — Forfeiture of rent —Proof of breach of covenant—Cross-examination of landlord.]—In an action of replevin by a sub-lessee against the lessor for goods taken by the lessor under a distress for rent, the plaintiff is entitled to prove, on cross-examination of the lessor, that there had been a breach of a covenant in the lease which forfeited the rent claimed.—A sub-lessee in such an action is entitled to the benefit of a covenant in the lease which forfeits the rent as a penalty for a breach, though there has been no assignment of the lease in writing. *Ringuette v. Hebert*, 37 N. B. R. 68.

**3. Distress for rent**—Illegal distress—Rent not in arrear—Clandestine removal—Goods subject to bill of sale—Damages. *Clarke v. Green*, 1 E. L. R. 552.

**4. Distress for rent**—Irregularities—Protection of statute—Failure to prove actual damage.] — The defendant distrained upon the plaintiff's goods for rent, then overdue, but nothing further was done and no special damage was shewn:—*Held*, that, if there were irregularities in connection with the making of the distress, the defendant was protected by R. S. N. S. 1900 c. 172, s. 10.—A previous distress of the plaintiff's goods was irregular in a number of particulars, among others as including goods which were not distrainable, and omission to give the notice required by the statute, s. 2, but none of the articles were removed from the premises; the plaintiff continued to use them as before, and the distress was abandoned before anything had been sold:—*Held*, that, to entitle the plaintiff to damages on account of the irregularities committed, some substantial hurt or injury must be shewn, resulting from the irregular proceeding, and that, in the absence of proof of actual damage, the trial Judge erred in awarding damages to the plaintiff, and his decision on this point must be reversed with costs. *Beckham v. Hickey*, 38 N. S. R. 55.

**5. Distress for rent** — Money obtained by landlord by fraud—Application on rent—Transfer of tenant's goods to plaintiff—Bona fides—Landlord not entitled to set up illegality.]—The defendant, as bailiff of D., levied upon goods in premises occupied by R. as tenant of D., but which were claimed by the plaintiff under a bill of sale given to secure a debt due for services rendered. The evidence shewed, and the trial Judge found, that the wife of R., being entitled to a sum of money held in trust for her, D. and R. were parties to a misrepresentation to the trustee, as the result of which D. obtained possession of a portion of the money so held in trust, it being agreed between the parties that D. should retain a portion of the money in payment of a debt due to him for professional services, and that the balance should be applied by him in payment of the rent of the premises occupied by R. as tenant of D. It was further shewn and found that the amount received by D. was more than sufficient to satisfy the debt due him for professional services and the rent due up to the time of the distress:—*Held*, that, as the plaintiff was not shewn to be a party to the fraud, and was not a privy in any sense which would subject her to its consequences, and as her title to the property in question was founded

on a bill of sale given for good consideration, the defendant's principal could not be heard to make the contention that the money obtained from the trustee was received under a fraudulent proceeding, to which he himself was a party. *Hains v. Leblanc*, 38 N. S. R. 528, 1 E. L. R. 137.

**6. Distress for rent**—Non-payment of bailiff's expenses—Excessive distress to realize them—Collusive sale—Depriving of costs. *Gardner v. Simpson*, 2 E. L. R. 90.

**7. Distress for rent**—Purchase by landlord at open auction sale—Illegal sale—Replevin—Damages. *Tingley v. Sharpe* (B.C.), 3 W. L. R. 159.

**8. Distress for rent**—Replevin—Pleading—Non cepit—Replication impeaching lessor's title.]—A replication which admits the taking of goods under a distress for rent and impeaches the lessor's title to the demised premises, pleaded in answer to a plea of non cepit in an action of replevin, is bad on demurrer: per TUCK, C.J., HANINGTON and MCLEOD, JJ.—Per BARKER and GREGORY, JJ., that the replication should have been objected to by an application to strike it out. *McLean v. Green*, 37 N. B. R. 204.

**9. Distress for rent**—Suspension of remedy—Promissory note—Rent of chattels—Abatement of claim—Illegal distress—Excessive distress—Detention of chattels—Damages—Counterclaim. *Armstrong v. Sherlock*, 8 O. W. R. 577.

**10. Disturbance of tenant's enjoyment**—Wrongful acts of neighbour—Liability of landlord.]—A lessor is liable for a disturbance in the enjoyment of his lessee arising from the acts of a neighbour performed in the exercise of his proprietary rights. So, when the owner of property contiguous to the leased premises builds a mitoyen wall, and in doing so cuts off means of access to them, shuts off light openings, and by sinking foundations puts a strain on the frame-work of the building, opening cracks and fissures therein through which rain gets in, the lessor who allows the performance of such acts, becomes liable to a reduction of rental proportionate to the loss of enjoyment of the lessee, and further to pay damages for deterioration of his goods. Judgment in *Saint-Onge v. Gauthier*, Q. R. 27 S. C. 232, affirmed. *Gauthier v. Saint-Onge*, Q. R. 15 K. B. 264.

**11. Injury to goods of tenant on demised premises**—Damages—Reference. *Burroughs v. Morin*, 7 O. W. R. 374.

**12. Lease**—Breach of covenant to repair—Tenant's fixtures—Alteration in premises—Breach of covenant not to assign or sublet—Waiver—Acceptance of rent—School taxes—Action—Scale of costs. *Nellis v. McNee*, 7 O. W. R. 158.

**13. Lease**—Covenant not to sublet—Breach—Damages of sub-tenant—Demand for improbation.]—1. A tenant who sublets premises in breach of a covenant with the owner not to do so without his consent, is liable for the damages sustained by the sub-tenant who is expelled at the suit of the owner.—2. A demand for improbation can only be made when it is relevant, and will be rejected if the "faux" complained of does not affect the issue between the parties. *Hanleyson v. Dozois*, Q. R. 28 S. C. 400.

**14. Lease**—Default by tenant—Action by landlord—Proof of damage.]—A landlord, in order to obtain judgment against his tenant for breach of covenants in the lease, must prove that he has suffered damage from his inability to relet the premises, that he has paid the taxes, and that the repairs done are "réparations locatives." *Lamarche v. Bessette*, 7 Q. P. R. 351.

**15. Lease**—Farm lease—Covenants—Breaches—Waiver—Acceptance of rent—Damages. *Wilson v. McLean*, 7 O. W. R. 540.

**16. Lease**—Neglect to deliver premises—Damages.]—The obligation to deliver the premises leased at the time agreed upon is of the very essence of a contract of lease, and a refusal or neglect to deliver is ground for a summary action for the recovery of damages resulting from the failure to carry out the obligations of the lease. *Darignon v. Chevalier*, 8 Q. P. R. 104.

**17. Lease**—Obligations of lessor—Keeping premises in repair—Apparent defects.]—The legal obligation to keep the premises in a condition to serve the purpose for which they have been let, being of the nature but not of the essence of the contract of letting, the lessor may validly stipulate that he shall not be bound to do so.—The lessor incurs no obligation by reason of apparent defects of which the lessee was aware at the time of the making of the lease. *Rivard v. Pelchat*, Q. R. 28 S. C. 8.

**18. Lease**—Repairs—Liability of landlord—Factory—Insurance.]—Repairs to a furnace, such as substituting a new section for one that is cracked and leaks from long usage, are not tenant's repairs, and the cost must be borne by



the lessor. — In construing a lease, in which the lessor and lessee are both described as manufacturers of tobacco, and the premises as "a four-storey building, etc., now occupied by the lessor as a factory," it is fair to infer that the premises were leased to be used as a tobacco factory. Therefore, a clause in the lease that "the lessee shall pay all extra premiums of insurance of the premises, exacted in consequence of the business or work he carries on therein," does not make him liable for the difference between warehouse and factory rates of insurance. *Fortier v. Youghcart*, Q. R. 28 S. C. 118.

**19. Lease—Repairs—Part destruction of premises—Rent during reconstruction—Collapse—Hidden defects—Liability.]—**A clause in a lease "that indispensable repairs shall be performed without reduction of rent, damages, or compensation," does not apply to the reconstruction of the premises leased, when partly destroyed so as to render them unfit for the purposes of the lease and to compel the lessee to vacate them. In such a case, the latter is relieved from the obligation to pay rent during the period of reconstruction. —2. The lessor is liable for the damages sustained by the lessee by the collapse of the premises leased, caused by bad construction and defective materials, even though such defects were hidden and could not have been ascertained by any ordinary examination of the building. *Central Agency Limited v. Les Religieuses, etc., de L'Hotel Dieu de Montréal*, Q. R. 27 S. C. 281.

**20. Lease—Rescission—Effect on sub-lease—Action for possession by landlord against sub-tenant.]—**The voluntary cancellation by the parties, for inability of the tenant to pay the rent, of a lease with a stipulation that failure to pay rent should dissolve it, extinguishes a sub-lease of part of the premises, notwithstanding the fulfilment of his obligations by the sub-tenant; and an action will lie against the latter, in favour of the lessor, to recover possession of the part sub-leased. *Duncan Co. v. Bridge*, Q. R. 14 K. B. 133.

**21. Lease—Rescission—Premises uninhabitable — Smoke and smell — Evidence.]—**A lessee has an action to rescind the lease of a flat which is uninhabitable by reason of smoke and obnoxious odours. Evidence of the existence of smoke and obnoxious odours in it during a stated period, is not sufficiently rebutted by proof that it was free from both, immediately before and after the period in question, and that the building of which it forms part was well constructed with all modern

improvements. Nor is it an answer to the action to say that the smoke and bad odours complained of came from neighbouring chimneys, while windows were opened, or from two flats underneath, and that the landlord is not responsible for the acts of neighbours or of co-lessees in the building. *Beardmore v. Bellerue Land Co.*, Q. R. 15 K. B. 43.

**22. Lease by municipal corporation—Expiration of term—Buildings and permanent improvements—Payment for—Work done under prior leases and by sub-tenant — "Permanent improvements"—Evidence to explain—"Worth"—Costs—Arbitration.]—**Where, by the terms of a lease, the lessors, in case of their refusal to renew at the expiration of the term, were to pay to the lessee "such reasonable sum" as "the buildings and permanent improvements" on the demised premises might then be worth, evidence was held, in an arbitration to fix their value, to be admissible to explain the meaning of the words "permanent improvements," namely, improvements made and in a sense owned by the lessee.—*Held*, also, that the meaning of the word "worth" was the value of such buildings and permanent improvements to the lessee in case the lease was renewed; and the principle to be adopted was the fair and reasonable market value thereof, as would result if it were the case of the bringing together of a willing buyer and prudent seller.—Certain of the alleged improvements claimed for consisted of filling in portions of a water lot, which was done by or for lessees under prior leases in performance of agreements entered into therefor:—*Held*, that the claimant was not entitled to be paid for such filling in, for when done it at once became part of the freehold, and was not in any sense a permanent improvement under the claimant's lease.—Other alleged improvements, also consisted of filling in, were done by a sub-tenant, under a sub-lease from the claimant; — *Held*, that such improvements enured to the benefit of the lessee, and he was entitled to be paid for them.—Where a submission to arbitration under the Municipal Arbitration Act, R. S. (1897 c. 227, is silent as to costs, s. 6 of s. 2 of the Act applies, and empowers the arbitrator to deal with them; and in this matter, he having awarded costs to the claimant, the Court, under the circumstances, refused to interfere. *Dalton v. City of Toronto*, 12 O. L. R. 582, 8 O. W. R. 154.

**23. Lease of part of building—Damage to roof by storm—Injury to tenant's goods—Obligation to repair.]—**The plaintiff was tenant under the defendant of the "dwelling portion" of a building.

the remainder of which was occupied by the defendant as a shop. During a storm a skylight was blown from a neighbouring building and struck the roof of the defendant's building and injured it. The plaintiff notified the defendant, who gave an order on a builder for the repair of the roof, but before this could be done the weather conditions became such that the repairs could not be effected, and, later on, water from rain and from the melting of a heavy accumulation of snow on the roof, came through and damaged the plaintiff's property:—*Held*, that the defendant was under no obligation to repair the roof which would make him responsible in damages, and that his promise to have the injuries made good was without consideration to support it and was not binding. *Betcher v. Hagell*, 38 N. S. R. 517, 1 E. L. R. 20.

**24. Lien of landlord — Contract—Security—Diminishment—Rent.]** — The lien of the landlord who leases a farm is a security given by contract, within the meaning of art. 1092, C. C. Consequently, a farmer who removes from the farm leased, crops growing thereon, loses, by diminishing the security, the benefit of the term which he could have for payment of the rent. *Egglefield v. Babcu*, Q. R. 28 S. C. 382.

**25. Oral agreement for lease—Tenant in possession — Disturbance of possession—Trespass—Lease to stranger—Notice—Registry laws—Damages—Injunction.** *Hare v. Krick*, 8 O. W. R. 620.

**26. Overholding tenant—Creation of new tenancy — Increased rent — Notice.]**—When a tenant holds over after the expiration of the term, and nothing is agreed on as to the terms of the new holding, that new holding is not of necessity to be on the same terms as the former, but the landlord may be awarded an increased rent if there are circumstances to shew that such was expected of him, and that such expectation was known to and not repudiated by the tenant.—*Elgar v. Watson*, 1 Car. & M. 494, followed. —In such a case the tenant was notified in writing within a month that the rent would be increased after another month, and paid two months' rent at the increased rate, without objection:—*Held*, that she was liable for rent at such increased rate for the remaining months of her occupancy, without deciding whether a new tenancy from year to year had been created or not. *Winnipeg Land and Mortgage Corporation v. Witcher*, 15 Man. L. R. 423, 1 W. L. R. 551.

**27. Overholding tenant—Notice to quit—Length of.]**—A tenant, who occupies a lodging by tacit holding over after

the expiry of a lease, in which the rent was payable monthly, has a right to only one month's notice to quit from his landlord. *Comte v. Gissing*, Q. R. 28 S. C. 497.

**28. Proof of tenancy—Rent exceeding \$50—Oral evidence — Occupation—Remedy is of landlord.]**—The lease of an immovable for a rent exceeding \$50 cannot be proved by the oral testimony of witnesses, but, when there has been occupation by the alleged lessee, the owner may, in accordance with art. 1608, C. C., exercise against him all the remedies which the law gives to lessors against lessees. *Superior v. Withell*, Q. R. 14 K. B. 396.

**29. Saisie gagerie—Motion to dismiss action—Sale of demised premises—Remedy for rent.]**—A motion to dismiss the action and declare the *saisie-gagerie* illegal, because the plaintiff is no longer owner of the premises, will be rejected; even if the plaintiff has no lien on the furniture, that is no reason for dismissing the action. *Shippel v. Sayan*, 7 Q. P. R. 429.

**30. Threatened disturbance — Injunction—Damages.]**—A tenant threatened with disturbance of his enjoyment of the demised premises by reason of works of construction instituted by the owner has a right to an interlocutory injunction to stop them, besides his remedy in damages, if injury should arise. *Haycock v. Pacaud*, Q. R. 27 S. C. 464.

**31. Vault door placed on demised premises by tenant — Annexation to freehold—Fixture—Removal after expiry of term—Waste—Damages.** *Cronkhite v. Imperial Bank of Canada*, 8 O. W. R. 18.

See BANKRUPTCY AND INSOLVENCY, 17, 29—CONTRACT, III. 8, X. 13 — COSTS, VIII. 5—EJECTMENT, 1. 5—EXECUTORS AND ADMINISTRATORS, 17 — FACTORIES ACT—ILLEGAL DISTRESS—INSURANCE, II. 12—LIMITATION OF ACTIONS, I. 9—MASTER AND SERVANT, II. 23—MORTGAGE, 3 — MUNICIPAL CORPORATIONS, XIV. 3—NUISANCE, 3, 5—PARTNERSHIP, 14—SALE OF GOODS, II. 2—SEIGNEURIAL TENURE—SPECIFIC PERFORMANCE, 1. 2—WASTE.

## LANDS.

See RAILWAY, IX.

## LEASE.

See CROWN, 6—LANDLORD AND TENANT —MINES AND MINERALS—PARTIES, II. 5—REGISTRY LAWS, 5—SPECIFIC PERFORMANCE—WASTE—WATER AND WATERCOURSES, 7.

**LEASE OR LICENSE.**

See CONTRACT, III. 8, 12.

**LEAVE AND LICENSE.**

See WATER AND WATERCOURSES, 14.

**LEAVE TO APPEAL.**

See APPEAL.

**LEGACY.**

See JUDGMENT, IV. 1—SUBSTITUTION, 2  
—WILL.

**LEGATEE.**

See DISTRIBUTION OF ESTATES.

**LEGISLATIVE ASSEMBLY.**

See CROWN, 3—MANDAMUS, 1.

**LEGISLATURE.**

See CONSTITUTIONAL LAW.

**LEGITIMACY.**

See EVIDENCE, II. 2, 4.

**LIBEL.**

See CRIMINAL LAW, III. 20 — DEFAMATION.

**LICENSE.**

**Building sewers in licensor's property**—Revocation of license—Licensee not entitled to set up powers of expropriation not originally acted on. *Town of Dartmouth v. Dartmouth Rolling Mills Co.*, 1 E. L. R. 194.

See CONSTITUTIONAL LAW, 3, 8—LIQUOR LICENSES — MINES AND MINERALS — MUNICIPAL CORPORATIONS, VII.—PATENT FOR INVENTION, 7—TIMBER.

**LICENSE COMMISSIONERS.**

See LIQUOR LICENSES.

**LICENSE FEE.**

See ASSESSMENT AND TAXES, 2.

**LIEN.**

**1. Improvements — Seeding—Harvest.**—Money spent on work and seeding of land does not constitute a disbursement for improvements within the meaning of art. 2072, C. C.; the special lien for the expense of such work exists only when the land is sold before harvest. *Carignan v. Gilbert*, 7 Q. P. R. 364.

**2. Railway employee — Manual labour—Wages—Arrears—Time — Computation.**—A person employed by a railway company at work to keep the track open is a railway employee engaged in manual labour within the meaning of art. 2009, No. 9, C. C.—2. The privilege given upon immovables in the above article is for arrears not exceeding three months, as specified in regard to the like privilege on movables in art. 2006.—3. The term of three months aforesaid is computed and runs back from the date of the seizure of the immovables. *Morse v. Lewis County R. W. Co.*, Q. R. 28 S. C. 178.

**3. Railway employees—Manual labour—Wages—Motormen, conductors, and carters—Seizure of tramway—Date of.**—The motormen and conductors of the electric tramways and carters who carry materials, remove snow, etc., for the purposes of the operation of the tramways, are railway employees performing manual work, within the meaning of art. 2009, C. C. Such employees have a lien upon the tramway and its branches for their wages for three entire months, without regard to the date of the seizure or sale which has been made of the tramway. Judgment in Q. R. 28 S. C. 178 reversed. *Paquet v. New York Trust Co.* Q. R. 15 K. B. 179.

**4. Salary of commercial traveller —Employer's goods.**—A commercial traveller whose services are not required in the store, shop, or workshop in which his employer's goods are contained, has no privilege on the same for his salary. *Kent v. Rosenstein*, Q. R. 28 S. C. 95.

**5. Woodman's lien — Enforcement —Saisie-conservatoire.**—One who cuts and piles wood pursuant to a contract



for getting it out, has a lien on the wood for the price of his work under art. 1994c., C. C.—A creditor who has a lien on a movable may, in general, cause it to be seized by way of *saisie-conservatoire* to assure the exercise of his right. *Ross v. Saint-Onge*, Q. R. 14 K. B. 478.

**6. Woodman's Lien**—*Lien of married woman for wages as cook — Contract with husband — Married Women's Property Act — Woodmen's Lien Act.*—A contract by a married woman with her husband to cook in the lumber woods for a crew of men whom her husband had engaged to get lumber for a third person, under an agreement at a fixed price per thousand, off the land of the third person, who was to furnish the supplies, is not a valid contract under the Married Women's Property Act, C. S. N. B. 1903 c. 78, and can not be enforced as a lien under the Woodmen's Lien Act, C. S. N. B. 1903 c. 148. *Patterson v. Bowmaster*, 37 N. B. R. 4.

See BANKRUPTCY AND INSOLVENCY, 10 — BANKS AND BANKING, 3 — CONTRACT, III. 9 — COSTS, III. 11 — DISTRESS — DOWER, 2 — EQUITABLE EXECUTION, 1, 2 — ESTOPPEL, 2 — IMPROVEMENTS — LANDLORD AND TENANT, 24 — MECHANICS' LIENS — MORTGAGE, 14 — PARTNERSHIP, 11, 14 — RAILWAY, III. 3 — SAISIE-CONSERVATOIRE, 2 — SET-OFF, 5 — SHIP, 20.

### LIEN NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 6 — PLEADING, VIII. 3 — SALE OF GOODS, I. 8, II. 4.

### LIEUTENANT-GOVERNOR IN COUNCIL.

See CLUB, 2 — COMPANY, IV. 5 — MUNICIPAL CORPORATIONS, XIV. 3 — SCHOOLS, 4.

### LIFE ESTATE.

See DEED, 3.

### LIFE INSURANCE.

See INSURANCE, III.

### LIFE TENANT.

See SUBSTITUTION, 1.

### LIGHT.

See ARCHITECT, 1 — EASEMENT, 1, 2, 3 — INJUNCTION, 8.

### LIMITATION OF ACTIONS.

- I. REAL PROPERTY LIMITATION ACT.
- II. OTHER CLAIMS.

#### I. REAL PROPERTY LIMITATION ACT.

**1. Contract of sale or gift**—*Action to set aside—Period of limitation.*—The period of 10 years within which an action to set aside a contract of sale or gift, resulting from a binding agreement, must be begun, according to the terms of arts. 816 and 1537, C. C., is absolute, and runs from the date of the instrument, without regard to the time agreed upon for payment of the price or performance of the obligations. *Galarneau v. Lefebvre*, Q. R. 27 S. C. 466.

**2. Constructive possession**—*Acts of ownership—Colourable title.*—McI. by his will devised sixty acres of land to his son, charged with the maintenance of his widow and daughter. Shortly afterwards the son with the widow and other heirs conveyed away four of the sixty acres, and nearly thirty years later they were deeded to McD. Under a judgment against the executors of McI., the sixty acres were sold by the sheriff, and fifty, including the said four, were conveyed by the purchaser to McI.'s son. The sheriff's sale was illegal under the Nova Scotia law. The son lived on the fifty acres for a time, and then went to the United States, leaving his mother and sister in occupation until he returned twenty years later. During this time he occasionally cut hay on the four acres, which was only partly enclosed, and let his cattle pasture on it. In an action for a declaration of title to the four acres:—*Held*, that the occupation by the son under colour of title of the fifty acres was not constructive possession of the four which he had conveyed away, and his alleged acts of ownership were merely intermittent acts of trespass. Judgment in *McDonald v. McIsaac*, 38 N. S. R. 163, affirmed. *McIsaac v. McDonald*, 37 S. C. R. 157.

**3. Conveyance of land**—Security—Agreement — Default — Redemption — Sale by public auction—Possession. *Patterson v. Dart*, 8 O. W. R. 800.

**4. Possession by mortgagor**—*Devise of life interest by mortgagee to mort-*

*gagor — Election.*—In 1862 J. M. conveyed land to W. by a deed which, although absolute in form, was intended to operate by way of mortgage, as security for a debt due from the grantor to the grantee. The last will of W., made seventeen years after the date of the deed, directed that the land in question should not be sold during the lifetime of M. M., the wife of J. M., and that if, at any time before the death of M. M., the grantor, J. M., should repay the amount of his indebtedness with interest, then the property should be reconveyed, &c. W. died in July, 1881, and M. M. died in February, 1903, having continued in possession of the land down to the time of her death:—*Held*, notwithstanding the clause in the will of W. restraining his executors from selling the land, that an action brought by the executors, after the death of M. M., to recover possession of the land, was barred by the Statute of Limitations. *Whitman v. Hiltz*, 39 N. S. R. 230, 1 E. L. R. 68.

**5. Possession of land**—Fiduciary relations between owner and persons in possession—Debt due by owner—Recovery of possession upon payment of debt—Equitable decree—Costs. *Gribbon v. King*, 7 O. W. R. 457.

**6. Possession under agreement for purchase**—*Tenancy at will*—Payment of part of purchase money—Evidence—Entries in books of deceased person—Admissions—Right of entry.]—Payment of part of the purchase money by a person in possession of land under an agreement to purchase is a renewal of the tenancy at will, and the Statute of Limitations begins to run from such payment.—Entries in the handwriting of a deceased person in his books of account, made in the ordinary course of his business, are admissible under s. 38, c. 127, C. S. N. B. 1903, and the first entry being admitted to be a payment on account of a land purchase, the second was evidence of a payment on the same account on the 23rd of May, 1886.—Where an entry in the handwriting of a deceased person is *prima facie* against interest, it is admissible for all purposes, irrespective of its effect or value when received.—An oral admission by a person holding under an agreement to purchase, that he is holding as tenant at will to the vendor, will not prevent the statute running against such vendor.—As between the vendor and a vendee in possession under an agreement to purchase, the vendor is substantially a mortgagee entitled to the rights and privileges secured to a mortgagee under s. 30 of c. 139 of C. S. N. B. 1903, and is also as a mortgagee within

the exception provided by s. 8 of the statute, and the right of entry of the vendor and his representatives would not be extinguished for 20 years after the last payment of principal or interest. *Anderson v. Anderson*, 37 N. B. R. 432, 1 E. L. R. 443.

**7. Tax sale**—Purchase by owner—New root of title—Interruption of possession—Evidence of possession—Conflict. *Huricorth v. Clemmer*, 7 O. W. R. 345.

**8. Tenant at will**—*Devise for life to tenant upon condition*—Violation of condition.]—A testator, dying in 1873, devised land of which his brother had been in possession since 1848 to his (the testator's) son after the death of his brother, to whom he devised a life estate, "on condition that he neither sells nor rents the same without consent in writing of my son." The brother continued in possession, and on the 1st April, 1895, leased the land (without consent) for one year. The plaintiffs, claiming under the son, sought to recover possession from the devisee of the brother, by an action begun on the 29th May, 1905:—*Held*, that the brother, having openly set at naught the condition of the will, should not be presumed to have accepted the devise, and the Real Property Limitation Act was a bar to the action.—*See* *Semble*, upon the evidence, that the brother went into possession as tenant at will, and that the statute had run in his favour before the death of the testator.—Judgment of FALCONBRIDGE, C.J., affirmed. *Coburn v. Elliott*, 11 O. L. R. 395, 7 O. W. R. 13, 495.

**9. Title by possession**—Mother and children living together—Daughter claiming title—Landlord and tenant—Tenant disputing landlord's alleged possessory title. *Chisholm v. Norwood*, 2 E. L. R. 149.

**10. Title by possession to upper storey of building with outside landing and staircase**—Declaratory judgment—Refusal of—Injunction restraining defendants from interfering with possession of portion of building—Easement. *Iredale v. Loudon*, 8 O. W. R. 963.

See ASSESSMENT AND TAXES, 15—CROWN LANDS, 2—DEED, 7—DOWER, 1—FRAUDULENT CONVEYANCE, 8—MORTGAGE, 5, 11, 12—TRUSTS AND TRUSTEES, 2, 4—VENDOR AND PURCHASER, 1, 6.

## II. OTHER CLAIMS.

**1. Acknowledgment**—Payment of dividend by assignee—Interruption of

*prescription.*] — The payment of a dividend upon a debt by the curator to an assignment of property, does not interrupt prescription; in the present cause it was not even alleged that the defendant had interrupted the prescription or had renounced the benefit of it. *Desrosiers v. Burdon*, 7 Q. P. R. 395.

**2. Claim on promissory note—**Commencement of statutory period—Return of defendant from beyond seas—Amendment—Limitation Acts in force in Territories—Imperial Acts—Territorial Ordinance—Effect of. *Plano Manufacturing Co. v. Peterson* (N.W.T.), 3 W. L. R. 565.

**3. Money demand—**Payment on account by party chargeable—Application of proceeds of security.]—The plaintiff sued for the balance due upon two lien notes, which were more than six years overdue at the time of suit. He had retaken the goods for which the notes were given, and re-sold them, crediting the defendant with the proceeds of sale:—*Held*, not a payment by the party chargeable or his agent sufficient to take the case out of the Statute of Limitations. *Massey-Harris Co. v. Smith*, 6 Terr. L. R. 50.

**4. Railway—**Fire from engine—Destruction of property—"By reason of the railway"—Period of limitation—Statutes—Special Act—General Railway Act—Subsequent amendments—Application of. *Northern Counties Investment Trust Limited v. Canadian Pacific R. W. Co.* (B.C.). 4 W. L. R. 539.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, I. 3 — **CONTRACT**, VI. 5 — **COURTS**, IV., V. 4 — **EXECUTORS AND ADMINISTRATORS**, 14 — **GIFT**, 4, 6 — **INSURANCE**, II. 10 — **INTEREST**, 1 — **JUDGMENT**, II. 2 — **PENALTY**, 3 — **PLEADING**, VIII. 5, 18 — **RAILWAY**, VI. 1, VIII. 1, IX. 8, 10 — **SALE OF GOODS**, I. 11 — **STATUTES**, 4.

## LINE FENCE.

See **TRESPASS TO LAND**, 8.

## LIQUIDATED DAMAGES.

See **CONTRACT**, I. 3, II. 2 — **RESTRAINT OF TRADE—STREET RAILWAYS**, I. 4.

## LIQUIDATOR.

See **COMPANY**, III.—**PARTNERSHIP**, 13.

## LIQUOR LICENSES.

**1. New Brunswick Act—**Conviction—*Habeas corpus*—Discharge of prisoner by County Court Judge—No right of appeal by prosecutor to Supreme Court—Judge's duty on *habeas corpus* application to consider evidence—Contemporaneous convictions—Concurrent terms of imprisonment. *McCrea v. Watson*, 2 E. L. R. 170.

**2. New Brunswick Act—**Conviction—*Jurisdiction of magistrate—Informant in previous prosecution—Disqualification—Opponent of licenses—Imprisonment—Term of—Amendment—Discretion.*]—D., the defendant, was twice convicted for offences against the Liquor License Act. In the first case C. was the informant and prosecutor; in the second he was the convicting magistrate:—*Held*, that while the first case was pending before this Court on *certiorari* C. had no jurisdiction to try the information in the second case.—The convicting magistrate was not disqualified by reason of his having circulated and obtained signatures to a petition praying that no licenses be granted in the parish where the defendant lived, and in which he was the sole applicant for a license.—A conviction ordering the defendant to be imprisoned for sixty days in default of payment of a fine can not be supported under a section of the Act which authorizes imprisonment for not less than three months in case of such default.—*Semble*, the Court will not amend a conviction when by so doing it has to exercise a discretion confided to the justice. *Rea v. Charest, Ex p. Daigle*, 37 N. B. R. 492; *Rea v. Daigle*, 2 E. L. R. 12.

**3. New Brunswick Act—**Conviction for sale without license—Convicting magistrate also clerk of peace and clerk of County Court—Territorial jurisdiction—Form of conviction—Name and style of magistrate—Constitutionality of s. 62 of Liquor License Act. *Rea v. Morneault, Rea v. Tardiff*, 2 E. L. R. 17.

**4. New Brunswick Act—**Extension of license—Revocation of—Second extension—Power of commissioners—*Jurisdiction—Certiorari.*]—The license commissioners, under the Liquor License Act, C. S. N. B. 1903 c. 22, have no power to extend the duration of an existing license under s. 23 for a greater period than three months of the next ensuing license year, or to grant a second extension.—The power of revocation, under s. 31, extends to an extension of the original license by the commissioners under s. 23.—*Per* GREGORY, J., that s. 31 does not give the Judges therein named

power to revoke an extension of a license granted by the license commissioners under s. 23, but such power is limited to an original license, when proved to have been given contrary to the terms of the Act, or obtained by fraud. *Rex v. Wilkinson, Ex p. Cormier*, 37 N. B. R. 53.

**5. New Brunswick Act—License commissioners—Grant of license—Time—Special grounds—Revocation—County Court Judge.]**—At a meeting for that purpose, for which notice had been given, a tavern license was granted under the Liquor License Act by commissioners under the Act to one D. on the 8th August, 1904, for the year ending the 30th April, 1905, on a petition of D. dated the 2nd July, 1904, the chairman objecting on the ground that they had no authority to grant a license after the 1st May, except on special grounds, and that no such grounds were either stated in the petition or shewn at the time; on an application to a County Court Judge to revoke the license under s. 31, on these grounds, an order was made revoking the license, the Judge refusing to admit evidence tending to shew that special grounds for the granting of the license existed, and were acted upon by the commissioners, holding that he, and not the commissioners, is the authority who determines as to the sufficiency of the special grounds, and whether the grounds alleged are special grounds within the meaning of the Act; also, on the ground that the petition for a license subsequent to the 1st May should allege the special grounds upon which the application is based:—*Held*, on making absolute the order *nisi* to quash the order revoking the license, that the commissioners, and not the Judge, are to determine the sufficiency of the special grounds, and whether the grounds alleged are special; and that the petition need not allege the special grounds upon which the application is based.—*Per TUCK, C.J.*, dissenting, that the County Court Judge was right in revoking the license, no special grounds having been shewn.—*Per GREGORY, J.*, dissenting, that the order should be discharged because the Court has no jurisdiction to review an order made by a Judge acting under s. 31 of the Liquor License Act. *Rex v. Wilkinson, Ex p. Duquay*, 37 N. B. R. 90.

**6. New Brunswick Act—License commissioner—Issue of license contrary to law—Mens rea.]**—A member of a board of license commissioners who, with a knowledge of all the facts, issues a license contrary to the provisions of the Liquor License Act, C. S. N. B. 1903 c. 22, is guilty under s. 59 of "knowingly" issuing a license contrary to law, though there is no evidence of a corrupt

motive or criminal intent. *Rex v. Ritchie, Ex p. Blaine*, 37 N. B. R. 213.

**7. New Brunswick Act—Sale without license—"Place"—Livery stable—Servant of occupant.]**—A livery stable is a "place," within the meaning of s. 99 of the Liquor License Act, C. S. N. B. 1903 c. 22, in which a sale of intoxicating liquor by a person employed by the occupant may make the occupant liable to a penalty under the Act, though there be no proof that the offence was committed with his authority or by his direction. *Rex v. McQuarrie, Ex p. Rogers*, 37 N. B. R. 374; *Rex v. Rogers*, 1 E. L. R. 354.

**8. New Brunswick Act—Sale without license—Summons for day of month with inconsistent day of week—Date of alleged offence changed in accused's absence.** *Ex p. Tompkins*, 2 E. L. R. 1.

**9. Nova Scotia Act—Keeping for sale without license—Proof of—Search of premises—Evidence—Presumption—Rebuttal.]**—Upon appeal from an order of a County Court Judge affirming a conviction made by a stipendiary magistrate for keeping liquor for the purpose of sale, barter, and traffic therein, without the license therefor by law required, the evidence shewed that the defendant occupied a house in the town of Truro, opposite a building occupied by his son-in-law as an hotel where liquor was believed to be sold illegally. The defendant had previously occupied the hotel himself, and had been convicted of unlawful selling, and was believed to be selling in collusion with his son-in-law, to whom he had rented the premises, the liquor being kept on the defendant's premises and carried across the street to the hotel as required. On making a search of the defendant's premises, the inspector found a quantity of liquor concealed in a hole below the floor of a room occupied as a bed-room, and also in a valise in a wood shed, which was found to be locked at the time of the search, and which the defendant declined to open. In both places he found a large quantity of straw wrappers, such as are used for packing bottles, and in the wood house some empty liquor cases. There was also evidence that, as the inspector left, the defendant said there was a barrel that he had not got, though this remark was not heard by the inspector, and was denied by the defendant:—*Held*, that the evidence of search, coupled with the provisions of the Act R. S. N. S. 1900 c. 100, s. 165, s.-s. 2, was ample to justify the conviction unless displaced. That defendant had to overcome the presumption raised against him and to explain the circumstances to the satisfaction of the

Judge, and having failed to do so, the Judge could properly find as he did, and the Court would not disturb the conviction. *Rex v. McNutt*, 38 N. S. R. 339.

**10. Nova Scotia Act—Selling without license—Conviction—Defendant not appearing—Service of summons—Reasonable time to appear—Third offence.]**—Information was laid before the stipendiary magistrate for the town of Truro, charging the defendant with having sold liquor at retail without license, the defendant having been previously convicted of first and second offences of the same nature. A summons was issued on the 20th June, 1905, requiring the defendant to appear at the town court room at 10 o'clock on the following morning to answer the charge against him, and to be further dealt with. A copy of the summons was served by a constable on the defendant personally on the same day on which the summons was issued, and defendant, failing to appear, was convicted in his absence. The conviction was attacked on the ground that the defendant was not served until the night of the day on which the summons was issued, and that he had no time to consult counsel:—*Held*, that the question of the reasonableness of the service was one for the justice, under all the circumstances of the case, and that on the facts stated there was evidence to justify him in coming to the conclusion that a reasonable time had elapsed between the time of service and the time fixed for the trial, and in proceeding with the case in the defendant's absence.—*Per RUSSELL, J.*, that if the defendant required further time, it was his duty to have appeared, and to have made his application to the justice, and that it was not permissible for him to ignore the summons and afterwards ask the Court to quash the conviction. *Rex v. Craig*, 38 N. S. R. 345.

**11. Ontario Act—Dismissal of complaint by police magistrate—Right of appeal to County Court Judge.]**—The Liquor License Act, R. S. O. 1897 c. 245, provides by s. 118, s.-s. 6, that "an appeal shall lie to the Judge of the County Court of the county in which an order of dismissal is made . . . where the Attorney-General of the province so directs, in all cases in which an order has been made by a justice or justices dismissing an information or complaint laid by an inspector:—"*Held*, that the words "justice or justices" in this sub-section does not include a police magistrate. *Re Rex v. Smith*, 11 O. L. R. 279, 7 O. W. R. 40.

**12. Quebec Act—Conviction—Validity—Temperance Act, 1864—Concur-**

*rent statutes still operative.]*—The Temperance Act of 1864, commonly known as the Dunkin Act, has never been repealed, and is still in force. Its operation, however, is not incompatible with that of the Quebec License Act, 63 V. c. 12, and both statutes take effect concurrently. A conviction, therefore, under the latter for selling liquor without a license, in a municipality in which a by-law has been passed under the former, to prohibit the sale of intoxicating liquor, is valid, although the offence is also a breach of and punishable under the Temperance Act, 1864. *Ex p. O'Neill*, Q. R. 28 S. C. 304.

**13. Territories Ordinance—Information—Several offences—One conviction—Fines—Forfeiture—Hard labour—Certiorari—Return—Amended conviction—Minute of adjudication—Depositions—Costs.]**—The Liquor License Ordinance (C. O. 1898 c. 89, s. 102) expressly provides that several charges of contravention of the Ordinance committed by the same person may be included in one and the same information or complaint.—1. Where the magistrate adjudges the accused guilty upon each charge it is not necessary that separate convictions should be drawn up; and the fines may be imposed in and by one and the same conviction, which may also adjudge a forfeiture in respect of each offence.—2. Where on a summary conviction the magistrate imposes imprisonment at hard labour on default in paying the fine, upon a charge in respect of which the law does not authorize hard labour to be imposed, the magistrate may return to a certiorari an amended conviction omitting the unauthorized part of his adjudication, and the amended conviction will not be bad by reason of such variance from the original adjudication.—3. A conviction in due form will not be quashed because it is founded upon a minute of adjudication which does not disclose an offence in law, if the Court is satisfied upon perusal of the depositions that the offence for which the formal conviction was made was in fact committed.—4. Under Criminal Code, s. 889, the Court may adjudicate *de novo* on the evidence given before the magistrate in cases removed by certiorari; but the Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate.—5. Where a magistrate returns an amended conviction in certiorari proceedings, and the conviction is sustained only by reason of the amendment, costs of the certiorari proceedings should not be awarded against the applicant. *Regina v. Whiffin*, 3 Terr. L. R. 3.

**14. Territories Ordinance—Refusal by license commissioners of application**



for, wholesale license—Complaint — Procedure of commissioners — Adjournment — Fraud—Violation of provisions respecting licenses—Jurisdiction of Judge to hear complaint — Bond—Surety—Occupant of premises—Lessee. *Re Bell* (N.W.T.), 3 W. L. R. 489.

See CONSTITUTIONAL LAW, 3, 12 — CONTRACT, IV. 3, X. 13—JUSTICE OF THE PEACE, 2 — MUNICIPAL CORPORATIONS, VII. 4, IX.

### LITIGIOUS RIGHTS.

See CONTRACT, X. 7.

### LIVERY STABLE.

See NUISANCE, 3, 5.

### LOAN COMPANY.

See COMPANY, IV. 5.

### LOAN CORPORATIONS ACT.

See COMPANY, IV. 5.

### LOCAL IMPROVEMENTS.

See COSTS, IV. 4—MUNICIPAL CORPORATIONS, VIII.

### LOCAL JUDGE.

See RECEIVER, 1—REGISTRY LAWS, 1.

### LOCAL LEGISLATURE.

See CONSTITUTIONAL LAW.

### LOCAL MASTER.

See REFERENCE—REGISTRY LAWS, 7.

### LOCAL OPTION BY-LAWS.

See MUNICIPAL CORPORATIONS, IX.

### LORD CAMPBELL'S ACT.

See FATAL ACCIDENTS ACT—MASTER AND SERVANT, II.—RAILWAY, VIII.

### LOST INDICTMENT.

See CRIMINAL LAW, IV. 11.

### LOST PROPERTY.

See BAILMENT.

### LUNATIC.

1. *Curator*—Appointment of—Choice of person—Rights of mother—Prothonotary—Family council.]—Under art. 339, C. C., curators to the person are appointed with the formalities and according to the rules prescribed for the appointment of tutors. — Mothers and female ascendants are entitled during their widowhood to the curatorship of a child interdicted for insanity, when the father is dead, the child unmarried, and there is no valid reason against their appointment.—The nomination of a curator to an interdict, made upon the strength of a declaration by the prothonotary that his mother was not capable of being named his curatrix, is null and void.—A new family council, and not the Court, has the right to appoint a new curator. *Charbonneau v. Mercier*, 7 Q. P. R. 326.

2. *Magistrate's commitment of sane person as a lunatic*—Judicial proceeding — Subsequent discharge—Action for damages—Malicious prosecution — Failure to prove favourable termination.]—In an action for malicious prosecution against persons by whom proceedings had been taken under the Act respecting Public Lunatic Asylums, R. S. O. 1897 c. 317, for arrest and confinement of the plaintiff as insane and dangerous, before a justice, who committed him to gaol, from which he was afterwards taken to an asylum, and was discharged on the ground that he was not and never had been insane:—*Held*, that the inquiry before the justice was a judicial proceeding, and that it was essential to the plaintiff's success that he should allege and prove that the proceedings had terminated in his favour, which they had not done so long as the order of the justice stood, and this although the statute did not provide for setting aside the adjudication of the justice by way of appeal or otherwise. *Bush v. Park*, 12 O. L. R. 180, 8 O. W. R. 566.

**3. Moneys expended in maintenance of lunatic not so found**—Right to recover—Ability to contract—Necessaries—Evidence. *Prest v. Prest*, 8 O. W. R. 659.

**4. Petition for declaration of lunacy**—Service out of the jurisdiction—Dispensing with personal service—Jurisdiction of Master in Chambers.]—A petition for a declaration of lunacy may be served out of Ontario under 3 Edw. VII. c. 8, s. 13 (O.)—And where the supposed lunatic was confined in an asylum outside of Ontario, and an order was made by the Master in Chambers authorizing service there upon the supposed lunatic and the medical superintendent of the asylum, and the latter alone was served, because he was of opinion that service might dangerously excite the former, an order was made dispensing with personal service and confirming the service made.—*Quære*, as to the jurisdiction of the Master in Chambers, under Rule 42, to make an order for service out of the jurisdiction of such a petition. *Re Webb*, 12 O. L. R. 194, 7 O. W. R. 565.

**5. Repairs to estate**—Collection of rents—Agent.]—Committee of the estate of a lunatic empowered to make needed repairs to the estate and to employ an agent at a fixed salary to collect rents. *In re McGiverty*, 3 N. B. Eq. 327, 2 E. L. R. 19.

See ASSESSMENT AND TAXES, 21—WILL, III. 1, 3.

## MAGISTRATE.

See JUSTICE OF THE PEACE—POLICE MAGISTRATE.

## MAINTENANCE.

See CHAMPERTY AND MAINTENANCE—DEED, 11—DOWER, 2—LUNATIC, 3—PAUPER.

## MAINTENANCE OF HIGHWAY.

See WAY, V.

## MALICIOUS PROSECUTION AND ARREST.

**1. Arrest by person employed as watchman by and appointed con-**

**stable on recommendation of railway company**—Liability of railway company—Express or implied authority—Interference—Railway Act. *Thomas v. Canadian Pacific R. W. Co.*, *Bush v. Canadian Pacific R. W. Co.*, 8 O. W. R. 93.

**2. Commissioner under Collection Act**—Refusal to discharge debtor—Judicial act—Malice—Inference—Disqualification from interest.]—An action against a commissioner, acting under the provisions of the Collection Act, R. S. N. S. 1900 c. 182, to recover damages for the arrest, imprisonment, and detention of the plaintiff, was withdrawn from the jury by the trial Judge:—*Held*, that the case was properly withdrawn from the jury, there being no evidence of malice or from which malice could be inferred.—The refusal of the commissioner to discharge the plaintiff from custody under an order for his arrest, made on the ground that he was about to leave the country, is a judicial act, and a perfectly justifiable proceeding, and there is no inference of malice.—It does not take away jurisdiction, and make the matter null and void, that it is afterwards discovered that the commissioner is disqualified from interest, as having, as a solicitor, a claim for another person against the same debtor. *Campbell v. McKay*, 38 N. S. R. 333.

**3. Favourable termination of prosecution**—Pleading—Declaration—Discharge.]—In an action for malicious prosecution, a statement in the declaration that the plaintiff was discharged from custody under a habeas corpus order, whereby the prosecution was determined, is not a sufficient allegation of the determination of the prosecution, and is bad on demurrer. *McKinnon v. McLaughlin Carriage Co.*, 37 N. B. R. 3.

**4. Information**—Civil reparation—Procedure—Burden of proof—Reasonable and probable cause.]—A slanderous information is a civil tort, and an information *téméraire* is a quasi-tort. Both arise from the obligation of civil reparation provided by art. 1053, C. C., subject to the rules of law which are derived from that article.—The provision of art. 796, C. P. C., 1867, reproduced in art. 893 of the present code of civil procedure, that the remedy in damages therein mentioned is subject to proof of absence of probable cause, does not modify these rules and does not introduce the rules of the English law in this matter.—By the application of art. 1203, C. C., the plaintiff in an action for recovery of damages

for a slanderous information or an information *téméraire* must prove the existence of the tort or of the quasi-tort, that is to say, the falsity of the information, his arrest, his acquittal, and the damages which he has suffered. The burden is on the defendant to shew that he has laid the information in good faith and acted for sufficient reasons (with probable cause), and without neglect or imprudence. *Sharpe v. Willis*, Q. R. 29 S. C. 14.

**5. Proof of favourable termination of prosecution—Bill ignored by grand jury — Reasonable and probable cause—Damages.]**—There cannot be a record of proceedings between the King and an accused person in a criminal prosecution until at least a "true bill" has been found by the grand jury.—The production by the proper officer of a certified copy of the bill of indictment, returned "no bill," is sufficient in view of the provisions of the Evidence Act, R. S. B. C. 1897 c. 71.—Where the act in respect of which the criminal proceedings were launched was done in the light of day, in open view of the defendant, and in pursuance of a statutory right, the trial Judge was right in leaving it to the jury to say whether, in the circumstances, the defendant really thought the plaintiff was a thief.—Upon the question of damages, there was sufficient proof of costs incurred by defendant in defending himself upon the criminal charge when the plaintiff swore that he was indebted to his solicitor, and, producing the latter's bill of costs, said he did not dispute it.—Judgment of MORRISON, J., affirmed; IRVING, J., dissenting. *Tanghe v. Morgan*, 11 B. C. R. 455, 3 W. L. R. 146

**6. Reasonable and probable cause**—Question whether it exists not to be left to jury. *Meaney v. Reid*, 1 E. L. R. 109.

**7. Want of probable cause—Inference—Damages — General verdict—Count for false imprisonment.]**—In an action for malicious prosecution and false imprisonment, where the circumstances connected with the offence with which the plaintiff was charged in no way pointed to him as the guilty person, and the defendant interfered at the time of the arrest and failed to prosecute, want of probable cause may be inferred.—*Semble*, if the verdict is general, and all the damages might have been recovered on either count, the Court will not grant a new trial, but will, if necessary, direct the verdict to be entered on the count sustained by the evidence. *Savage v. Breton*, 37 N. B. R. 240.

See FALSE ARREST AND IMPRISONMENT—LUNATIC, 2—PLEADING, VIII. 15.

## MALPRACTICE.

See MEDICAL PRACTITIONER, 2, 3.

## MANDAMUS.

**1. Clerk of executive council — Election of member of Legislative Assembly—Jurisdiction of Court—Interference with jurisdiction of legislature.** *Re Dubuc* (N.W.T.), 3 W. L. R. 248.

**2. Interim order—Municipal corporation—Supply of light to building—Arrears due by previous occupant.** *Anderson v. Town of Wetaskiwin* (N.W.T.), 3 W. L. R. 251.

See MINES AND MINERALS, 7 — SCHOOLS, 4—WATER AND WATERCOURSES, 19—WAY, III. 1.

## MANDATE.

See ACCOUNT, 1—PRINCIPAL AND AGENT.

## MANITOBA GRAIN ACT.

See CRIMINAL LAW, III. 39.

## MARGINS.

See BROKER.

## MARITIME LAW.

See SHIP.

## MARITIME LIEN.

See SHIP, 20, 21.

## MARKETS.

See MUNICIPAL CORPORATIONS, VII. 6.

## MARRIAGE.

See EVIDENCE, II. 2, 4—HUSBAND AND WIFE—MASTER AND SERVANT, II. 9.



**MARRIED WOMAN.**

See COURTS, V. 1—HUSBAND AND WIFE  
—RECEIVER, 1.

**MASTER AND SERVANT.**

I. CONTRACT OF HIRING AND DISMISSAL OF SERVANT.

II. INJURY TO SERVANT BY NEGLIGENCE OF MASTER.

III. LIABILITY OF MASTER FOR ACTS OF SERVANT.

IV. MISCELLANEOUS.

See APPEAL, I. 2 — ARBITRATION AND AWARD, 4—CONSPIRACY, 2 — CONTRACT, IV. 5—COSTS, V. 24, VIII. 2—DISCOVERY, IV. 2—FATAL ACCIDENTS ACT—INFANT, 3 — LIQUOR LICENSES, 7—NEGLIGENCE, 17, 19, 21, 22, 25—PARTIES, I. 8, III. 7 — RAILWAY, VIII., X. 1 — STATUTES, 2.

I. CONTRACT OF HIRING AND DISMISSAL OF SERVANT.

1. **Breach** — Construction — Wages. *Johnston v. Mead* (Y.T.), 4 W. L. R. 192.

2. **Breach**—Wrongful dismissal—Attempted alteration in term—Justification for dismissal—Damages—Lack of promptitude in seeking other employment—Impossibility of performance of contract—Destruction of ship for which plaintiff's services were engaged. *Robertson v. Northern Navigation Co.*, 7 O. W. R. 476.

3. **Company** — Seizure by debenture holders — Operation of, as discharge of servant — Damages.]—The plaintiff was engaged as accountant of the defendant company in April, 1904. In the following August the debenture holders seized the property and put in charge a receiver and manager, to whom the plaintiff delivered the books of account, the plaintiff himself having actually made the seizure. He afterwards continued in the same position as before the seizure, but was paid by the receiver:—*Held*, that there had been an actual seizure known to the plaintiff, and, following *Reid v. Explosives Co.*, 19 Q. B. D. 264, that the appointment of a receiver and manager operated as a discharge of the servants of the company, and the plaintiff could not recover damages, as he was employed for some time at the same salary. *Rolfe v. Canadian Timber and Saw Mills Limited*, 12 B. C. R. 363.

4. **Contract to pay "while at work"**—Illness of servant — Notice of dismissal — Subsequent retraction — Quantum of damages. *Lloy v. Billman*, 1 E. L. R. 351.

5. **Covenant by servant not to enter into similar employment at termination of engagement**—Oppressive and void contract—Wrongful dismissal—Damages—Evidence —Admissibility. *Harvison v. Cornell*, 8 O. W. R. 697.

6. **Manager of mining company**—Salary—Contract — Quantum meruit—Expenditure by manager for work done for company — Settled account—Representation work—Purchase of properties—Authorization—Costs of action for libel brought against manager — Liability of company to pay—Scope of manager's authority—Office rent and expenses—Interest on overdraft at bank—Counterclaim —Refusal to carry out instructions—Negligence—Appropriating property of company. *Tyrrell v. Bonanza Creek Hydraulic Concession, Limited* (Y.T.), 4 W. L. R. 131.

7. **Monthly hiring** — Contingent yearly hiring—Dismissal—Notice — Reasonable time.] — The plaintiff was employed by the defendants as their manager, at a salary of \$200 per month, until a mill, which they were constructing, was completed and working, when he was to be engaged at a salary of \$2,500 per annum, payable monthly. He worked under the \$200 per month arrangement a certain time, and for a portion of a month after the mill had been completed, when he was dismissed without notice:—*Held*, that it is usually an implied term of hiring in similar cases that the service could be determined by a reasonable notice, and the jury here having fixed on three months, that was a reasonable notice in the circumstances. *Henderson v. Canadian Timber and Saw Mills Limited*, 12 B. C. R. 295.

8. **Wages** — Absence of agreement—Quantum meruit—Pleading—Parent and child — Right of parent to recover for wages of child—Infant over 16—Burden of proof. *Slater v. Tunnicliffe* (N.W.T.), 4 W. L. R. 120.

9. **Wages**—Findings of fact—Corroboration—Laches—Appeal.] — In an action to recover an amount alleged to be due the plaintiff for wages for services rendered to the defendant as his housekeeper, the trial Judge gave judgment in the defendant's favour, on the ground of conflict between the plaintiff and the defendant in their evidence as to the terms of the hiring, and that, on the whole, the

probabilities were with the defendant. The Court, on appeal, took a different view of the probabilities, but, in the absence of corroborative evidence, and the plaintiff's claim being a stale one, declined to review the finding of the trial Judge, and dismissed the appeal with costs. *Drake v. Duncan*, 39 N. S. R. 49, 1 E. L. R. 17.

**10. Wages** — Period of service—Domestic servant—Leaving without notice. *Manson v. McKen* (N.W.T.), 4 W. L. R. 545.

**11. Wrongful dismissal**—Justification—Incompetence — Misconduct—Disrespectful language—Provocation. *Williams v. Hammond* (Man.), 4 W. L. R. 208.

**12. Wrongful dismissal**—Want of efficiency not made out. *Parsons v. Chandler*, 1 E. L. R. 176.

See SHIP, 27.

## II. INJURY TO SERVANT BY NEGLIGENCE OF MASTER.

**1. Company** — Absence of personal negligence — Power appliances — Competent foreman — Damages—Workmen's Compensation Act. *Linden v. Trussed Concrete Steel Co.*, 7 O. W. R. 236, 613.

**2. Company** — *Explosion of boiler—Defective appliances—Reasonable care in selection—Incompetence of fellow servant — Knowledge of officers of company — Selection of competent officers—Liability at common law — Workmen's Compensation for Injuries Act — Damages.*—The plaintiffs were employed by the defendants, an incorporated company, in a rolling mill, and while so employed were injured by the explosion of a boiler. The immediate cause of the explosion was that the water in the boiler had been allowed to become too low owing to the valve which regulated the supply having been closed. It was the duty of the "water tender," who was killed by the explosion, to attend to the valve and see that a sufficient supply of water was maintained. The boiler was built by reputable makers, and there was nothing to shew that it was not originally built of good material or that it had become defective or worn out except as to the "pet-cock" at the foot of the glass gauge. In actions against the defendants at common law and under the Workmen's Compensation for Injuries Act to recover damages for the plaintiffs' injuries, four allegations of negligence were made: (1)

that the "water tender" was negligent and incompetent; (2) that the boiler was insufficient and dangerous by reason of the valve which regulated the water supply having been placed upon the vertical pipe or water column, instead of being lower down by itself upon a horizontal pipe through which the water passed on its way to the boiler; (3) that the boiler was also out of repair in that a brass pet-cock at the bottom of or connected with the glass indicator had become broken, and its place imperfectly supplied by a wooden plug; and (4) that the defendants failed in their duty to see that the boiler was kept supplied with water. The actions were tried by a jury, who answered a number of questions mainly in favour of the plaintiffs:—*Held*, that there was no evidence of negligence proper for the jury upon the question of the valve. The real question was, whether the defendants, in buying and using the boiler with the valve as it was, fell short of discharging the duty of exercising reasonable care, which was the limit of their obligation; and the undisputed evidence disclosed that such boilers with valves so arranged were in common use, and that the boiler in question was built by makers of good reputation and large experience.—2. There was evidence proper for the jury that the "water tender" was incompetent when employed and remained incompetent and negligent in the discharge of his duty, and that the defendants' officials had been amply warned thereof, and were negligent in retaining him. But, there being no finding and no evidence that these officials were themselves incompetent, their negligence in carrying on operations could not be imputed to the defendants. And this also applied to any right of action as at common law for failure to repair the pet-cock.—The law laid down in *Wilson v. Merry*, L. R. 1 Sc. App. 326, 332, is the law by which the Court is bound; although the rule laid down by the Supreme Court of the United States, that where the master only acts in the management of his business through vice-principals he will be liable for their negligence as for his own, is a more reasonable rule.—3. The failure to repair the pet-cock was negligence for which the defendants were answerable under the Workmen's Compensation for Injuries Act; it was a fair and reasonable inference from the evidence that with a pet-cock in proper order the real difficulty might have been at once discovered by its use, in time to avert the disaster; and the defect was well known to two of the defendants' officials for several weeks before the accident.—The plaintiffs were, therefore, confined to such damages as were recoverable under the statute.—Judg-

ment of *ANGLIN, J.*, varied. *Woods v. Toronto Bolt and Forging Co., Dunsford v. Toronto Bolt and Forging Co.*, 11 O. L. R. 216, 6 O. W. R. 637.

**3. Company—Foreman—Open hatch in vessel—Absence of lights—Evidence—Workmen's Compensation Act.** *Bassani v. Canadian Pacific R. W. Co.*, 7 O. W. R. 271.

**4. Danger—Order of foreman—Mine—Voluntary risk—Common fault.]—**An employer is responsible for an accident caused by the falling into a mining pit of a rock which has threatened to fall in for some time, and which the foreman had, foreseeing the danger, endeavoured to detach from the wall of the pit. There is no common fault on the part of a workman who, believing there is danger nevertheless descends, upon the order of the foreman and upon his affirmation that there is no danger, to work at the bottom of the pit. *Gauthier v. Wertheim*, Q. R. 28 S. C. 280.

**5. Dangerous machine—Absence of guard—Factories Act—Proximate cause of injury—Damages.** *McBain v. Waterloo Manufacturing Co.*, 8 O. W. R. 333.

**6. Dangerous work—Absence of inspection—Findings of jury—Common law liability—Joint tort-feasors—Death of one—Action against survivor and executors of deceased—Damages—Motion for new trial on affidavits—Charge of unprofessional conduct against solicitor—Affidavits—Contradiction.** *Casselman v. Barry*, 7 O. W. R. 328.

**7. Dangerous work—Proximate cause of injury—Findings of jury—Common law liability—Workmen's Compensation Act—Joint tort-feasors—Death of one—Action against survivor and executors of deceased—Excessive damages—New trial.** *Casselman v. Barry*, 8 O. W. R. 198.

**8. Dangerous work—Neglect to provide safeguards—Evidence for the jury—Excessive damages.]—**The plaintiff, employed as a workman in the defendants' foundry, was working within a few feet of another workman, who was chipping off the rough projections from a large cast iron cylinder, when he was struck in the eye by one of the flying chips so as to cause him to lose the sight of that eye. The evidence shewed that the work was dangerous to those in the immediate vicinity, and that the accident might have been avoided by the use of a screen, or by having the casting on a pivot, and having the chipping done in a direction away from the other workmen, or by having it

done in an open yard apart from the other employees:—*Held*, that there was evidence of negligence to submit to the jury.—*Held*, also, that a finding of \$2,000 damages was not under the circumstances excessive. *Allan v. Sawyer-Massey Co.*, 12 O. L. R. 282, 8 O. W. R. 269.

**9. Death—Action by widow under Fatal Accidents Ordinance—Proof of marriage—Negligence of master—Proximate cause of injury—Neglect of statutory duty—Negligence of fellow workmen.]—**In an action by the administratrix of the estate of D., who was killed in an explosion in the defendants' mine, brought under C. O. 1898 c. 48, there was evidence of the plaintiff that she was married to D. in Belgium, was living with him to time of death, and that he was the father of her children, oldest aged 17 years; that he was killed by explosion of gas in the defendants' mine in June, 1900; that ventilation was defective and not as required by s. 39, rule 1. of C. O. 1898 c. 16; that the mine was not inspected, as required by rule 3 of that section; that the mine was gaseous; that on the morning of the accident there was gas present in explosive quantities for two or three hours before the explosion; that the manager knew of the presence of gas; that two fellow workmen of deceased had opened their safety lamps; there was no evidence to rebut presumption of marriage, and no evidence of inspection of the lamps, as required by rule 8 of s. 39 above, or that the explosion arose from any act or default of deceased:—*Held*, per *McGUIRE*, C.J., at the trial, that the oral evidence of the widow was sufficient proof of marriage, according to the general rule that cohabitation and reputation is sufficient evidence of marriage, though in cases of bigamy and divorce, and petitions for damages for adultery, stricter proof is required.—(2) That the effective and proximate cause of death having been found to be an explosion due to the fault and negligence of the defendants and their breach of the duty imposed by Ordinance C. O. 1898 c. 16, they were not relieved if there was contributory negligence on the part of a fellow workman of the deceased or of a mere stranger.—(3) That by reason of Ordinance c. 13 of 1900, if negligence was proved, there was no reason to inquire whether it was that of a fellow workman.—*Held*, by the Court *en banc*, that marriage was sufficiently established by the plaintiff's evidence; that strict proof was not required; that the fact that the alleged marriage took place in a foreign country did not affect the question, as the *lex fori* governs questions of proof.—(2) That there was sufficient evidence to support the findings of the trial Judge, and

the findings were sufficient to render the defendants liable. *Daye v. H. W. McNeill Co.*, 6 Terr. L. R. 23.

**10. Death**—Action under Fatal Accidents Act—Action maintainable although deceased an alien and action brought for benefit of aliens resident abroad. *Gyorgy v. Dawson*, 8 O. W. R. 784.

**11. Death**—Negligence—Common law liability—Workmen's Compensation Act—Defect in engine—Repair—Inspection—Reasonable care—Person intrusted with duty of providing proper appliances—Findings of jury—Interpretation of—Refusal to grant new trial. *Schwob v. Michigan Central R. R. Co.*, 8 O. W. R. 710.

**12. Death**—Negligence—Destruction of vessel by fire—Warning—Watchman—Common employment—Findings of jury—Absence of evidence to sustain—Nonsuit. *Finch v. Northern Navigation Co.*, 8 O. W. R. 412.

**13. Death**—Workmen's Compensation Act—Application by parents for compensation—Arbitration—"Dependents"—Jurisdiction of County Court—Lord Campbell's Act—Aliens.]—Section 8 of the second schedule to the Workmen's Compensation Act, 1902, provides for the recording of any award of compensation, or of any matter decided under the Act, in the County Court for the district in which any person entitled to such compensation resides:—*Held*, on the facts, that the applicants had not proved that they were dependents of the deceased.—*Semble*, however, that the principle governing Lord Campbell's Act governs the Workmen's Compensation Act, viz., given the wrongful act in respect of which the deceased, had he lived, would have had a right of action, the statute intends, in case of death, to make the wrongdoer liable in damages to those who, irrespective of race or residence, stood to the deceased in any of the relationships mentioned in the Act. *Varesick v. British Columbia Copper Co.*, 12 B. C. R. 286, 5 W. L. R. 56.

**14. Defect in machine**—Contractor—Sub-contractor—Owner—Superintendence—Common fault—Liability.]—Where an injury to a workman caused by the use of a defective machine, happens in the course of work done under contract, with a sub-letting of the hand work and machine work, and executed under the direction of a servant of the owner, there is a common fault of the owner, the contractor, and the sub-contractor, which makes them severally responsible. *Dominion Iron and Steel Co. v. Cook*, Q. R. 14 K. B. 563.

**15. Defect in machine**—Findings of jury. *Connell v. Ontario Lantern and Lamp Co.*, 7 O. W. R. 77.

**16. Defect in machine**—Findings of jury—Particulars—Damages. *McCarthy v. Kilgour*, 7 O. W. R. 44, 8 O. W. R. 515.

**17. Defective apparatus**—Death of servant—Action by widow and children.]—The use of a wooden beam as part of the operating plant of a brewery, which gave way owing to dry rot and fell upon a man employed in the brewery and killed him, was held to be such negligence as made the employer liable in an action by the widow and children of the man who was killed. *Demers v. Montreal Brewing Co.*, Q. R. 28 S. C. 35.

**18. Defective condition of machine**—Findings of jury. *Connell v. Ontario Lantern and Lamp Co.*, 8 O. W. R. 201.

**19. Defective scaffolding**—Liability at common law—Workmen's Compensation Act—Want of inspection. *Keller v. John Inglis Co.*, 8 O. W. R. 170.

**20. Defects in machinery**—Contributory negligence—Volenti non fit injuria. *Short v. Canadian Pacific R. W. Co. (N. W.T.)*, 3 W. L. R. 326.

**21. Duty to servant**—Defective appliances—New trial. *Uylaki v. Dawson, Gyorgy v. Dawson*, 7 O. W. R. 300.

**22. Electrical appliances**—Intermittent danger—Duty to give warning—Notice—Burden of proof.]—A master who makes an intermittent use of electrical appliances, dangerous when charged with electricity, and necessarily placed within reach of his workmen, is under obligation to cause them to be warned on every occasion upon which the current of electricity is turned on, and in default is responsible for injuries which may occur from contact with the appliances.—The burden of proof that a sufficient notice to employees has been given is upon the master. *Shawinigan Carbide Co. v. Saint-Onge*, Q. R. 15 K. B. 5. (See post 27.)

**23. Elevator**—Defective appliances—Inspection—Duty of tenant—Findings of jury—New trial. *Talbot v. Hall, Delaire v. Hall*, 7 O. W. R. 187.

**24. Evidence**—Long continued user.]—The fact that for many years an operation has been carried on in the same way and with the same appliances without an accident, while strong evidence in the mas-



ter's favour, is not conclusive, and if there is evidence that the system is defective the case must be submitted to the jury. Judgment of a Divisional Court affirmed, OSLER, J.A., dissenting. *Commarford v. Empire Limestone Co.*, 11 O. L. R. 119, 6 O. W. R. 1018.

**25. Factories Act—Dangerous machine—Want of guard—Notice—Negligence—Liability.**]—The neglect of the owner of a factory to furnish a dangerous machine with a guard as prescribed by the regulations made in virtue of art. 3022, R. S. Q., especially after notice to conform thereto given by an inspector of factories, is a fault which makes him responsible for accidents which result from the want of a guard. *Bélanger v. Desjardins Co.*, Q. R. 29 S. C. 1.

**26. Impairing fitness of servant to do work—Injury resulting from—Infant—Claim of parent for expenses and loss of time.**]—An employer who keeps his servant continuously at work for an undue number of hours, makes himself liable for the result in damages of an accident to such servant in the ordinary discharge of his duty, caused by his inability from fatigue to use the skill and care required.—2. The father of the servant under age, in the above circumstances, has a right of action against the employer to recover his expense and loss of time in caring for his son, and for the medical attendance for which he has made himself responsible, but not for loss resulting from the diminished earning capacity of his son in the future. *Great Northern R. W. Co. v. Couture*, Q. R. 14 K. B. 316.

**27. Necessary protection—Burden of proof—Voluntary exposure to danger.**]—Judgment of the Court of King's Bench, Quebec, Q. R. 15 K. B. 5, affirmed. *Shawinigan Carbide Co. v. St. Onge*, 31 S. C. R. 688.

**28. Quebec Industrial Establishment Act—Regulations—Failure to comply with—Factory—Dangerous machinery.**]—Failure by the owner of an industrial establishment to comply with the regulations made by the Lieutenant-Governor in council, under the authority of the Quebec Industrial Establishment Act, 1894, is a fault which makes him liable for injuries to an employee caused thereby.—Independently of such regulations, when machinery, including a revolving shaft, is used in a factory where the employees are exposed to contact with it, ordinary prudence requires that, after a stoppage, the putting of it in motion again should be signalled, and the omission to do so is a fault that makes the employer liable for an injury caused

thereby.—In like manner, to allow girls and women in the factory to wear their hair loose and flowing on their backs, so that it can be caught in the machinery, is a fault that makes their employer liable for injuries caused thereby.—It is not enough that rules and regulations for the prevention of accidents be posted in factories; they must further be drawn to the attention of the employees. *Caron v. Standard Shirt Co.*, Q. R. 28 S. C. 211.

**29. Railway—Unpacked frog—Construction work—Horse tramway—Subcontractors—Independent contractor—Employment of workmen—Liability of principal contractor—Damages—Workmen's Compensation Act.** *Amendola v. Doheny*, 7 O. W. R. 32.

**30. Superintendent of works—Workmen's Compensation Act—Place of danger—Warning—Findings of jury.** *Higgins v. Hamilton Electric Light and Cataract Power Co.*, 7 O. W. R. 505.

**31. Workmen's Compensation Act—Notice of accident—Reasonable excuse for failure to give—Release of cause of action—Inadequacy of payment—Surrounding circumstances—Invalidity.** *Smith v. McIntosh*, 8 O. W. R. 472.

**32. Workmen's Compensation Act—Superintendence—Negligence—Damages.**]—The infant plaintiff, a lad of 18, was engaged with two men in riveting the plates of a boiler. It was the duty of one of the three to heat the rivets, of the second to place them in position, and of the third to fasten them by means of a hydraulic hammer, which he put in operation by a lever. This man directed the infant plaintiff to go inside the boiler to hold back a loose stay which was coming in the way of the rivets, and the infant plaintiff while in the boiler was injured:—*Held*, affirming the decision of a Divisional Court, 11 O. L. R. 124, 6 O. W. R. 962, that the man who was using the hydraulic hammer was in effect necessarily intrusted with the superintendence of the whole operation, that to his orders the infant plaintiff was bound to conform, and that the accident having happened, as was found, owing to this man's negligence, the infant plaintiff was entitled to damages.—*Held*, however, that the damages must be reduced by the \$400 which the jury evidently intended for the adult plaintiff, as there was no evidence to support the verdict in this respect. *Shea v. John Inglis Co., Limited*, 12 O. L. R. 80, 8 O. W. R. 208.

**33. Workmen's Compensation Act—Injury caused "solely" by servant's "serious neglect."**]—An application by

the parents of a brakesman who was killed in the service of the defendants, under s.-s. 4 of s. 2 of the Workmen's Compensation Act, to recover compensation for his death, was refused because the evidence shewed the injury to the deceased to have been caused "solely by his serious neglect." Misconduct is not "serious" merely because the actual consequences in the particular case are serious; the misconduct must be serious in itself. Any neglect is "serious neglect" within the meaning of the Act which, in the view of reasonable persons in a position to judge, exposes anybody, including the person guilty of it, to the risk of serious injury. If the danger to be apprehended is a danger of serious injury, or if the injury to be feared is of such a character that it may be described as serious, then the case is within the language of the Act. *Hill v. Granby Consolidated Mines Limited*, 12 B. C. R. 118, 4 W. L. R. 104.

### III. LIABILITY OF MASTER FOR ACTS OF SERVANT.

**Injury to third person by negligence of servant** — *Responsibility of master—Servant departing from course of employment.*—The driver of the defendants' ice-waggon, after delivering their ice along his prescribed route, instead of returning to the company's barns, got drunk, and some hours after he was due to return, and while driving out of his homeward course, ran over the plaintiff, causing injury:—Held, that the defendants were not liable, as the driver was not acting in the course of his employment at the time of the accident. *Wills v. Belle Ewart Ice Co.*, 12 O. L. R. 526, 8 O. W. R. 331.

### IV. MISCELLANEOUS.

**1. Masters and Servants Ordinance** — Non-payment of wages—Complaint heard by magistrate—Failure to establish relationship. *Rex v. Pinkiert* (Y.T.), 3 W. L. R. 88.

**2. Servant taking contract for his own benefit.** *Warren Bitulithic Paving Co. v. Lowe*, 1 E. L. R. 114.

### MASTER IN CHAMBERS.

See COSTS, VI. 2 — DISCOVERY, I. 8 — LUNATIC, 4.

### MASTER'S OFFICE.

See EVIDENCE, III. 4, 5—MORTGAGE, 18.

### MEASUREMENTS.

See SALE OF GOODS—TIMBER.

### MECHANICS' LIENS.

**1. Action by sub-contractor against contractor—Parties—Former owner.**—A., an owner of property, who has employed a contractor to build a house for him, and, before the filing of a lien under the Mechanics' and Wage Earners' Lien Act by a sub-contractor for his claim against the contractor, has sold and conveyed all his interest in the land to a purchaser, is neither a necessary nor a proper party to the action afterwards commenced to realize the lien, as the plaintiff could not have any relief against him. Although the plaintiff's claim would be limited to the amount due by A. to the contractor, and he would have to prove what that indebtedness was, yet that would not justify making A. a party, as the plaintiff could prove that indebtedness at the trial or on a reference to the Master without having A. before the Court. *Christie v. McKay*, 15 Man. L. R. 612, 2 W. L. R. 303.

**2. Action to enforce lien—Pleading—Defence—Time for filing lien—Time for instituting proceedings—Costs.** *Imperial Elevator Co. v. Welch* (Man.), 4 W. L. R. 51.

**3. Lien of material man—Right to maintain claim as against owner—Payment—Waiver of lien — Acceptance of promissory note—Agreement not to file lien.** *John Arbuthnot Co. v. Winnipeg Manufacturing Co.* (Man.), 4 W. L. R. 48.

**4. Lien of sub-contractor — Oral agreement by owner with sub-contractor—Work done on faith of agreement—Personal judgment against owner.** *Waddell v. White* (Man.), 4 W. L. R. 562.

**5. Material supplied—Request, privity or consent or credit of owner—R. S. O. 1897 c. 153, s. 2, s.-s. 3, and s. 4.**—Under the Mechanics' Lien Act, in order to create a lien on the property of the owner in favour of the material man, there must in all cases be a request of the owner and the furnishing of the materials in pursuance of that request, either upon the owner's credit or on his

behalf or with his privity or consent or for his direct benefit. In the circumstances of this case, it was held that the person who had furnished the materials had a direct lien upon the land as against the owner, and not a sub-lien upon the moneys owing by the owner to the contractor or upon the statutory drawback. *Graham v. Williams*, 8 O. R. 478, 9 O. R. 458, *Blight v. Ray*, 25 O. R. 415, *Gearing v. Robinson*, 25 A. R. 364, considered. *Slattery v. Lillis*, 10 O. L. R. 697, 6 O. W. R. 543.

**6. Material supplied to contractor**—Discharge of contractor by owner—Return to work—Acquiescence—Right of material men to lien—Waiver by accepting and discounting promissory notes and appropriating proceeds—Account—Debits and credits—Defence—Admission—Judgment—Costs. *National Supply Co. v. Horrobin* (Man.), 4 W. L. R. 570.

**7. Misdescription of land**—Right to amend lien—Interest of timber licensee.]—Where the land sought to be charged by lien is misdescribed in the lien affidavits, the Court will not give leave to amend by correcting the description, as that would in effect be creating a lien, and the statute provides a specific mode for creating a lien.—Section 54 of the Land Act, which vests in the holder of a special timber license all rights of property in all trees, timber, and lumber cut within the limits of the license during the term thereof, does not give any estate in the land itself chargeable under the Mechanics' Lien Act. *Rafuse v. Hunter*, *MacDonald v. Hunter*, 12 B. C. R. 126, 3 W. L. R. 381.

**8. Payments by owner to workmen**—Deduction from percentage to be retained by owner. *McArthur v. Martinson* (Man.), 3 W. L. R. 2.

**9. Rights to lien**—Work or material supplied to sub-contractors—Arts. 2013 et seq., C. C.]—The privilege or lien provided by arts. 2013 et seq., C. C., is for the benefit only of workmen, etc., who bargain with the owner or the contractors with whom the owner has contracted; those who do work or furnish materials for sub-contractors who have not contracted with the owner, and are therefore unknown to him, cannot have the benefit of the privilege. *Fréchette v. Ouimet*, Q. R. 28 S. C. 4.

**10. Statement of claim**—Amendment—Time—Judgment. *Nelson v. Brewster* (N.W.T.), 3 W. L. R. 362.

**11. Time for registration**—Completion of work—Extent of lien. *Day v. Crown Grain Co. and Cleveland* (Man.), 3 W. L. R. 545.

**12. Time for registration**—Completion of work—Principal and agent—Authority of agent—Limitation—Estoppel—Judgment in personam—Finding of fact—Review by appellate court.]—Whether material is supplied in good faith for the purpose of completing a contract, or as a pretext to revive a right to file a lien, is a question of fact for the trial Judge, and his decision on such fact should govern.—Where an agent is vested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third parties having dealings with the agent. In the absence of such notice, the principal is estopped from setting up the limitation as against a third party acting *bona fide*.—Whether authority has been conferred on an agent is a question of fact, which may be proved by shewing that it was expressly given; or the acts of recognition by the principal may be such that the authority may be inferred.—When the relationship of debtor and creditor is established on the hearing of a claim for a mechanic's lien, the jurisdiction of the County Court Judge to give a judgment *in personam* arises under s. 23 of the Mechanics' Lien Act Amendment Act, 1900.—*Per DUFF, J.*:—A finding of fact, based entirely upon the inference which the trial Judge has drawn from the evidence before him, may be freely reviewed by the Court of Appeal. *Hood v. Eden*, 36 S. C. R. 476, at p. 483, referred to.—A principal who, knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their position on the faith of the existence in fact of the pretended authority, cannot afterwards, against such third persons, dispute its existence. *Sayward v. Dunsmuir*, 11 B. C. R. 375, 2 W. L. R. 319.

**13. Time for registration**—Completion of work—Satisfaction of architects—Work done after registration of lien.]—Under a contract made with a railway company for the erection of a building, the work was to be done to the entire satisfaction of certain architects. The plaintiffs, who were sub-contractors for a part of the building, ceased work on the 20th May, under the belief that their contract was completed, and their secretary-treasurer, on the 8th June, made an affidavit stating such to be the fact, with a view of having a lien registered, which was done on the 24th June. The architects, however, were not satisfied, and required further work to be done, and this was accordingly done in June, and again in August, and it was not until the 4th August that the archi-

fects were satisfied and accepted the work:—*Held*, that under the contract the architects being the persons to determine when the work was completed, it was not so completed until they had signified their approval, and therefore the lien was registered in time. *Vokes Hardware Co. v. Grand Trunk R. W. Co.*, 12 O. L. R. 344, 7 O. W. R. 537, 8 O. W. R. 24.

**14. Time for registration**—Time when last work done and last materials supplied—Trivial but not merely colourable work—*Bona fides* — Complete contract — Separate contracts. *Steinman v. Kosciuk* (Man.), 4 W. L. R. 514.

**15. Workman—Liability of owner**—*Failure to retain percentage—Pay list—Builders' and Workmen's Act (Man.)*—“*Claim*” under §20.]—1. A workman under a contractor engaged in the repair of a building for the owner is entitled, under ss. 9 and 12 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, to a lien on the building for his unpaid wages, to the extent of the 20 per cent of the payments made that the owner should have held back from the contractor but did not. *Carroll v. McVicar*, 15 Man. L. R. 379, followed.—2. A workman who has brought his action under the above Act, can not in that action avail himself of the personal remedy given by the Builders' and Workmen's Act, R. S. M. 1902 c. 14, against the proprietor, for the full amount of his claim in cases where a pay list is not kept, and the proprietor neglects to see that the workmen are paid.—3. The word “claim” in the second paragraph of s. 4 of the first named Act, providing that no lien shall exist under the Act for any *claim* under §20, means the amount actually due to the claimant under his contract or employment, and not the amount to which his right or remedy against the land may on inquiry be found to be limited. *Phe-lan v. Franklin*, 15 Man. L. R. 520, 2 W. L. R. 29.

See RAILWAY, X. 3—STAY OF PROCEEDINGS, 3—WRIT OF SUMMONS, 6.

## MEDICAL ACT.

See STATUTES, 3.

## MEDICAL PRACTITIONER.

**1. College of Physicians and Surgeons of Ontario**—Erasure of name from register — Ontario Medical Act —

“Infamous and disgraceful conduct in a professional respect”—Advertising remedy for disease—Secrecy as to preparation of remedy—Misleading or defrauding public — Inquiry by committee of medical council — Adoption of report—Change—Refusal of particulars—Change in nature of alleged offence—Mistrial—Appeal. *Re Crichton*, 8 O. W. R. 841.

**2. Malpractice—Negligence** — Failure to detect dislocation. *Stamper v. Rhindress*, 2 E. L. R. 186.

**3. Malpractice—Trial without jury—Negligence—Evidence—Costs.**] — It is now the general rule, as recognized in *Town v. Archer*, 4 O. L. R. 383, that actions against physicians or surgeons for malpractice, where the facts are not so much in dispute as the deductions of skilled witnesses upon the method of treatment disclosed, shall be tried without a jury.—The negligence complained of in this case was in setting and treating a fracture of the plaintiff's leg, the result being a shortened leg and a slightly everted foot:—*Held*, that this result could not be invoked as sufficient evidence of negligence, on the doctrine of *res ipsa loquitur*; and that the defendant's treatment was not to be condemned because somebody else of perhaps equal skill would have pursued another course; and there being no lack of care and attention on the defendant's part, and the evidence not disclosing any piece of negligence or ignorance which could be classed under the head of malpractice, the action was dismissed.—Upon consideration of a number of circumstances, one of them being that the action was defended by a medical protection society, the plaintiff was relieved from payment of the costs of the defence upon condition of the proper fees of the defendant for his treatment being paid. *Hodgins v. Banting*, 12 O. L. R. 117, 7 O. W. R. 707.

**4. Physicians and surgeons—Expulsion of registered member of college—Unprofessional conduct—Evidence—Appeal—Costs.**] — A young unmarried woman, being pregnant, having to the knowledge of T. endeavoured to effect a miscarriage, asked him to perform on her a criminal operation for abortion. T., supposing that it might be necessary to expel the contents of her uterus owing to the patient's condition arising from these unsuccessful attempts, inflicted a wound on her body with the object of enabling him and his patient the more effectually and easily to deceive her parents and others with respect to her real condition, by causing them to believe that she had been operated upon for appendicitis. This was done in a private sani-



tarium, under T.'s exclusive control, and without professional or other consultation. T. informed her father (whom she resided with and was dependent upon) in answer to inquiries as to his daughter's condition, that she was suffering from appendicitis. The incision made by T. could serve no purpose relating to the health of the patient. The woman died from the effects of attempts at abortion. T. was afterwards prosecuted on a charge of manslaughter, but was acquitted. The medical council, however, after a formal inquiry by a committee of council, resolved to erase his name from the register of medical practitioners. From this decision he appealed to a Judge of the Supreme Court: — *Held*, reversing the decision of MORRISON, J., that T. was guilty of unprofessional conduct, and that the order of the medical council, erasing his name from the register, should be restored. — *Held*, as to costs, that, the proceedings being in substance *ad vindicatam publicam*, in the absence of express enactment, the legislature did not intend to confer the power to award costs. *In re Telford*, 11 B. C. R. 355. 2 W. L. R. 405.

See EXECUTORS AND ADMINISTRATORS, 4—PAUPER, 2—STATUTES, 3.

## MEETINGS.

See COMPANY,

## MERCHANT SHIPPING ACT.

See SHIP, 26.

## MERGER.

See MORTGAGE, 5—WAY, VI. 1.

## MESNE PROFITS.

See EJECTMENT, 3—TRESPASS TO LAND, 4.

## MILEAGE PAYMENTS.

See STREET RAILWAYS, I. 1.

## MILITARY RESERVE.

See CONSTITUTIONAL LAW, 7.

## MINES AND MINERALS.

**1. Adverse action—Failure of plaintiff to prove claim—Inquiring into title of defendants — Jurisdiction — Mineral Act Amendment Act, 1898. s. 11—Admissions — Finding of trial Judge—Credibility of witnesses — Appeal—Fraud—Abuse of process of Court.]** — At the commencement of the trial of an action brought to enforce an adverse claim under the provisions of s. 37 of the Mineral Act, the plaintiff, claiming in respect of two mineral claims, admitted inability to support the allegation that the boundaries of such claims embraced any part of the area within the limits of the claim sought to be adversely, and could not pretend to claim any right to any part of the land or minerals within the limits of such claim. The trial Judge proceeded to hear evidence as to the defendants' right to the ground, under the provisions of s. 11 of the Mineral Act Amendment Act, 1898, c. 33, and dismissed the action, but found that the defendants had not affirmatively proved their title to the adverse claim. Counsel for the defendants did not on this admission move for dismissal:—*Held*, that, as soon as this admission was made by the plaintiff, it was open to the defendants to move for dismissal, for the reason that there was no ground in controversy within the meaning of s. 11, and that they were not bound in the circumstances to bring forward their title for investigation. That s. 11 was designed, where there is a real controversy within the meaning of s. 37 of the Mineral Act, to get rid of the rule theretofore acted upon that the plaintiff must succeed on the strength of his own title, and that the defendant might rely on the weakness of his adversary's title; and to substitute as a new rule for determining the title to mining claims that each party is to bring forward the evidence of his own title, thereby putting both parties on an equality as regards the onus of proof. The section presupposes a real controversy, a genuine *lis*, and not a challenge by a party who comes into Court and admits no title in himself.—*Per DUFF, J.*:—On an appeal from a judgment by a trial Judge, sitting alone, the hearing of the appeal is a re-hearing of the cause; and where, giving to the views of the trial Judge as to the credibility of particular witnesses the weight which is justly due to such views, the Court of Appeal cannot reconcile his decision with the inferences to be drawn from admitted facts, or from facts proved by credible witnesses or documents, that Court should not generally regard itself as bound by his conclusions. —*Scmble*, the Court will not allow itself, by means of sham pro-

ceedings, to be made an instrument to effectuate a fraudulent design. *Voigt v. Groves*, 12 B. C. R. 170, 3 W. L. R. 428.

**2. Adverse claim—Death of locator—Official administrator—Performance of miner's duties—Crown—Irregularity of record—Curative effect of certificate of work—Mineral Act—Validity of location.]**—The official administrator administering the estate of a free miner dying intestate is a statutory officer simply, and his interest in or possession of a mineral claim in such capacity cannot be regarded as an interest or possession of the Crown.—The official administrator, not having maintained the assessment work on a mineral claim, the ground was re-located and recorded by another person under the name of the Parkside mineral claim, and assessment work done on it. The original claim, known as the "June," was, subsequently to such re-location, sold by the official administrator to the plaintiff, who performed and recorded the annual assessment work:—*Held*, in an action brought to adverse an application for a certificate of improvements to the Parkside claim, that the June claim had lapsed, and that the ground was open to location under the Mineral Act.—*Seemle*, that s. 5 of the Mineral Act Amendment Act, 1898, does not affect the decision in *Peters v. Sampson*, 6 B. C. R. 405.—Where, before the issue of a certificate of work, a third interest intervenes to the area in question, s. 28 of the Mineral Act does not apply.—In his declaration the locator of the Parkside did not set forth all the words which were put upon the initial post at the time of location:—*Held*, upon the evidence, applying the curative force of s.s. (g) of s. 16 (as enacted by s. 4 of c. 33, 1898), that the defect complained of was not a substantial non-compliance with the provisions of s. 16; and that the rule to be followed in such cases is that the words on the initial post shall be quoted in the affidavit with sufficient accuracy to enable the identification of the record as the record of the particular location to which it refers, and to prevent fraudulent substitution of other language for the language placed upon the posts at the time of location. *Windsor v. Copp*, 12 B. C. R. 213, 3 W. L. R. 294.

**3. Boundaries of mining claims on creek—Plan of survey—Amendment—Original survey—Evidence.** *Syndicat Lyonnais du Klondike v. McDonald* (Y. T.), 4 W. L. R. 189.

**4. Coal Mines Act, B.C.—Prospecting licenses—Leases—Issue of more than one license for the same area—Powers of**

**chief commissioner—Lieutenant-Governor in council—"Claim."]**—The legislature has not, by s. 12 of the Coal Mines Act authorized the establishment of any regulations, conditions, or restrictions depriving a license granted pursuant to ss. 2 and 3 of its characteristic of exclusiveness over the area to which such license applies. The chief commissioner cannot modify the conditions precedent prescribed by ss. 2 and 3.—In performing their functions under the statute, the chief commissioner and the assistant commissioner do not act as agents of the Crown, but as mandataries of the statute.—Section 12 does not contemplate the granting of licenses by the Lieutenant-Governor in council; it contemplates the application to and the granting of a license by the chief commissioner under ss. 2 and 3.—The powers of the Lieutenant-Governor in council do not extend to the prohibition of the grant of licenses over reserved lands. impose conditions or restrictions, does not import a grant of the power to prohibit.—*Per IRVING, J.*:—Section 9 of the Coal Mines Act is limited to disputes between adverse claimants in respect of (1) the right or title to a license acquired or sought to be acquired; or (2) in respect of right or title to any claim acquired or sought to be acquired under the Act.—*Seemle*, the word "claim" stands for "area of land," and is equally applicable to the area of land included in a license as it is to that included in a lease. *Baker v. Smart, Leckie v. Watt*, 12 B. C. R. 129, 3 W. L. R. 497, 505.

**5. Coal Mines Regulation Act—Election of check weighman—Mode of making up list of voters—Acquiescence—Quo warranto** *In re McBain*, 2 E. L. R. 160.

**6. Mineral claim—Invalidity—Imperfections in staking—Mineral Act.** *Pine Creek v. Pearse* (B.C.), 3 W. L. R. 425.

**7. Ontario Mines Act, 1906—Claims for mining locations—Duty of mining recorder to record—Applications for mandamus—Ministerial act—Result of failure to record—Rights of applicants—Previous adverse claims undisposed of—Bar to recording fresh claims—Affidavit—Form—Appeal to mining commissioner—Judicial functions of recorder—Concurrent jurisdiction of mining commissioner to grant mandamus—Powers of High Court—Merits—Discretion—Intituling proceedings in Court—Costs.** *Munro v. Smith, Mackie v. Smith, Richardson v. Smith*, 8 O. W. R. 452.

**8. Petition to cancel water record**—*Water Clauses Consolidation Act, s. 36*—*Re-trial*—*Viva voce examination of witnesses*—*Change of venue*—*Proper registry*—*Forum*.]—The right of appeal upon petition to cancel a water record under s. 36 of the Water Clauses Consolidation Act is in effect a right to a re-trial before a Judge of the County Court or a Judge of the Supreme Court; and the appropriate method of dealing with questions of fact on that appeal is by examination and cross-examination of witnesses *viva voce*. *Ross v. Thompson*, 10 B. C. R. 177, followed.—There is jurisdiction to change the place of hearing of the appeal or trial; and an application may be heard at Victoria, although the petition was filed in the Vancouver registry. *Wallace v. Flewin*, 11 B. C. R. 328, 2 W. L. R. 13.

**9. Placer mining** — *Re-location of claim*—*Alleged failure to perform representation work*—*Sufficiency of work done*—*Time for filing affidavits proving work*—*Additional affidavits*—*Declaration that claim vacant*—*Re-staking by new locators*—*Numbering* — *Notice* — *Construction of mining regulations*—"Deemed to be abandoned"—*Mining recorder*—*Gold commissioner* — *Jurisdiction*. *Grant v. Treadgold* (Y.T.), 4 W. L. R. 173.

**10. Placer mining**—*Use of stream*—*Riparian proprietors*—*Deposit of debris and tailings*—*Injury to lower owners*—*Reasonable use of water* — *Industrial necessity*—*Injunction* — *Damages* — *Reduction on appeal to nominal damages*—*Costs*. *McLaren v. Jensen*, *McLaren v. Elliott* (Y.T.), 3 W. L. R. 199, 4 W. L. R. 162.

**11. Staking claim**—*Initial post* — *Occupied ground*—*Curative provisions of statute*.]—In staking out a claim under the Mineral Act of British Columbia, the fact that initial post No. 1 is placed on ground previously granted by the Crown under these Acts does not necessarily invalidate the claim, and s. 4 of s. 4 of 61 V. c. 33, amending the Mineral Act, R. S. B. C. c. 135, may be relied on to cure the defect. *Madden v. Connell*, 30 S. C. R. 109, distinguished. Judgment appealed from, 11 B. C. R. 37, affirmed; IDINGTON, J., dissenting. *Clark v. Dockstader*, 26 C. L. T. 72, 36 S. C. R. 622.

**12. Trespass to mining claim** — *Right of action*—*Status of plaintiff* — *Purchaser in possession under agreement with vendor*—*Maintenance* — *Damages* — *Value of mineral in the ground* — *Severance* — *Quantum of damages* —

*Milder rule*. *Kincaid v. Lamb* (Y.T.), 4 W. L. R. 167.

**13. Trespass workings** — *Extra-lateral rights* — *Continuous or faulted veins*—*Evidence* — *Inspection* — *Conflicting theories*.]—In a contest to determine the question as to whether a particular vein, called the Star vein, was continuous, or whether it was faulted by another vein styled the Black or Barren Fissure, the Court, after inspection of the mine, in presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertaining which theory was correct. The facts that in three different places identically the same material was found in the Star vein and in the Fissure; that ore was found in the first 280 feet of the Fissure of the same character as that in the Star vein, and distributed over its entire width; that experiments destroyed the theory of junction or cut off in all slopes and levels in the mine where it was alleged that such existed; that in all pits dug on the apex the same vein matter was visible; that assay ore was found in a pit on the apex corresponding to the middle of the barren vein; that the defendants had followed up their vein into and along the Black Fissure for over 1,000 feet without cross-cutting: were sufficient to warrant the conclusion that the two veins were continuous in fact, and that one vein did not fault the other; and outweighed the circumstances that the Fissure was barren for about 1,000 feet, and that it presented a shattered and contorted appearance in making a sharp curve around a dyke of porphyry. *Star Mining and Milling Co. v. Byron N. White Co.*, 12 B. C. R. 162, 2 W. L. R. 411.

**14. Water Clauses Consolidation Act**—*Leaseholders and placer miners*—*Respective rights to water*—*Forfeiture*.]—It was the intention of the legislature, by s. 29 of the Water Clauses Consolidation Act, as enacted by s. 2 of c. 56, 1903-4, to secure to free miners, occupants of placer ground, whether they hold as original locators or as leaseholders, that continuous flow of water which the section specifies.—A free miner, having obtained certain rights on one creek under s. 29, does not forfeit them because he obtains additional rights on another creek under another section.—The enactment contained in c. 56 of 1903-4, shews a clear intention to cut down the rights of holders of water records, and to increase the benefits accruing to the individual free miner under the Placer Mining Act.—*Per IRVING, J. (dissentiente)*:—A leasehold being held under a lease granted pursuant to the recommendation of the

Gold Commissioner, on the representation by the applicant that the ground is abandoned as placer ground, the term "location" would not be properly applied to it. *Ginaca and Mourot v. McKee Consolidated Hydraulic Limited*, 11 B. C. R. 481.

**15. Water Clauses Consolidation Act—Water record—Grant by commissioner—Amendment—Review.]—**A mining commissioner, under the Water Clauses Consolidation Act, before the amendment of 1905, having adjudicated upon an application for a record, and having made the appropriate entry, is functus, and has no power to amend such record.—Any such amendment, being a nullity, cannot be reviewed in any proceedings under s. 36. *Wallace v. Flewin*, 11 B. C. R. 354, 2 W. L. R. 418.

See ASSESSMENT AND TAXES, 14 — ATTACHMENT OF INTEREST IN MINES—COMPANY, I, 5, IV. 3—CONTRACT, III. 10, X. 5—CROWN, 7—DISCOVERY, I. 4—GOLD COMMISSIONER—MASTER AND SERVANT, II. 4—MORTGAGE, 14—PLEADING, IX. 5—PRINCIPAL AND AGENT, 10 — STATUTES, 1, 2—TRESPASS TO LAND, 11 —VENDOR AND PURCHASER, I. 9, II. 4.

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### MISNOMER.

See JUDGMENT, I. 1.

### MISTAKE.

**Rescission of contract — Election to affirm voidable contract.]—**1. The mistake of one party to an agreement for the purchase of land as to the amount of land purchased, when the mistake is not known to the other party, and there is nothing in the language or conduct of the other party which led or contributed to the mistake, does not give a right of rescission unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, and it would be unreasonable to do so. *Tamplin v. James*, 15 Ch. D. 215, and *Miller v. Dahl*, 9 Man. L. R. 444, followed.—2. If a purchaser of land enters into and retains possession of the land and pays two monthly instalments of the purchase money after he has found out his mistake, he should be held to have elected to affirm his contract, and cannot afterwards have it rescinded. *Slowski v. Hopp*, 15 Man. L. R. 548, 2 W. L. R. 363.

See APPEAL, XIII. 2 — ARBITRATION AND AWARD, 7 — BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 2—COMPANY, III. 25—CONTRACT, V. 2—COSTS, VII. 1 — COURTS, VI. 1—CROWN, 5 — DEED, 8, 13 — IMPROVEMENTS—MORTGAGE, 4, 7—PLEADING, VIII. 16—SALE OF GOODS, I. 9, 10 — TRIAL, III. 1 — VENDOR AND PURCHASER, I. 10, 24, 37—VENUE, 12—WILL, I. 11—WRIT OF SUMMONS, 3.

### MONEY IN COURT.

**Ownership of—Partnership—Judgment creditors — Stop orders—Creditors' Relief Act—Payment out to sheriff for distribution.** *Campbell v. Croil*, 8 O. W. R. 67.

See MORTGAGE, 21 — PAYMENT INTO COURT—STAY OF PROCEEDINGS, 1.

### MONOPOLY.

See INJUNCTION, 2.

### MORTGAGE.

**1. Action to enforce—Dilatory exception—Recourse against vendor—Warranty—Contract — Absence of priority—Delay.]—**In an hypothecary action the defendant pleaded that his vendor guaranteed to him that he would obtain an

extension of time for payment, and, by a dilatory exception, asked leave to bring in his vendor in warranty:—*Held*, that the plaintiff, not being a party to the alleged subsequent agreement, whereby the vendor was alleged to have undertaken to obtain delay for payment, was not to be embarrassed and delayed in his remedy by reason thereof, and the dilatory exception was dismissed. *Corse v. Myler*, 8 Q. P. R. 7.

**2. Assignment**—Agreement — Executors—"Acting executor"—Solicitors — Investment of funds—Liability for loss. *Carman v. Wightman*, 8 O. W. R. 572.

**3. Attornment clause**—*Excessive rent*—*Distress*.]—An attornment clause in a mortgage is valid if it constitute a real relation of landlord and tenant between the mortgagee and mortgagor, and a distress levied for the rent is good, though the rent reserved is sufficient during the term specified in the mortgage, viz., ten years, to repay the principal money and interest thereon at 7 per cent. *Massey-Harris Co. v. Young*, 37 N. B. R. 107.

**4. Collateral security**—Validity — Bank—Future advances — Bank Act — Consideration partly illegal — Right to recover for money lent.—Amendment—Account—Appropriation of payments—Interest—Pass book—Monthly receipts—Settled account—Estoppel—Recital—Misrepresentations—Duress — Collateral agreement—Usurious rates of interest—Voluntary payment — Rates charged by bank without assent of customer—Reduction of rate—Interest on moneys deposited in current account — Oral contract—Deposit of gold dust—Assay value—Bank charges—Guaranty—Continuing instrument — Mistake — Negligence — Pleading—Credit for moneys transferred to bank. *Canadian Bank of Commerce v. McDonald* (Y.T.), 3 W. L. R. 90.

**5. Conveyance of equity of redemption to mortgagee** — Merger—Intention—Evidence — Statute of Limitations — Vacant land—Legal estate—Acknowledgments in writing — Letters of owner of equity—Dictation to Amanuensis—Costs. *Rogers v. Brann*, 7 O. W. R. 617.

**6. Covenant for payment**—Action on—Impossibility of restoring mortgaged land if payment made. *National Trust Co. v. Bousfield* (Man.), 4 W. L. R. 575.

**7. Discharge**—Form and effect of—Intention to take assignment—Mistake in conveyancing—Subrogation — Chargee

of land joining in mortgage as surety for owner—Extension of time to owner — Reservation of rights — Release of surety—Declaration of priority—Action — Parties—Amendment — Will — Condition — Fulfilment. *Quackenbush v. Brown*, 7 O. W. R. 284.

**8. Foreclosure** — Parties — Final order—Irregularity — Decease of infant defendant — Right of representatives to redeem—Order of revivor — Practice—Accounts—*New day*.]—An action upon a mortgage for foreclosure was begun in 1898, and the usual judgment was pronounced on the 30th January, 1899. One of the mortgagors defendants died on the 20th June, 1899, an infant, unmarried, and intestate. On the 2nd May, 1900, a final order of foreclosure was granted, no notice being taken of the death of the infant, and he and not his personal representatives or those claiming under him being declared to stand absolutely debarred and foreclosed:—*Held*, that the final order was irregular and was not binding on the infant's mother, who was not a party to the action, and in whom an undivided interest in the estate of her deceased son vested at the expiration of a year from his death; and that she was entitled to redeem and to be added as a defendant, upon her own application. *Campbell v. Holyland*, 7 Ch. D. 166, followed.—An order was made adding her as a defendant, and directing that the action be carried on between the plaintiff and the continuing defendants and new defendant, and that it stand in the same plight and condition in which it was at the time of the infant's death.—The effect would be to require a new account to be taken and a new day fixed for redemption, of which all the defendants would be entitled to avail themselves. *Kennedy v. Foowell*, 11 O. L. R. 389, 7 O. W. R. 26.

**9. Foreclosure**—Practice in action—Notice to incumbrancers. *Acadia Loan Corporation v. Wood*, 1 E. L. R. 121.

**10. Interest post diem**—Construction of redemption clause—Usurious rate of interest. *Sparling v. Cunningham* (Y.T.), 4 W. L. R. 336.

**11. Limitation of actions**—Adverse possession — Foreclosure — Interest — Legal rate — Damages—Redemption—Arrears—Personal order.]—In an action by mortgagees for foreclosure, it appeared that the defendant had left the land in 1892, 7 years after the last payment on account of the mortgage, and had never paid or attempted to pay any taxes on it since those for 1884 after which the plaintiffs paid all the taxes. The mort-



gage contained the usual provisions for quiet possession to the mortgagees on default and for possession by the mortgagor until default:—*Held*, following *Bucknam v. Stewart*, 11 Man. L. R. 625, and *Trustees, &c., Co. v. Short*, 13 App. Cas. 793, that the defendant had not been in actual adverse possession for a sufficient length of time to acquire title under the Real Property Limitation Act against the plaintiffs, and that occasional entries upon the land by a relative of the defendant for the purpose of cutting hay for several years after the defendant had left the land vacant had not the effect of continuing his actual possession beyond that time.—The principal of the mortgage fell due on the 25th May, 1884, and it was provided that interest at the rate of 8 per cent. per annum was to be paid half yearly . . . till the whole of the principal should be paid:—*Held*, following *Freehold Loan Co. v. McLean*, 8 Man. L. R. 116, and *Manitoba and North-Western Loan Co. v. Barker*, 8 Man. L. R. 296, that interest after the due date was only recoverable as damages and only at the statutory rate and only for the 6 years prior to the commencement of the action.—(2) That, although 63 & 64 V. c. 29 (D.), making 5 per cent. the legal rate, provides that "the change in the rate of interest in this Act shall not apply to liabilities existing at the time of the passing of this Act," the interest for that part of the 6 years since the passing of that Act should only be allowed at the rate of 5 per cent. per annum, for the word "liabilities" in that Act does not refer to the principal debt, but only to the obligation to pay interest as damages.—(3) It is only in an action for redemption, or one in which the question of the number of years' arrears of interest to be allowed is to be treated as if the action were one for redemption, that more than 6 years' arrears are allowed, on the principle that he who comes into equity must do equity.—*Dingle v. Coppen*, [1899] 1 Ch. 726, and *In re Lloyd*, [1903] 1 Ch. 385, distinguished.—*Held*, also, that s. 24 of the Real Property Limitation Act barred the right of the plaintiffs to a personal order against the defendant for payment of the mortgage debt after 10 years from the last payment. *British Canadian Loan and Agency Co. v. Farmer*, 15 Man. L. R. 593, 24 Occ. N. 273.

**12. Limitation of actions**—Mortgagor barred—Subsequent service of notice of sale—Effect of.—After the Statute of Limitations has run against a mortgagor of lands, service of a notice of sale by the mortgagee on the mortgagor does not give the mortgagor a right to redeem, the mortgagee's statutory title being in no way affected thereby. *Shaw*

*v. Coulter*, 11 O. L. R. 630, 5 O. W. R. 305, 6 O. W. R. 55.

**13. Mill—Machinery — "Plant."]**—The word "plant" in a mortgage of a mill, held not to include office furniture, or a horse and carriage used for occasional errand purposes in connection with the mill, or material kept on hand for repairs to machinery; but held to include scows used for lightering the output of the mill from its wharf to steamers, and in lightering coal for the use of the mill, and also to include such stores as axes, shovels, and files and other articles complete in themselves, used in carrying on the mill business. *Eastern Trust Co. v. Cushing Sulphite Fibre Co.*, 3 N. B. Eq. 378, 2 E. L. R. 28.

**14. Mining property — Judgment creditor of mortgagee — Sheriff's sale — Purchaser under — Priorities — General Mining Act, s. 30—Registration—Expenditure on account of mortgaged property —Lien.]**—Mining leases of lands in New Brunswick and of the minerals therein, issued by the Crown to the appellant company, subsequent to a mortgage executed by them in the State of N. to the respondent company, incorporated under the laws of the State of N., which laws, unlike those of New Brunswick, do not reserve the minerals to the State, are subject to the mortgage.—A judgment creditor of the mortgagor having purchased the leases at sheriff's sale under an execution upon his judgment, whereupon new leases were issued to him in his own name, the Crown having no knowledge of the mortgage, took the new leases subject to the mortgage.—The mortgage, though not registered under s. 139 of the General Mining Act, C. S. N. B. 1903 c. 30, is not void as against a judgment creditor who had notice of the mortgage, and whose judgment was not registered under the section at the commencement of the suit.—The judgment creditor is not entitled to a lien prior to the mortgagee for the amount of the rent paid to the government on the licenses declared to be held in trust for the mortgagee. *Mineral Products Co. v. Continental Trust Co.*, 37 N. B. R. 140. Affirmed by the Supreme Court of Canada: *MACLENNAN, J.A.*, dissenting. S. C. 37 S. C. R. 517.

**15. Power of sale—Construction—Notice—Validity of sale without notice to second mortgagee.** *Dominion Trust Co. v. Bower (B.C.)*, 3 W. L. R. 157.

**16. Power of sale—Notice of exercising—Omission to serve on mortgagor and wife—Conveyance of equity of redemption—Vendor and purchaser—Objection to title.** *Re Muffitt and Mulvihill*, 8 O. W. R. 347.

**17. Redemption** — Foreclosure—Order nisi—Right to redeem if order absolute not issued—Practice. *DeBeck v. Canada Permanent Mortgage Corporation* (B.C.), 4 W. L. R. 91.

**18. Redemption** — Priorities—Execution creditors proving claims in Master's office—Payment of mortgagee's claim—Subsequent statutory assignment for creditors — Rights of assignee — Assignments and Preferences Act, s. 11. *Federal Life Assurance Co. v. Stinson*, 7 O. W. R. 777, 8 O. W. R. 929.

**19. Redemption**—Sale by mortgagees under power of sale—Redemption subject to sales—Addition of purchasers as parties.]—When, after default in payment of a mortgage of lands, the mortgagee has sold the lands, under the power of sale in the mortgage, the purchasers must be made parties to an action brought by the mortgagor for redemption, unless the plaintiff is satisfied with judgment for redemption subject to the several agreements of sale, as the sales could not be set aside or inquired into without having the purchasers before the Court. — It would not be sufficient to make the purchasers parties in the Master's office under Rule 40 of the King's Bench Act, as that Rule applies only to cases where no direct relief is sought against the parties to be added.—*Rolph v. Upper Canada Building Society*, 11 Gr. 275, and *Hopper v. Harrison*, 28 Gr. 22, followed. *Campbell v. Imperial Loan Co.*, 15 Man. L. R. 614, 2 W. L. R. 327.

**20. Right to discharge** — Payment Mutual loan company — Terminating shares—By-laws of company—Collateral security—Land Titles Act. *Re Kelly and Colonial Investment and Loan Co.* (N.W.T.), 3 W. L. R. 62.

**21. Sale**—Purchase money — Default—Deficiency—Money in Court—Payment out—Creditors of partnership. *Campbell v. Croil*, 7 O. W. R. 379, 475.

See BANKRUPTCY AND INSOLVENCY, 25  
—CHOSE IN ACTION, ASSIGNMENT OF, 5  
—COMPANY, I. 3. III. 23. IV. 2, 7—  
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## MORTGAGE COMPANY.

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## MUNICIPAL CORPORATIONS.

- I. CONTRACTS.
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- IV. EXPROPRIATION OF LAND.
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### I. CONTRACTS.

**1. By-law**—Purchase of land—Con-  
veyance to corporation—Attempted res-  
cission.]—A municipal council, desiring  
to maintain as required by statute (3  
Edw. VII. c. 19, s. 524) an industrial  
farm, passed a by-law directing that "a  
farm be purchased for an industrial  
farm." Tenders were then called for;  
a committee was appointed to examine  
the properties offered, that of the plaintiff  
being among them; the plaintiff's tender  
was accepted; the title to his property  
searched by the corporation's solicitor;  
and a conveyance of the property to the  
corporation obtained and registered. A  
cheque in the plaintiff's favour for the  
purchase money was made out and signed  
by the proper officers, but before its de-  
livery to the plaintiff a by-law was  
passed by the council rescinding the  
former by-law, ordering the cheque to be  
cancelled, and directing the property to  
be reconveyed to the plaintiff:—*Held* that  
the transaction was an executed one, the  
benefit of which the corporation had ob-  
tained, and, notwithstanding the absence

of a by-law specifically authorizing it, could not be rescinded against the will of the plaintiff, in whose favour judgment for the purchase money was accordingly given. *Macartney v. County of Ha'di-mand*, 10 O. L. R. 668, 6 O. W. R. 875.

**2. Contract with member of council—Money paid—Action to recover—Illegality—Statute — Penalty—Pleading.]**—R., being reeve of the plaintiff municipality, did certain work repairing a stone crusher, for which work the municipal council voted him \$75, such sum being shewn in the accounts as expenses. Subsequently, he spent considerable time, at the request of the council, in advocating the passage through the legislature of a loan bill, in respect of which time he was voted \$100. An action was brought for the recovery of these two sums of money as illegal payments in contravention of s. 21 of the Municipal Clauses Act, and also for penalties under s. 22 for sitting and voting as reeve after the receipt of these respective sums. The claim for penalties was abandoned at the trial, and the action resolved itself into a question of law, as to whether the statement of claim disclosed a cause of action in the circumstances:—*Held*, that the statement of claim did not disclose a cause of action, as the contract was not made void by the statute, and there were no grounds alleged on which it might be declared void in equity.—The statute does not prohibit the making of a contract, although it imposes a penalty for acting or voting subsequently thereto. *Municipality of South Vancouver v. Rae*, 12 B. C. R. 184, 4 W. L. R. 98.

See MUNICIPAL ELECTIONS, 13.

## II. DRAINAGE.

**1. Defective system — Recovery of damages and costs — Subsequent assessment—Drainage Act, s. 95.]**—The assessment for damages and costs recovered by a person complaining of a defective system of drainage must be made only against the lands included in the drainage scheme complained of. Lands included in an amended scheme undertaken after the right to damages has accrued and claim has been made are not liable.—Judgment of the Drainage Referee affirmed. *In re McClure and Township of Brooke*, 11 O. L. R. 115, 6 O. W. R. 1021.

**2. Deposit of earth on plaintiff's land—Claim for compensation—Remedy—Action — Forum — Drainage Referee.** *Burke v. Township of Tilbury North*, 8 O. W. R. 457, 862.

**3. Flooding lands—Cause of action—Injunction—Damages — Drainage Referee—Appeal while reference still pending—Negligence—Insufficiency of excavation—Improper deposit of material excavated—Breach of trust—Allowing contractor to escape from obligation as to place of deposit—Engineer—Directions of —Depth and width of excavations. *Mc-Ouat v. United Counties of Stormont, Dundas, and Glengarry*, 8 O. W. R. 40.**

**4. Overflow of lands—Negligence—Damages — Natural watercourses—Construction of ditches—Action by officer of municipality—Effect of his negligence. *Baskerville v. Rural Municipality of Franklin (Man.)*, 3 W. L. R. 547.**

**5. Petition for drainage scheme—Report of engineer—Delay in making—Death of petitioners meanwhile—Extensions of time by council after time expired — Invalidity of report — By-law founded thereon—Powers of council—Provisions of Drainage Act—Conditions. *Re McKenna and Township of Osgoode*, 8 O. W. R. 713.**

**6. Petition for work—Majority of owners to be benefited—Assessment for outlet—Assumption of award drain—Enlargement and extension into new territory—Exit—Pipe under railway embankment—Enlargement — Effect. *Fairbairn v. Township of Sandwich South*, 8 O. W. R. 925.**

See APPEAL, V. 12—PARTIES, I. 1.

## III. ELECTRICAL WORKS.

**1. By-law—Motion to quash—Irregularity.]**—Motion to quash a municipal by-law for the construction of electric light works, upon the ground that s. 500 (5) of the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), had not been complied with, inasmuch as there had been only publication in four weekly issues of a weekly paper instead of for one month, and also upon the ground of the omission to appoint and give notice of the appointment of a day for finally considering the by-law in council:—*Held*, that under the circumstances the jurisdiction to quash should not be exercised, although the first objection was a substantial one, inasmuch as the by-law might be validated by registration under s. 399 and the irregularities had not affected the result.—The jurisdiction to quash on motion conferred by s. 378 of the Municipal Act 1903, ought, generally speaking, to be exercised in every case of an illegal by-law which cannot be validated; but in



the case of one which can be validated, it should be exercised only, generally speaking, when the irregularities in question affected or might have affected the passing of it. *Cartwright v. Town of Napanee*, 11 O. L. R. 69, 6 O. W. R. 773.

**2. By-law regulating electrical construction**—Scope of—Permit necessary before work done—Conviction. *Re v. Cope and Frey* (B.C.), 4 W. L. R. 253.

**3. Purchase and sale of electrical energy**—*Special Act—By-laws — Contract.*]—A special Act, 57 V. c. 75 (O.), enacts that the defendants shall, in addition to the powers conferred by the Municipal Light and Heat Act, which is thereby incorporated, have power to produce, manufacture, and use, and supply to others to be used, electricity for motive power and for any other purpose to which the same can be applied . . . and to acquire and hold lands, water powers, machinery, and all other property . . . necessary therefor, and shall for and with respect to such powers and purposes have all and every the powers which are by the said Act conferred on municipal corporations with respect to light and heat. In reliance on this Act, the defendants passed a by-law providing for the execution of an agreement with a private company for the supply to the defendants of electrical power, which they contemplated using and supplying to others by means of a certain property and plant which they had acquired from another company.—*Held*, that the by-law was *ultra vires* because the special Act did not authorize the defendants thus to purchase electricity for using and supplying to others, but only themselves to enter upon the process of production and manufacture of electricity so produced and manufactured, and to supply it to others. *Ottawa Electric Light Co. v. City of Ottawa*, 12 O. L. R. 290, 8 O. W. R. 204.

#### IV. EXPROPRIATION OF LAND.

**1. Absence of by-law**—Payment to land-owner—Resolution of council—Nullity—Ratepayer—Reimbursement of corporation.]—A resolution of the city council of St. Henri to pay a sum to a land owner as indemnity for lands which the city has appropriated for the purpose of opening up roads, without an expropriation by-law, is void, as is also a payment made by virtue of such resolution; and three ratepayers, municipal electors of the city, have a right of action for a declaration of such nullity and to compel the owner to reimburse the city corpor-

ation the sum which has been paid to him. *Marsan v. Guay*, Q. R. 28 S. C. 145.

**2. Appointment of arbitrator**—By-law—Notice — Insufficiency — Provisions of city charter—Acquiring land as market site—Arbitration — Prohibition. *Re Devitt and City of Winnipeg* (Man.), 4 W. L. R. 369.

**3. Property of street railway company designed for car barn**—Action to restrain council from passing by-law—Declaratory judgment—Refusal to pronounce—Discretion—Appeal. *Toronto R. W. Co. v. City of Toronto*, 8 O. W. R. 78, 431.

**4. Waterworks company**—*Statutory powers—Crown — Pre-emptor — Ascertainment of lands — Compensation.*]—Lands expropriated by a waterworks company under statutory powers and taken over by the defendant municipality, were claimed by the plaintiff:—*Held*, that the statutory powers of compulsory appropriation were not exerciseable against the Crown, but as soon as the pre-emptor obtained his record, these powers became applicable as against him to the lands comprised in the record. The evidence shewing that the areas sought to be appropriated were not set out or ascertained with any reasonable certainty, the plaintiff was entitled to compensation. *Carroll v. City of Vancouver*, 11 B. C. R. 493.

See APPEAL, XI.—ARBITRATION AND AWARD, 6.

#### V. HIGHWAYS AND BRIDGES.

**1. Bridge — Definition of — County bridges—Municipal Act.**]—A structure for crossing the waters of a lake, with a wooden section 243 feet long spanning the waters at low water, and embankments at either end of 140 feet and 260 feet respectively, the whole width being covered at high water, is a bridge over 300 feet in length within the meaning of s. 617 (a) of the Consolidated Municipal Act, 1903, whereby certain bridges over that length may be declared county bridges.—*Seemle*, that s. 617 (a) is not to be read as applying only to bridges crossing rivers, streams, ponds, or lakes, to the exclusion of bridges crossing ravines. *In re Mud Lake Bridge*, 12 O. L. R. 159; *In re County of Victoria and Township of Carden*, 8 O. W. R. 1.

**2. By-law closing street**—Public interest—Discrimination—Substitution of

convenient way—Compensation to land owner—Providing access to land—Construction of statute—Costs. *Re McLean and Town of North Bay*, 7 O. W. R. 169.

**3. By-law for raising money to construct sidewalks**—Submission to electors—Failure to comply with s. 342 of Municipal Act—Appointment of scrutineers—Date of issue of debentures—Date of payment—Quashing by-law—Costs. *Re Kerr and Town of Thornbury*, 8 O. W. R. 451.

**4. By-laws—Discretion—Supervision by Superior Court—Oppression.**—Municipal by-laws dealing with roads and pavements are left to the discretionary power of municipal councils in the manner provided by the municipal code. The remedy of an action to annul a by-law founded upon the right of supervision by the Superior Court, by virtue of art. 50, C. P. C., is not open except in case of abuse and injustice arising from bad faith and so serious as to be oppressive. *Pepin v. Village of Mas-sueville*, Q. R. 15 K. B. 261.

**5. Closing highway—Property injuriously affected**—Municipal Act, 1903, s. 437.]—A property on the west side of a street running north and south was held to have been "injuriously affected" within the meaning of s. 437 of the Municipal Act, 1903, by the closing of a street running from the first street in an easterly direction opposite the property in question, and an award of compensation by the official arbitrator to the owner of the property was upheld, the principle of *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243, being applied. *In re Tate and City of Toronto*, 10 O. L. R. 651, 6 O. W. R. 670.

**6. Liability of abutting land-owner for maintenance**—Resolution of council—Expense of cleaning ditch—Charge on land—Sale of land to realize.]—When an owner who is under an obligation to maintain a public road fills up the ditch which forms part of it, the municipal council may by resolution order the inspector of roads to summon him to clean the ditch within 48 hours, and in default of his obeying the summons to do the work at his expense.—A municipal corporation incurs no responsibility for damages by reason of such a resolution and its being put into execution, nor by the fact that the cost of the work, \$16.61, is added to the municipal taxes due by the owner in the minute which the secretary-treasurer of the municipality transmits to the secretary-treasurer of the county pursuant to art. 373 of the Muni-

cipal Code, followed by notices of sale of the whole of the property affected by virtue of arts. 998-1001 of the Municipal Code. *Lagacé v. Village of St. Joseph de Bordeaux*, Q. R. 28 S. C. 319.

**7. Toll roads expropriation—Costs of arbitration—Toll Roads Expropriation Act, 1901.**—A county which, upon the petition of the ratepayers affected, presented through the medium of two interested townships, and proceeding in accordance with the provisions of the Toll Roads Expropriation Act, 1901, initiates and takes part in an arbitration to fix the value of a toll road, cannot recover from the townships the costs incurred by it. *United Counties of Northumberland and Durham v. Township of Hamilton and Township of Haldimand*, 10 O. L. R. 680, 6 O. W. R. 814.

**8. Township bridge—User by other municipalities—Important means of communication—Repair and maintenance—Injustice to township—Liability of county.**—By s. 617a of the Con. Mun. Act, 3 Edw. VII. c. 19 (O.), where a township bridge is over 300 feet in length, the township council may, by resolution, declare that by reason of such length, and that it is being used by inhabitants of municipalities other than the township, and is situated on a highway, being an important road and affording means of communication to several municipalities, it is unjust that the township should be liable for its maintenance and repair and that such liability should be imposed on the county, and an application may be made to the County Court Judge to have it so declared:—*Held*, that such user need not be by the inhabitants of municipalities within the county, the material point being its extensive use for travel by neighbouring municipalities, whether in or out of the county; nor that the road which affords such means of communication should either be a line of road extending through the municipalities referred to or a main trunk road with branches into different municipalities; all that is necessary is that it should be an "important road" connected with other roads or ways forming a means of communication, whereby the inhabitants of such municipalities may pass and repass over the said bridge.—Judgment of a County Court Judge affirmed with a variation. *Township of McNab v. County of Renfrew*, 11 O. L. R. 180, 6 O. W. R. 523.

## VI. ILLEGAL EXPENDITURE.

**1. Ratepayer no right to maintain action**—Attorney-General's intervention

necessary. *Tanton v. City of Charlotte-town*, 1 E. L. R. 282.

**2. Ratepayer no right to maintain action**—Corporation must sue or else Attorney-General for ratepayers. *Hart v. City of Halifax*, 2 E. L. R. 118.

**3. Resolution** — *Payment of newspaper reporters—Ultra vires—Action to annul—Ratepayer—Compelling refund.*—The only powers a public corporation can exercise are those expressly given, or, by implication, those necessary to carry the former into effect. No power to pay newspaper reporters their contingent expenses is expressly, or by necessary implication, to be found in the charter of the city of Montreal, and a resolution of the city council to that effect is *ultra vires*, null and void.—A ratepayer has a right to bring an action to have such a resolution annulled, but he cannot ask a condemnation against the parties who have received money in virtue thereof, to refund it. *Tremblay v. City of Montreal*, Q. R. 28 S. C. 411.

## VII. LICENSING AND REGULATING POWERS.

**1. By-law licensing hawkers and pedlars**—*Prohibitory effect—Conviction—Amendment of—Motion to quash—Repeal of amending by-law.*—The defendant was convicted of an infraction of a by-law passed by a town council, under s.-s. 14 of s. 583 of the Mun. Act, 1903, 3 Edw. VII. c. 19 (O.), relating to hawkers and pedlars, etc., the violation charged against the defendant being "by going from place to place with an animal bearing or drawing or otherwise carrying goods, wares, or merchandise, for sale, without a license therefor," but not stating that he did so as a hawker, etc., nor did the conviction negative the exceptions in the proviso to s.-s. 14 of s. 583 that the sale was to a retail trader, or of goods manufactured in this province by the defendant or his employer: as the evidence shewed that the defendant was not within the proviso, the conviction was amended by supplying these defects, and a motion to quash by reason of the omissions was dismissed.—The conviction was also objected to on the ground that the by-law, though professedly passed for licensing and regulating, was in reality passed at the instance of the retail merchants of the town, who had the license fees made so high as to be in fact prohibitive:—*Held*, that, as the Court were not trying the defendant, or hearing an appeal from the conviction, and this not being a motion to quash the by-law, and

there being evidence, though slight, upon which the magistrate might find against there being any such prohibition, a motion to quash the conviction on this ground was also dismissed.—Section 376 of the by-law fixed the license fees at \$20, \$5, and \$4, contingent respectively on the use of a horse or cart by the hawker, etc., or his travelling on foot, with or without a push cart, etc. This by-law was amended by by-law 779, which struck out the words 20, 5, and 4, and substituted therefor 75, 50, and 50. This last-named by-law was repealed by by-law 821, and the first-named by-law amended by striking out the words 20, 5, and 4, and substituting therefor 75, 50, and 50. Then by by-law 855 this last-named by-law was amended, but not in so far as regarded the last-named amendment, and in other respects was confirmed. It was objected that no penalty was provided in the by-law 821, which repealed by-law 779, as it did not in its terms restore to s. 376 the words 20, 5, and 4, but merely directed the substitution of the words 75, 50, and 50 for such words as if they had been restored:—*Held*, that the objection must be overruled, for the rule under s.-s. 46 of s. 8 of the Interpretation Act, R. S. O. 1897 c. 1, which restricts the effect of repeal of a repealing Act, has no application to by-laws, and, therefore, the repeal of by-law 779 restored s. 374 to its original condition, and by by-law 821 the purpose intended was effected. *Rex v. Laforge*, 12 O. L. R. 308, 8 O. W. R. 104, 551.

**2. By-law licensing professional men** — *Barrister—Payment of fee to municipality—"Practising," what constitutes—Penalty.*—The profession of a barrister is included in the term "profession" in clause 26 of s. 171 of the Municipal Clauses Act, as amended in 1902, c. 52, and s. 173, as amended in 1903, c. 42, imposing the payment of a license fee upon every person following a profession within a municipality.—*Semble*, one appearance in the town where the barrister has his office, in Court as counsel for a client, is sufficient to constitute an offence under the statute, when the license fee has not been paid, although, following *Apothecaries Co. v. Jones*, [1893] 1 Q. B. 89, acting in several instances would constitute only one offence, in respect of which only one penalty could be imposed. — It is not necessary that the tax-imposing by-law should fix a penalty; s. 175 of the statute does that, and provides the manner in which it may be recovered. *City of Victoria v. Belyea*, 12 B. C. R. 112.

**3. By-law licensing sale of cigarettes**—*Excessive license fee—Prohibitive fee—By-law—Ultra vires.*—*Held*, that

a by-law of a municipal corporation imposing a license fee of \$200 on the sale of cigarettes in stores and shops, purporting to be passed under s. 583, s.-ss. 28, 29, of the Consolidated Municipal Act, 3 Edw. VII. c. 19 (O.), was *ultra vires*, was in effect prohibitive, and not merely regulative, the evidence shewing that it exceeded the annual profits which any shop in the municipality could make on the sale of cigarettes. *In re Talbot and City of Peterborough*, 12 O. L. R. 358, 8 O. W. R. 274.

**4. By-law limiting number of tavern licenses prescribing accommodation** — “License year” — *Liquor License Act* — *Objections to procedure* — *Validity of by-law.*] — A by-law passed by the council of a town before the 1st March, 1905, limiting the number of tavern licenses, prescribing the accommodation to be possessed by taverns, and fixing the amount of license duties, was held not to be invalid because it omitted the words “beginning on the first day of May,” after the words “license year,” in prescribing the number of tavern licenses for the “ensuing license year.” In prescribing the accommodation for taverns the by-law did not limit its provisions to the ensuing license year, but was so general that it might apply to all future years. — *Held*, that the scope of the by-law being limited on its face to the license year 1905-1906, the general words of the clause dealing with accommodation were limited to that year. Sections 20 and 29 of the Liquor License Act, R. S. O. 1897 c. 245, considered. — *Objections to the procedure of the council in relation to the passing of the by-law were overruled*, the by-law being valid on its face, none of the objections having been raised by any member of the council, and the matters objected to being matters of internal regulation. *Re Caldwell and Town of Galt*, 10 O. L. R. 618, 6 O. W. R. 340.

**5. By-law regulating auctioneers** — License fees — Discrimination between residents and non-residents — Invalidity of by-law — Quashing conviction. *Re v. Pope* (N.W.T.), 4 W. L. R. 278.

**6. By-law regulating sale of coal** — *Market by-law* — *Weighing* — *Municipal Act.*] — The provision in s. 580, s.-s. 9, of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19, whereby municipalities are empowered to pass by-laws “for regulating, measuring, or weighing (as the case may be) of lime, shingles, laths, cordwood, coal, and other fuel,” must be read as limited to such articles as are marketed or exposed for sale within the limits of the municipality. It cannot have been intended by the legislature that where such articles have been the subject of a

complete contract of sale made beyond the limits of the municipality, and the only act done within it is the delivery, there should be the right to impose what is practically a tax upon the vendor of the articles. *Re v. Woollatt*, 11 O. L. R. 544, 7 O. W. R. 727.

## VIII. LOCAL IMPROVEMENTS.

**1. Assessment — By-law — Alteration by resolution of council — Extension of time for payment — Interest — “Cost.”**] — A municipal by-law is not an agreement, but a law binding upon all persons to whom it applies, whether they care to be bound by it or not; and a resolution can no more alter a by-law than a statute. — The council of the plaintiffs passed by-laws for the prolongation of a street, and assessed the adjacent property with the whole cost: — *Held*, that the “cost” would properly include the purchase of the land required for the prolongation. — *Held*, also, that the council had no power by resolution to alter the time fixed by the by-laws for payment. *City of Victoria v. Meston*, 11 B. C. R. 341, 2 W. L. R. 384.

**2. Statutory powers — Expropriation — Assessment — Arbitration and award — Appeal — Grounds of objection.**] — When a statute for improvements in a city provides that the cost of the necessary expropriations shall be borne, one-half by the city, and the other by a class of proprietors, and awarded and assessed by a board of arbitrators, with a right for such proprietors to appeal from the award, the assessment should be proceeded with, notwithstanding appeals, inasmuch as, if they fail, the assessment will be good, and, if they are allowed, a second assessment can be made to meet any increase of the awards. — 2. Proceedings in expropriation under a statute, when otherwise regular and in conformity with its provisions, cannot be attacked for reasons which might have been urged against the passing of the statute, but which do not affect its validity. *Guy v. City of Montreal*, Q. R. 14 K. B. 401.

## IX. LOCAL OPTION BY-LAWS.

**1. Motion to quash — Objections — Voting — Notices — Character of type — Posting — Public places — Tenants voting without right — Effect on majority — Refusal to swear voter — Undue influence — Bribery — Coercion — Boycotting — Proof of offences — Promise to erect building in village.** *Re Leahy and Village of Lakesfield*, 8 O. W. R. 743.



**2. Motion to quash — Procedure—***Non-compliance with statute—Substantial compliance — Petition for by-law—Percentage of qualified electors—Inquiry by council—Minutes of council—Voters' list —Certificate of clerk — Summing up of votes—Adjournment—Time for by-law to take effect—Mistake.]* — On an application to quash a local option by-law passed under the provisions of ss. 61 to 73, inclusive, of the Liquor License Act, R. S. M. 1902 c. 101:—*Held*, that none of the following objections to the proceedings were fatal to the by-law:—1. That, instead of one petition, about 13 papers, all with the same printed heading, each having a number of signatures, were tied up in a roll, the sheets not fastened together, and presented to the council, it being admitted that the heading of each was sufficient for a petition.—2. That there was no entry in the minutes of the proceedings of the council shewing receipt of the petition, such receipt having been recited in the by-law.—3. That there was no proof that the petitions altogether had been signed by one-fourth in number of the electors. It was for the council to satisfy itself that this condition had been complied with, and it must be assumed that it performed its duty in that respect.—4. That, instead of preparing and posting up "a list of those entitled to vote on such by-law," as required by s. 67 of the Act, the clerk of the municipality posted up and supplied merely copies of the last revised list of electors of the municipality for the year, certified by him to be true copies thereof. Under s. 63 of the Act the two lists would contain the same names.—5. That the certificate of the clerk as to the result of the voting, by mistake, referred in the body of it to the by-law by a wrong number. The heading of the certificate, however, sufficiently shewed what by-law was referred to.—6. That, instead of summing up the votes on the day appointed by the by-law, the clerk, on account of the non-receipt of one of the ballot boxes, adjourned the proceeding to a future day, for which there is no statutory authority.—7. That the by-law received its third reading on the 27th December, 1904, and, although passed in the afternoon of that day, was declared to be in force on that day, that is, as alleged, from the beginning of that day.—When there has been a virtual compliance with the statute, and the departures complained of have been rather from the letter than from the spirit of the enactment, the Court has a discretion in determining whether there has been a sufficient compliance, and whether effect should be given to the objections on an application to quash. *In re White and Township of East Sandwich*, 1 O. R. 530, and *Re Young and Township*

*of Binbrook*, 31 O. R. 108, followed. *In re Caswell and Rural Municipality of South Norfolk*, 15 Man. L. R. 620, 1 W. L. R. 327.

**3. Motion to quash — Publication through mistake of by-law and notice more than five weeks before day of voting —Correction — Validity of election of members of council passing by-law—Invalid resignation of reeve prior to signing by-law and affixing seal.]—Where, by the mistake of the township clerk, the first publication of a local option by-law was more than five weeks before the voting day, but very shortly afterwards, on discovering the mistake, he caused such publication to be cancelled, treating it as a nullity, and republished the by-law so as to bring it within the proper time, the notice appended thereto stating it was the first publication, and the result of the voting was apparently in no way affected by the first erroneous publication:—*Held*, that the publication was sufficient. *Re Armstrong and Township of Toronto*, 17 O. R. 766, distinguished.—The legality of the election of the members of the council who pass such a by-law, they having been returned as duly elected and having taken the oath of office, will not be inquired into on a motion to quash the by-law.—The fact that the reeve, who signed the by-law and caused the corporate seal to be attached, had prior thereto purported to resign from the office, without the consent of the majority of the members present at a meeting of the council, and without his resignation having been entered on the minutes thereof, did not preclude him from afterwards acting as such. *Re Vanduke and Village of Grimsby*, 12 O. L. R. 211, 7 O. W. R. 739, 8 O. W. R. 81.**

**4. Motion to quash—**Technical objections — Substantial compliance with statute—Delay in moving—Discretion—Refusal to quash. *Re Robinson and Village of Beamsville*, 8 O. W. R. 689.

**5. Omission of essential part—***Summing up of votes—Time and place for.]*—The omission in a local option by-law of the time and place where the votes are to be summed up, as provided by ss. 341 and 342 of the Municipal Act, 1903 (O.), is the omission of an essential part of and makes the by-law invalid, and s. 204 of the Act does not apply to cure the defect, as such omission is more than an irregularity. *Re Bell and Township of Elma*, 13 O. L. R. 80.

**6. Procedure under Liquor License Act—**Omission to give notice of place where by-law may be seen—Omission to give notice of third reading—Fatal

**irregularities—Quashing by-law—Costs.]**

—1. The notice given by the council under s. 66 of the Liquor License Act, R. S. M. 1902 c. 101, must, among other things, state that the by-law or a true copy of it can be seen at the office of the clerk until the day of the taking of the vote, and the absence of such statement in the notice will be fatal to the by-law on an application to quash it.—2. If, on account of an application for a recount of the votes, the council postpone the further consideration of the by-law until after the result of the recount is known, they must either formally adjourn such further consideration to a named day, or they must afterwards give such notice of the time and place when the third reading is to be moved that parties opposed to it may be in a position to attend and urge their views, and, if the third reading takes place without such notice being given, the by-law will be quashed. *Re Mace and Frontenac*, 42 U. C. R. 85, and *Hall v. South Norfolk*, 8 Man. L. R. 430, followed.—3. The third reading of such a by-law, even after it has been carried by the votes of the electors, is not an empty formality, as the councillors have still to exercise their judgment upon it, and may, if they choose, then finally refuse to pass it.—4. Under s. 427 of the Municipal Act, R. S. M. 1902 c. 116, a Judge, on quashing such a by-law for illegality, as in this instance, has no discretion to refuse costs to the applicant. *In re Cross and Town of Gladstone*, 15 Man. L. R. 528, 2 W. L. R. 40.

**7. Submission to electors—Bribery**

**—Treating.]**—A cattle drover, who was not a "temperance man," nor an agent in any way of the "temperance people" who were promoting the passage of a local option by-law, having a grudge against a local hotel keeper, took an active interest in the passing of the by-law and endeavoured to promote it by treating freely as he travelled through the township, with a view, as he admitted, of influencing the electors to vote for the by-law. There was no general drunkenness, and it was not proved definitely that any one elector had been treated. The by-law was carried by a majority of 205 in a vote of over 1,200:—*Held*, in the circumstances, that such treating and conduct were not the means of the passing of the by-law in violation of the provisions of ss. 245 and 246 of the Consolidated Municipal Act, 1903. Order of MEREDITH, C.J.C.P., reversed. *Re Gerow, and Township of Pickering*, 12 O. L. R. 545, 8 O. W. R. 356, 497.

**8. Submission to electors—Majority** — Computation — Voters depositing spoiled ballots. *Re Swan River Local Option By-law (Man.)*, 3 W. L. R. 546.

**9. Voting on by electors—Town divided into wards—Elector not entitled to more than one vote—Municipal Act, s. 355—Disregard of statutable formalities not affecting result—Curative provision, s. 204—Voters not legally entitled—Qualifications—Confusion from colour of ballot papers.]**—Section 355 of the Consolidated Municipal Act, 1903, providing that "where a municipality is divided into wards each ratepayer shall be so entitled to vote in each ward in which he has the qualification necessary to entitle him to vote on the by-law," does not apply to what is commonly known as a local option by-law, which, under s. 141 of the Liquor License Act, R. S. O. 1897 c. 245, must be "approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act:" and in voting on such a by-law no elector is entitled to more than one vote.—Objections based upon formalities not observed in the taking of the votes upon a local option by-law, not being such as are required by the statute, in express words, to be observed as a condition precedent to the right to pass the by-law, were held to come within the curative provisions of s. 204 of the Municipal Act, there being nothing to shew or suggest any intentional violation of the directions of the Act, nor any reason for believing that any disregard of the statutable formalities called for by the Act affected the result of the voting.—It was also objected that one hundred persons were allowed to vote who were not legally entitled to vote:—*Held*, that more than 75 of these persons might be duly qualified voters, for all that was shewn was that they did not possess the qualifications credited to them by the assessment roll, whereas they might be possessed of other sufficient qualifications, and in that event would be entitled to vote; but, even if all of them were disqualified, it was not shewn that their being allowed to vote was the result of any evil intent, and the deduction even of 100 votes from the majority (476) would not affect the result: and this objection was overruled.—Finally, it was objected that the voters were confused or misled by the colour of the ballot papers being similar to that used for voting upon another by-law at the same time and place. One was scarlet, the other pink. Each ballot had printed on its face a statement of its purport and effect:—*Held*, that no person of ordinary intelligence, exercising ordinary care, could mistake one for the other; and this objection was also overruled.—Order of MABEE, J., quashing the by-law, reversed. *Re Sinclair and Town of Owen Sound*, 12 O. L. R. 488, 8 O. W. R. 239, 298, 460, 974.

See APPEAL, V. 17, 18.

## X. OFFICERS OF CORPORATIONS.

**1. Board of police commissioners**

—*Resolution — Cab-stand—Designation — Delegation—Police administration.*]

The commissioners of police of the city of Montreal may establish by resolution a cab-stand in the neighbourhood of a hotel for the use of its guests, and may also in the same way order that this stand shall be occupied only by cab-men designated by the proprietor of the hotel. Such resolutions do not import a usurpation of the legislative power conferred upon the city council, but simply acts of police administration. *Samson v. City of Montreal*, Q. R. 14 K. B. 461.

**2. Decisions of municipal officers**

—*Review by Court.*]

The Court is not competent to reverse the decisions of municipal officers upon questions of fact, save in the case of fraud or manifest abuse. *Pepin v. Pepin*, Q. R. 14 K. B. 371.

**3. Liability for acts of police officer**

—*Respondent superior—Ratification—False imprisonment.*]

A municipal corporation can not be made to answer in damages for the unlawful acts of one of its police officers while attempting to perform a public duty.—The plaintiff, who was temporarily in the town of C., collecting subscriptions for a newspaper published in the city of S., was arrested by a police officer of the town for a breach of one of its by-laws, which required all persons, who were not ratepayers of the town or non-residents of the county of N., to pay a license fee before engaging in any calling, occupation, or employment in the town. The arrest was made by the officer without any warrant, and the plaintiff was only released upon his paying to the town treasurer the fee demanded, which was retained. In an action for false imprisonment against the town corporation for the alleged unlawful arrest by the police officer: — *Held*, following *McCleave v. City of Moncton*, 35 N. B. R. 296, 32 S. C. R. 106, that, assuming the arrest to have been unlawful, the doctrine of *respondent superior* did not apply, and the corporation were not liable. —*Held*, further, that the fact that the police officer, in making the arrest, was endeavouring to enforce a by-law of the town made for revenue purposes only was not sufficient to take this case out of the rule laid down in the *McCleave* case; and that the payment of the license fee to the town treasurer, and its retention by him, in the absence of any evidence of knowledge on the part of the town of the circumstances surrounding such payment and retention, was no proof of any intention on the part of the town to ratify the

acts of the police officer. *Woodforde v. Town of Chatham*, 37 N. B. R. 21.

**4. Public offices — Local Master—**

—*Stationery and furniture*”—*Law books —County council.*]

The office of a local Master in Chancery is an office within s. 506 of the Municipal Act, 3 Edw. VII. c. 19 (O.), which enacts that the county council shall provide proper offices (together with fuel, light, stationery, and furniture), for all officers connected with the High Court of Justice. The words “stationery and furniture” do not extend to law and text books. *Re Local Offices of High Court*, 12 O. L. R. 16, 7 O. W. R. 316.

## XI. RAILWAY AID.

**1. By-law — Condition precedent—**

*Part performance—Assignment of obligation—Notice—Signification.*]

An action for the annulment of a municipal by-law will lie, although the obligation thereby incurred be conditional, and the condition has not been and may never be fulfilled.—Where a resolatory condition precedent to payment of a bonus to a railway company, under a municipal by-law in aid of construction and operation of works, has not been fulfilled within the time limited on pain of forfeiture, an action will lie for the annulment of the by-law at any time after default, notwithstanding that there may have been part performance of the obligation undertaken by the railway company, and that a portion of the bonus has been advanced to the company by the municipality.—In an action against an assignee for a declaration that an obligation has lapsed and ceased to be exigible on account of default in the fulfilment of a resolatory condition, exception cannot be taken on the ground that there has been no signification of the assignment, as provided by art. 1571 of the Civil Code of Lower Canada. The debtor may accept the assignee as creditor, and the institution of the action is sufficient notice of such acceptance. *Bank of Toronto v. St. Lawrence Fire Insurance Co.*, [1903] A. C. 59, followed. *City of Sorel v. Quebec Southern R. W. Co.*, 26 C. L. T. 70, 36 S. C. R. 686.

**2. Expropriation of land—Resolution of council—Confirming Act—Plans.]**

—A municipal council passed a resolution by which it agreed to pay for lands required for the right of way, station grounds, sidings, and other purposes of a railway, as shewn upon a plan filed under the provisions of the general Railway Act. At the time of the resolution, there

were 4 such plans filed, each shewing a portion of the land proposed to be taken, and including in the aggregate a greater area than could be expropriated for right of way and station grounds under the provisions of the Acts applicable to the undertaking of the railway company. The legislature passed an Act confirming such resolution. To an action by the owner of the land taken, on an award fixing the value of that in excess of what could be expropriated, the corporation pleaded no liability on account of such excess, and also that there was no specific plan on file describing the land:—*Held*, affirming the judgment in *McIsaac v. County of Inverness*, 38 N. S. R. 76, that the first defence failed because of the Act confirming the resolution, and, as to the second, that the four plans should be read together and considered to be the plan referred to in such resolution. *County of Inverness v. McIsaac*, 26 C. L. T. 187, 37 S. C. R. 75.

## XII. SEWERS.

**1. Establishment in part of town**—*By-law—Validity—Borrowing money—Statutory powers.*—A municipal corporation authorized by charter to perform works of public utility (in this case to establish a system of sewers) may proceed to perform the whole work at one time, or in parts, and in such subdivisions of their territory as they judge to be suitable, the mode followed being left to their discretion. A by-law of the town of Levis establishing a system of sewers in the town, except in one of its quarters, is therefore valid.—2. A special power of borrowing may be exercised according to the statute which confers it, notwithstanding a provision in the charter which forbids borrowing for general purposes beyond a prescribed sum or in proportion to the value of the taxable property of the town. *Juncau v. Town of Levis*, Q. R. 14 K. B. 104.

**2. Insufficiency**—Backing up water into cellar of house—Liability of corporation. *Faulkner v. City of Ottawa*, 8 O. W. R. 126.

**3. Liability for flooding private premises**—Sufficiency of culvert—Negligence—Extraordinary rainfall. *Cardston Drug and Book Co. v. Town of Cardston* (N.W.T.), 3 W. L. R. 64.

**4. Neglect to repair**—Notice—*Misfeasance.*—A municipal corporation failing, after notice, to repair a sewer laid under statutory authority, thereby causing continuous damage to a person connected therewith for sewerage purposes,

are guilty of misfeasance and liable in an action for damages. *Lirette v. City of Moncton*, 36 N. B. R. 475, distinguished *Curless v. Town of Grand Falls*, 37 N. B. R. 227.

## XIII. TAXATION.

**1. By-law — Exemption of company from taxation — Discrimination — Ultra vires — Pleading — Judicial notice of statute.**—By statute the council of the town of Woodstock are empowered from time to time, at their discretion, to give encouragement to manufacturing enterprises within the town, by exempting the property thereof from taxation for a period of not more than ten years:—*Held*, that a by-law of the council exempting any company establishing a woollen mill in the town from taxation for a period of ten years was ultra vires, being a discrimination in favour of a company as against private persons engaged in the same business. A bill alleging that the plaintiffs were entitled to exemption from taxation under a by-law passed by the defendants:—*Held*, sufficient, on demurrer, without alleging that the by-law was authorized by statute. *Carleton Woollen Co. v. Town of Woodstock*, 26 C. L. T. 315, 3 N. B. Eq. 138.

**2. By-law—Levying of tax—Statute authorizing—Repeal—Abrogation of by-law—Recovery of money paid for taxes.**—The repeal of an enactment to enable a municipal corporation to levy a tax by by-law abrogates *ipso facto* any by-law passed in the exercise of the power conferred; and sums paid under such a by-law, after the repeal of the enabling Act, may be recovered by action against the corporation. *Royal Ins. Co. v. City of Montreal*, Q. R. 29 S. C. 161.

**3. By-law — Powers of taxation — Special Act—General Acts.**—A town cannot exceed the limit set to the taxing power conferred on it by its special Act of incorporation. The right given it therein to make by-laws as provided by the Towns Corporation Act and by the Municipal Code is subject to the restriction above. A by-law passed by the town under the general Acts which involves taxation beyond the limit prescribed in the special Act is, therefore, null and void. *McGuire v. Town of Waterloo*, Q. R. 29 S. C. 189.

## XIV. MISCELLANEOUS.

**1. Action by non-ratepayer—Deposit—Default—Stay of proceedings.**—



Article 793 of the Municipal Code, in exacting a deposit of \$10 from a non-ratepayer who begins an action against a municipal corporation, imposes a prejudicial obligation, the non-performance of which is ground for a stay of proceedings or a dilatory exception. *Lalonde dit Gascon v. Parish of St. Vincent de Paul*, Q. R. 27 S. C. 218.

**2. Arbitration and award—Evidence of arbitrator—Admissibility of — Separation of territory from town and annexation to township—Valuation of assets and liabilities—Subjects of and mode of.]**—On a motion to set aside an award made by two of the three arbitrators—the third arbitrator dissenting — appointed under s. 18 of the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), for the settlement of the terms and conditions of the separation of territory comprised within the limits of a town, and its annexation to an adjoining township, and for the adjustment of the assets and liabilities on such separation, the evidence of the dissenting arbitrator as to the basis on which the valuation of the assets and liabilities was made is properly admissible.—In the valuation of the assets and liabilities: (1) school houses are not proper subjects of valuation, being vested in school boards whose limits of control may or may not be the same as that of the municipal corporations; (2) sidewalks are properly such subjects, for though under s. 509 of the Act the soil and freehold thereof are vested in His Majesty, yet the possession and control of and liability therefor are in the municipal corporations, and in no other body; (3) mistakes in the construction of works, *e.g.*, waterworks, should not be given effect to in the reduction of the value of the asset, being common incidents of such construction. *Re Town of Southampton and Township of Saugeen*, 12 O. L. R. 214, 7 O. W. R. 334.

**3. By-law — Lease — Moneys to be expended by lessee — Repayment by municipality — Actual loan — Approval of electors and Lieutenant-Governor in council — Publication — Contestation — Time.]** — A by-law to authorize a town corporation to lease, for a nominal rent, premises which the lessee undertakes to repair at a cost of \$7,000, to be reimbursed by the corporation, is a by-law for a loan, and is therefore subject to the double requirement of the approval of the majority in number and value of the owners of lands, being municipal electors, who vote upon it, and that of the Lieutenant-Governor in council.—The publication of such a by-law must not be made until after

these two requirements have been complied with, and the notice of publication must mention the date of it. Consequently, the period of three months allowed for contesting the by-law does not commence to run until it comes into force, fifteen days after such publication. *Newell v. Town of Richmond*, Q. R. 28 S. C. 406.

**4. By-law—Submission to electors—Qualification of electors — Motion to quash — Status of company interested.]** — Certain persons not qualified and others not authorized having voted on a municipal by-law authorizing the grant of electric lighting and water franchises:—*Held*, that the by-law was defective and must be quashed.—*Held*, also, that upon the motion to quash, only the applicant and the municipal corporation had a status to be heard, and not the company interested in the grant. *In re MacLean and City of Fernie*, 12 B. C. R. 61, 3 W. L. R. 512.

**6. Proces-verbal—Report of special superintendent—Time for—Costs.]**—The period within which the special superintendent charged with making a procès-verbal must make his report to the council, pursuant to art. 794 of the Municipal Code, is not fixed under penalty of nullity. It may be given effect to, according to the provisions of the code, by a procès-verbal deposited with a report a day or two after the time fixed, unless some real injustice will result from it; and the special superintendent has the right to recover the costs of it from the corporation whose council has appointed him. *Demers v. Corporation of St. Jean*, Q. R. 28 S. C. 371.

**6. Sale of lands of corporation to other than the highest bidder —Reasons actuating aldermen — Good faith.]**—Where the action of a municipal corporation in selling real estate of the corporation to a person other than the highest bidder is called in question:—*Held*, that it is sufficient if the Court find (1) that the council acted in perfect good faith, and (2) that they had reasons before them which they might reasonably have considered good and sufficient to justify their action. *Phillips v. City of Belleville*, 11 O. L. R. 256, 7 O. W. R. 49.

**7. Snow Fences—By-law—Conditional undertaking by municipality to pay for fences—(Compulsory arbitration—Municipal Act.)** — The defendants' council passed a by-law enacting "that where the road is liable to be blocked with snow in winter, and where in the opinion of the council such drifts would be pre-

vented by the removal of any . . . fence and replacing the same by wire or other fence, the council may order the removal of such fence . . . and in the removal of such fence or fences by the owners and the erection of such wire or other fences as the council shall direct, the parties erecting such wire or other fences shall be paid out of the general funds of the municipality a sum not exceeding, etc. The plaintiff, before erecting certain wire fencing, submitted his contract for it to the council through A., and at a session of the council, and in the presence of the township clerk and several councillors, the reeve expressed to A. the opinion and order of the council that the plaintiff's existing fence should be removed, and its direction for or approval of the erection of the proposed wire fence; and A. communicated this order and direction to the plaintiff, and thereupon the plaintiff removed his existing fence and had the wire fencing in question erected:—*Held*, that the defendants were liable to pay for the wire fencing. The by-law was a conditional undertaking by them to pay, and the plaintiff had fulfilled the required conditions.—By the Act respecting Snow Fences, R. S. O. 1897 c. 240, s. 1, "If the council and the owner cannot agree in respect to compensation to be paid by the council, then the same shall be settled by arbitration in the manner provided in the Municipal Act, and the award so made shall be binding upon all parties."—*Scmble*, that this did not preclude the jurisdiction of the Court, where, as here, the parties were not merely unable to agree as to the amount of compensation, but the municipal corporation wholly repudiated liability. *Brohm v. Township of Somerville*, 11 O. L. R. 588, 7 O. W. R. 721.

**8. Subdivision**—*Property subject to partition.*—The property the division of which is referred to in art. 86, C. M., in the case of the division or subdivision of municipalities, is that of their private domain and not of the public domain, of which they have only the administration. *Parish of St. Denis v. Village of St. Denis*, Q. R. 15 K. B. 97.

**9. Tort**—*Breach of by-laws*—*Police protection.*—The municipal corporation are not liable to a citizen for damages suffered by him in one of the streets of the municipality by reason of an assault upon him, in breach of the by-laws of the city, even where gross negligence in not providing police protection is alleged. *Ratteau v. Drosse*, Q. R. 28 S. C. 208.

**10. Water rates** — *Power to discriminate.*—A water rate imposed by a

municipal authority must be an equal rate to all consumers, unless express legislative authority has been given to discriminate. *Attorney-General of Canada v. City of Toronto*, 23 S. C. R. 514 followed. Judgment of STREET, J., 10 O. L. R. 280, affirmed. *Hamilton Distillery Co. v. City of Hamilton. Hamilton Brewing Association v. City of Hamilton*, 12 O. L. R. 75, 7 O. W. R. 655.

## MUNICIPAL ELECTIONS.

**1. Alderman for city** — *Property qualification*—*Declaration before nomination* — *Insufficiency of*—*Subsequent declaration*—*Actual qualification.*—A candidate for the office of alderman, though in fact possessing the necessary property qualification, misstated it in his declaration, made pursuant to s. 129, s.-s. 3 (a), of the Municipal Act, 1903, as amended 4 Edw. VII. c. 22, s. 4 (O.), and, as there set out, it was insufficient. This declaration, however, he supplemented by another before taking office, as required by s. 311, in which he shewed sufficient property qualification:—*Held*, in the circumstances, that it was too late, after the election, to contend that the misstatement in the former declaration was ground for setting aside his election otherwise free from objection. *Rex ex rel. Martin v. Watson*, 11 O. L. R. 336, 7 O. W. R. 282.

**2. Alderman for city** — *Property qualification*—*Tenancy of house*—*Value*—*Assessment roll* — *Yearly tenant* — *Indefinite term.* *Rex ex rel. Martin v. Moir*, 7 O. W. R. 300.

**3. Ballots**—*Marking*—*Town charter*—*Provincial Election Act.*—The town charter of Ste. Anne de Bellevue has not made part of its election machinery s. 136 of the Provincial Election Act, which says that in voting the cross is to be marked in the white circular space upon the ballot opposite the name of the candidate.—Even if this section did apply to the town, the cross marked in the white space containing the name of the candidate, would be valid, for s. 183 of said Provincial Election Act, in its list of the causes which justify rejection of a ballot paper, does not include a breach of the rule laid down by s. 136. *St. Denis v. Pécoret*, 7 Q. P. R. 415.

**4. Ballot**—*Recount*—*Scope of inquiry*—*Duty of Judge.*—Upon a recount of the ballots cast at a municipal election, the Judge is limited to verifying the ballots in the same way that the deputy returning officer does so: he cannot strike off

the vote of an elector on the ground of the omission of some formality required in order to prevent possible frauds. *Ex p. Metayer dit St. Onge*, 7 Q. P. R. 386.

**5. Bribery—Disqualification of candidate—Penalty — Prosecution—Accomplice—Bar.]**—When a candidate at a municipal election for the city of Montreal, withdraws therefrom because of his disqualification under a provision of the city charter, the giving and accepting of a sum of money, to and by him, to defray the expenses incurred by him to the time of his withdrawal, is an act of bribery within the meaning of ss. 227, 228, and 230 of the charter.—2. A person, though ineligible to office by reason of a legal disqualification, may none the less be a candidate at an election to the office, and as such be liable to the penalties and forfeitures imposed on candidates who are guilty of bribery.—3. No penalty for bribery can be pronounced upon, nor recovered from, a party (other than the principal in the offence), who has brought suit against an accomplice or accomplices for the same offence, on the day on which he was himself prosecuted therefor. *Masson v. Hébert*, *Hébert v. Gagnon*, *Lapointe v. Hébert*, *Drolet v. Lapointe*, Q. R. 27 S. C. 435.

**6. Bribery of candidate—Inducement to withdraw — Go-between.]**—Where a candidate at a municipal election for the city of Montreal, who was ineligible, was induced to withdraw upon payment of his election expenses, effected by means of two promissory notes, the first signed by the principal in the transaction, for whose advantage the withdrawal took place, in favour of a third party, who, in turn, signed the second for a like amount in favour of the candidate, the aforesaid third party in thus acting as the mere go-between, did not commit the offence of bribery punishable under ss. 227 and 230 of the city charter, 62 V. c. 58. *Lapointe v. Berthiaume*, Q. R. 27 S. C. 460.

**7. Corrupt acts by agent—Treating—Voiding election.]**—The Court has power under the provisions of the Municipal Controverted Elections Act, R. S. N. S. 1900 c. 72, ss. 4, 16, 22, aided if necessary by s. 64, to set aside the election of a municipal councillor for corrupt acts of an agent, whether committed with or without the knowledge and consent of the candidate.—The giving of a drink on election day, by a person standing in close relationship with the respondent, to a voter who had “changed” from the petitioner three days before the election and decided to support the respondent, was held sufficient to render the election

of the respondent void. *Kaulbach v. McKean*, 38 N. S. R. 364.

**8. Councillor—Qualification—Pleading — Particulars—Quo warranto.]**—Upon a motion for a *quo warranto* against a person who occupies the position of a municipal councillor, founded upon the allegation that he has not the qualification of landed proprietor required by the statute, where the respondent by his pleading affirms that he has such qualification, the petitioner had no right to demand, by a motion for particulars, the description of the property which he has and the production of the title deeds upon which it rests. *Trudel v. Boucher*, Q. R. 28 S. C. 192.

**9. Councillor—Qualification — Poll tax payer is not ratepayer — Disqualified person retaining office—Quo warranto proceedings for removal—Statutes—Construction—Effect to be given to form.** *In re Mack*, 1 E. L. R. 222.

**10. Irregularities—Declarations of qualification—Saving clause of statute—Compliance with statute—Subscription—Commissioner. *Res ex rel. Cavers v. Kelly*, 7 O. W. R. 280, 600.**

**11. Petition to set aside election —Particulars — Corrupt practices.]**—A petition to set aside the election of a councillor for the city of Montreal should indicate in a summary manner the corrupt practices committed by the candidate or his agents, and the dates and places where these acts of corruption were committed. *Larin v. Nault*, 7 Q. P. R. 482.

**12. Petition to set aside election —Security for costs—Bond—Time for filing—Expiry of — Substitution of security.]**—The bond which must be furnished by a party who contests a municipal election in the city of Montreal, must cover all the costs of such contestation, and cannot be limited to any amount.—When the delay for putting in security has lapsed, the Court has no power to allow an amendment thereto or the substitution of another security in lieu of the one complained of. *St. Denis v. Mercier*, 8 Q. P. R. 20.

**13. Reeve—Motion to avoid election of—Delay for nine months after relator's knowledge of disqualification — 3 Edw. VII. c. 18, s. 33 (O.)—Construction — Dismissal of motion — Interest in contract with corporation. *Res ex rel. Hunt v. Genge*, 8 O. W. R. 583.**

**14. Voters—Qualification of—Local Improvement Ordinance — “Occupant”**

—"Owner"—Homestead entry — Payment to sub-agent. *Re Clark* (N.W.T.), 3 W. L. R. 311.

**15. Voters—Qualification—Owners of real estate—Necessity for registration.]—**In order to qualify as a voter at municipal elections under s. 6 of the Municipal Elections Act, as enacted by s. 2 of the Municipal Elections Act Amendment Act, 1902, with respect to real estate, it is necessary that the applicant should be the registered owner of such real estate under s. 74 of the Land Registry Act, c. 23, 1906. *Re Kaslo Municipal Voters' List*, 12 B. C. R. 362.

See COSTS, IV. 4—DEFAMATION, 1.

## MURDER.

See CRIMINAL LAW, III. 21, 22, 23.

## NAVIGATION.

See SHIP—WATER AND WATERCOURSES, 22.

## NECESSARIES.

See CRIMINAL LAW, III. 26—HUSBAND AND WIFE, IX. 1, 4—INFANT, 2—LUNATIC, 3.

## NEGLIGENCE.

**1. Dangerous operations near highway—**Injury to person lawfully on highway—Warning — Contributory negligence—Verdict of jury — Refusal to disturb—Weight of evidence. *Stonor v. Lamb* (Y.T.), 4 W. L. R. 26.

**2. Destruction of nets—**Nets too far from shore — Tug and tow — Tug directing course. *Hubbard v. Dickie*, 1 E. L. R. 218.

**3. Druggist—**Sale of liniment containing poison — Neglect to label as poison—Warning to purchaser — Death of purchaser by drinking—Liability of druggist—Action under Fatal Accidents Act—Expectation of benefit. *Antoine v. Duncombe*, 8 O. W. R. 719.

**4. Electric wires—**Legislative authority — Contact with derrick—Injury to workman and consequent death — Joint and several liability—Jury—Dam-

ages—Special verdict—Judgment — New trial — Apportionment.]—When legislative authority is given to do a thing in one of two or more ways, the selection or adoption of the way is subject to the ordinary rules of prudence with respect to liability for the consequences. So, where a company for electrical purposes is empowered by its charter to construct and lay its wires over or under the streets, it cannot arbitrarily do the one thing or the other, and if it lay, over ground, wires charged with so heavy a voltage that, as a matter of ordinary prudence, they should be laid under ground, it will be liable in damages for losses and accidents caused thereby.—2. Where a death is caused by electricity so carried on the wires of the company flowing into a derrick, brought in contact with the wires by another party to whom it belongs, it is a question for the jury to find whether the death is imputable to the joint fault of the company and of the owner of the derrick, or, exclusively, to the sole fault of either of them. Therefore, if the finding is that the company alone is at fault, the Court, whatever may be its own view of the evidence on the point, cannot interfere and will reject a motion by the company for a judgment *non obstante veredicto*, or for a new trial made on that ground.—3. In assessing the damages caused by the death of a husband and father to his widow and children, a jury are not restricted to a consideration of the wage-earning capacity of the deceased; they are justified in making a further allowance for any material aid and assistance, apart from money, which the plaintiffs might have expected from him, had he lived.—4. A plaintiff who moves for judgment on a special verdict that one of two defendants is liable, to the exclusion of the other, for the cause of action, cannot at the same time move for a judgment *non obstante veredicto*, nor for a new trial, against the other defendant.—5. When a block sum has been awarded by the verdict of a jury as damages to several minor children, whose individual claims must be different by reason of the difference in their age, the Court will reserve their right to have the amount apportioned among them accordingly. *Dumphy v. Montreal Light, Heat, and Power Co.*, Q. R. 28 S. C. 18. (Reversed: see the next case.)

**5. Electric wires—**Powers of electric company—Statutory authorization—Findings of jury.]—An electric company authorized by the statute incorporating it to place its wires above or below the streets, roads, etc., under the direction of the municipality, may, at its choice, adopt one or the other mode without be-



coming responsible for accidents which happen in consequence.—Upon a trial by jury, a verdict declaring an electric company responsible for an accident caused by the contact of the arm of a crane with its wires, because the latter were exposed, and the company was at fault in not exercising due diligence in protecting the public safety, in not placing the wires underground, instead of above, and in making no attempt to insulate the wires or place guard wires around them, is irregular and insufficient and should be set aside. To be valid it should indicate positively the omission or the fault which involves the responsibility of the company. *Montreal Light, Heat, and Power Co. v. Dumphy*, Q. R. 15 K. B. 11.

**6. Electrical installations—Cause of fire—Defective transformer—Improper installations—Evidence—Onus of proof,]**—In an action to recover the amount of a policy of fire insurance paid by the plaintiffs upon the destruction of premises insured by fire, caused, as alleged, through the defective condition of a transformer of the defendant company, whereby a dangerous current of electricity was allowed to enter the insured building, the evidence failed to shew conclusively that the transformer was out of order previous to the occurrence of the fire, and at the same time it appeared that the wiring of the building might have been defective: — *Held*, affirming the judgment of the Court of King's Bench, which reversed the judgment in Q. R. 28 S. C. 289 (*post* 8), that the onus of proof upon the plaintiffs had not been satisfied, and that they could not recover. *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 440, referred to. *Guardian Fire and Life Assurance Co. v. Quebec Railway, Light and Power Co.*, 37 S. C. R. 676.

**7. Fall of scaffold—Defective construction—Want of inspection—Contributory negligence.** *Day v. Miles*, 2 E. L. R. 254.

**8. Fire—Destruction of house—Electric light company—Cause of fire—Condition of transformer—Rules of insurance association.]**—A company furnishing electricity for the lighting of a house and conducting a primary current at a tension of 2,000 volts to its transformer, where, in order to avoid danger, it is reduced to a secondary current at a tension of 110 volts, at which it enters the house and is received by wires installed by the owner, are responsible for a fire which occurs in the house, when the evidence shews no other acceptable explanation of it than the state of inefficiency

of the transformer, ascertained immediately after the fire, especially when the concomitant facts establish that such state of inefficiency existed at the time of the fire and was not a result of it.—It was in vain for the company to contend that the evidence established that the branch wires in the house had not been installed in accordance with the rules of the association of insurers, for there was nothing to shew that the fire had been occasioned by any breach of the rules. *Union Assurance Co. v. Quebec Railway, Light and Power Co.*, Q. R. 28 S. C. 289. (See *ante* 6.)

**9. Hole in ice over harbour—Accident—Cause—Findings of jury—Contributory negligence.]**—The dead body of the plaintiff's husband was found lying on ice formed over a harbour, the head being in open water where the defendants had made a hole. At the trial of an action to recover damages for his death, questions were submitted to the jury, and answered in favour of the plaintiff, except the following: "Could the deceased by the exercise of ordinary and reasonable care have avoided the accident which occasioned his death; and, if so, in what respect or how could the deceased have avoided the accident?" To this the jury answered: "Yes, he might have taken another road, or if sober, on a bright night, he might have avoided the hole:"—*Held*, that this was a finding of contributory negligence, and the action was properly dismissed, though the trial Judge (10 O. L. R. 37) dismissed it on another ground. *Plouffe v. Canada Iron Furnace Co.*, 11 O. L. R. 52, 6 O. W. R. 500.

**10. Infant—Destruction of property—Fire—Liability of infant—Liability of father—Ownership of property destroyed—*Ins tertii*.** *Turner v. Snider* (Man.), 3 W. L. R. 385.

**11. Injury to animal—Fences—Failure to shew cause of injury—Nonsuit—Contractor for building of fence along right of way of power company.** *Benner v. Dickenson*, 8 O. W. R. 752.

**12. Injury to bicyclist by motor car—Evidence for jury—Setting aside nonsuit—New trial.** *Haverstick v. Emory*, 7 O. W. R. 799, 8 O. W. R. 528.

**13. Injury to bicyclist by overtaking street car—Unusual position of car—Speed—Defect in fender—Failure of plaintiff to look behind—Contributory negligence—Proximate cause of injury—Case for jury—Motion for nonsuit.** *Heath v. Hamilton Street R. W. Co.*, 7 O. W. R. 459, 8 O. W. R. 32, 937.

**14. Injury to child playing in street at level railway crossing—**Hand-car — By-law of municipality — Contributory negligence — Findings of jury — Duty to give warning of approach of hand-car—Damages. *Burtch v. Canadian Pacific R. W. Co.*, 8 O. W. R. 837.

**15. Injury to infant in highway** *Careless driving — Evidence for jury—*Damages — *Right of infant's father to recover for expenses—Objection not taken at trial.*] — The infant plaintiff, while playing in a city street, was run over by a dray of the defendants, which, according to some of the evidence, was being driven at a great rate of speed, at a corner which the dray turned, taking the left side of the roadway: — *Held*, that there was evidence of negligence which could not be withdrawn from the jury.—The infant plaintiff's father was joined with him as a plaintiff claiming to recover the expenses which he had incurred on account of the infant's injuries. The infant was six years old and lived at home with and under the charge of the father: — *Held*, that the father was obliged to supply the infant with necessities of life, including medical attendance, and if the burden of that duty was increased by the wrongful acts of the defendants, the father was entitled to recover as damages the amount of such increase; *MEREDITH, J.A.*, dissenting. *Wilson v. Boulter*, 26 A. R. 184, distinguished.—No objection was taken by the defendants to the right of the father to recover until the argument before the Court of Appeal: — *Held, per OSLER, J.A.*, that the objection was open, unless it was possible for the plaintiff's case to have been bettered by the introduction of further evidence at the trial, which did not appear to be the case; but, *per GARBOW, J.A.*, that it was too late to take the objection.—Judgment of a Divisional Court affirmed. *Banks v. Shedden Forwarding Co.*, 11 O. L. R. 483, 7 O. W. R. 88.

**16. Injury to person—Falling of wall of building — Exceptional storm —**Defective construction—*Employment of competent superintendent and builder—*Architect.]—Judgment of a Divisional Court. 9 O. L. R. 57, 4 O. W. R. 543, affirmed for the same reasons. *Valiquette v. Fraser*, 12 O. L. R. 4, 8 O. W. R. 55.

**17. Injury to person by fault of driver of vehicle in highway—***Liability of owner—Relation between owner and driver — Master and servant or bailor and bailee—Inference from facts* *[Duty of appellate court.]* — The defendant, an hotel keeper, being the pos-

essor of an omnibus and horses, made an agreement with M. whereby, in consideration of M. driving the defendant's guests free to and from the railway stations, and paying the defendant 70 cents a day for the board of the horses at the defendant's stables, M. should be entitled to the use of the omnibus and horses, and to take for his own use all sums which he could earn by conveying passengers other than the defendant's guests, and by carrying luggage. The plaintiff was injured upon the highway owing to the negligence of M., who was driving the omnibus empty to one of the stations to meet an incoming train:—*Held*, that the question whether the relation between the defendant and M. was that of master and servant or that of bailor and bailee was a question of fact, and the test was the existence of the right of control as to anything not necessarily involved in the proper performance of the work undertaken by M. for the defendant; and (*CLUTE, J.*, dissenting), that the proper inference from the above facts and other facts in evidence (set out in the judgments) was that the relationship between the defendant and M. was that of bailor and bailee, and therefore the defendant was not responsible for the negligence of M. *Saunders v. City of Toronto*, 26 A.R. 265, followed. — There was no conflict of evidence, and the trial Judge drew inferences from the undisputed facts.—*Held*, that an appellate court was at liberty (and *per ANGLIN, J.*, was bound) to review the inferences of the trial Judge. *Fleuty v. Orr*, 10 O.L.R. 59, 8 O.W.R. 793.

**18. Injury to person driving—***Collision — Contributory negligence—Immoderate speed.*]—In an action for damages for injuries received by the plaintiff in consequence of negligent driving by the defendant, to which the principal defence was contributory negligence on the part of the plaintiff, the trial Judge found in the plaintiff's favour, and assessed the damages at \$850, giving the plaintiff costs. On appeal, the Supreme Court *en banc* was equally divided on the question of contributory negligence, and the defendant's appeal was dismissed without costs. *Naas v. Manning*, 39 N. S. R. 133, 1 E. L. R. 35.

**19. Injury to servant—**Contributory negligence—Findings of jury—Disagreement — Nonsuit — Master and servant. *Wilson v. Hamilton Steel and Iron Co.*, 8 O. W. R. 525.

**20. Injury to ship—**Navigable river —Erection of bridge — County corporation—Leaving sunken piles in river—In-

jury to ship—Contributory negligence—Conflicting evidence—Findings of trial Judge. *McAuliffe v. County of Welland*, 8 O. W. R. 522.

**21. Injury to workman**—Contributory negligence—Finding of jury. *Kent v. John Bertram Sons Co.*, 8 O. W. R. 874.

**22. Injury to workman — Ship—Unprotected trap—Joint liability of owner of contractor for work.**—A ship-owner who contracts with a ship-liner to put up cattle stalls between decks, is jointly and severally liable with him for an injury sustained by one of the workmen employed in the work, caused by a fall through an unprotected open hatchway, although the ship-liner's foreman knew of the danger and warned his men against it. And such warning to the men, given in a general way, does not relieve the contractor from his liability, in the absence of proof that the plaintiff heard it. *Proulx v. Lee*, Q. R. 27 S. C. 304.

**23. Injury to yardsman**—Municipal corporation—Coal yard—Railway siding—Construction of wall—Evidence—Findings of jury—Nonsuit. *Hammill v. Grand Trunk R. W. Co. and City of Hamilton*, 8 O. W. R. 434.

**24. Injury to yardsman — Shunting railway cars—Absence of warning—Contributory negligence—Failure to look—Jury.**—A railway yardsman in the ordinary course of his duty was passing behind the most westerly of four cars standing by themselves on a side line. As he was crossing the track, two cars of the defendants, propelled by a flying shunt, came from the east and ran into the standing cars, with the result that he was knocked down, run over, and killed by the car behind which he was passing. There was no evidence that cars were liable to be shunted negligently or unexpectedly, and he did not see or hear the cars, and no warning was given to him:—*Held*, that there was evidence of negligence on the part of the defendants to go to the jury, and that the fact that the yardmaster did not look for approaching cars before going behind the standing car was not sufficient to shew that he was guilty of such negligence as *ipso facto* to deprive him of the right to recover.—Judgment of MEREDITH, J., reversed. *London and Western Trusts Co. v. Lake Erie and Detroit River R. W. Co.*, 12 O. L. R. 28, 7 O. W. R. 511.

**25. Master and servant — Defect in machinery—Workmen's Compensation Act.**—Order of a Divisional Court, 9 O. L. R. 86, 5 O. W. R. 157, affirmed by the Court of Appeal. *Schwob v. Michigan Central R. W. Co.*, 10 O. L. R. 647, 6 O. W. R. 630.

**26. Steamboat Inspection Act—Fishing tug—Dominion rules and regulations — Life-saving apparatus.**—The Steamboat Inspection Act, 1898, 61 V. c. 46, s. 3 (1.), enacts: "No steamboat used exclusively for fishing purposes and under 150 tons gross tonnage . . . shall be subject to the requirements of this Act . . . except as to the obligation to carry one life-buoy . . . and to carry a life-preserver for each person on board." Section 11 of part VIII. of the Dominion rules and regulations respecting the inspection of boats, etc., purporting to have been passed under the Act, provides that "every steamboat not employed in the carriage of passengers . . . shall at all times when the crew thereon is on board . . . have on board . . . a good, suitable and sufficient boat or . . . boats, in good condition. etc.; and another regulation provides that "every steamboat not employed in the carriage of passengers . . . shall . . . have on board . . . a number in due proportion to that of the crew of . . . fire buckets . . . and of axes and lanterns, to the satisfaction of the inspectors:"—*Held*, that the above Act, except as to life-buoys and life-preservers, did not apply to a fishing tug of the defendants of some 12 1-2 tons, and that if the rules and regulations were intended to carry the provisions beyond the terms of the statute, they were without authority, but that it was preferable to read them as not intended to apply to steamboats excepted from the operation of s. 3 of the Act; and that therefore the plaintiff could not recover in an action brought under the Fatal Accidents Act against the defendants in respect to a death alleged to have been caused by the negligence of the defendant company in failing to comply with the provisions of the above Act and regulations as to life-saving apparatus other than life-buoys and life-preservers. *Sturgeon v. Port Burwell Fish Co.*, 12 O. L. R. 154.

**27. Street railway — Contributory negligence — Collision between electric car and waggon — Findings of jury — Meaning of** *Liddiard v. Toronto R. W. Co.*, 7 O. W. R. 207.

**28. Street railway—Horse killed by electric wire — Dangerous appliances—**

Necessity for extraordinary precautions. *Hinman v. Winnipeg Electric Street R. W. Co.* (Man.), 3 W. L. R. 351.

**29. Street railway—Injury to bicyclist—Piling snow at side of track — Contributory negligence—New trial.]**—The plaintiff, a telegraph messenger, was riding a bicycle in a southerly direction behind a street car of the defendants on the west track, and the car stopping, in order to avoid running into it, and because he found snow was piled up on the road on the right side, he turned to the left side and was struck by a car coming north on the east track, and injured. It did not appear that the latter car had sounded the gong or given any other warning. The plaintiff was nonsuited at the trial:—*Held*, that the defendants were bound to adopt reasonable precautions to prevent accidents by sounding a gong or otherwise, although there was no statutory obligation; and although the plaintiff may have put himself in a position of peril, this was not *per se* an act of negligence; and, there being evidence which might have satisfied the jury that the accident was caused by omission on the defendants' part to ring the gong, and also evidence from which they might have found that it was attributable to the plaintiff's own negligence, the case should not have been withdrawn from them. *Dublin, Wicklow, and Wexford R. W. Co. v. Slattery*, 3 App. Cas. 1155, specially referred to. *Preston v. Toronto R. W. Co.*, 11 O. L. R. 56, 6 O. W. R. 786, 8 O. W. R. 504.

**30. Trial by jury—Findings—Statutory privilege — Street railway — Condition of highway.]**—On the trial of an action based on negligence, the jury should be asked to find specially what the negligence of the defendant was that caused the injury. General findings of negligence, unless the same is found to be the direct cause of the injury, will not support a verdict.—Where a street railway company have by their charter privileges in regard to the removal of snow from their tracks, and the city engineer is given power to determine the condition in which the highway shall be left after a snow storm, a duty is cast upon the company to exercise their privilege in the first instance in a reasonable and proper way and without negligence. *Mader v. Halifax Electric Tramway Co.*, 26 C. L. T. 188, 37 S. C. R. 94.

See ANIMALS — BAILMENT — BANKS — BANK BANKING, 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, II, 2 — CARRIERS, 1 — COMPANY, I, 2 — CONTRACT, VIII, 3—CROWN, 9, 12, 13—DAMAGES, 2, 8 — FIRE—MASTER AND SERVANT—

MEDICAL PRACTITIONER, 2, 3—MORTGAGE, 4—MUNICIPAL CORPORATIONS, II, 3, 4, XII, XIV, 9—NEW TRIAL, 2—NUISANCE, 1, 2, 4—PARTIES, I, 6, III, 1, 6—PLEADING, III, 5—RAILWAY—SHIP, 4, 12, 13—STREET RAILWAYS, II, III.—TREES—TRESPASS TO LAND, 3—TRIAL, I, 16—TRUSTS AND TRUSTEES, 7—WAY, III.

## NEW TRIAL.

**1. Charge to jury — Misdirection—Bias.]**—In an action upon a guarantee, judgment was entered for the plaintiffs at the trial upon the answers of the jury to questions submitted, and the defendants moved for a new trial on numerous grounds of improper reception and rejection of evidence, misdirection, improper direction, and remarks by the trial Judge. The Supreme Court of New Brunswick (37 N. B. R. 163) was equally divided, and the defendants appealed to the Supreme Court of Canada, where judgment was given (DAVIES, J., diss.) ordering a new trial, on the ground that the charge of the trial Judge to the jury shewed passion and bias and was improper. *Bustin v. W. H. Thorne & Co., Ltd.*, 37 S. C. R. 533.

**2. Misdirection — Substantial miscarriage—Court equally divided—Negligence.]**—In an action for damages for the negligent operation of an elevator by the defendant's servant, causing the death of the plaintiff's son, a new trial was moved for on behalf of plaintiff, on the ground of misdirection. The Court was equally divided:—*Held*, *per* GRAHAM, E.J., and RUSSELL, J., that, as the effect of the misdirection complained of was to withdraw from the jury questions which were proper for their consideration, and upon which they should have been asked to pass, there should be a new trial.—*Per* TOWNSHEND, J., that, although the trial Judge in his instructions to the jury used inaccuracies of expression in regard to the law of negligence, these expressions were not of such a character as to mislead the jury on the main subject of inquiry, and, no substantial wrong or miscarriage having been occasioned, the provisions of O. 37, r. 6, applied, and a new trial should not be granted.—*Per* LONGLEY, J.—The findings of the jury were warranted by the evidence, and, the questions submitted being proper, there was no reason for a new trial, and the application should be dismissed. *Hawley v. Wright*, 39 N. S. R. 1, 1 E. L. R. 26.

**3. Surprise — Loss of cattle—Bailment—Cause of disease not assigned in pleading or examination.]**—The defendant



agreed to "feed and winter" 47 young cattle for the plaintiff and to be responsible for the loss of any of the cattle in any other way than by death from ordinary disease. A large number of the cattle died, and the plaintiff sued for damages. At the trial, the plaintiff had a verdict on the strength of evidence proving that the stable in which the defendant had kept the cattle was too small for so many cattle. There was nothing in the statement of claim to inform the defendant upon what grounds he was held liable, and he filed affidavits to shew that he had been unable to ascertain such grounds on the examination of the plaintiff for discovery, also that the stable, which had been taken down and removed before the trial, had been of quite sufficient size to accommodate the cattle:—*Held*, that there should be a new trial, on the ground of surprise in the evidence produced by the plaintiff as to the size of the stable. Costs to abide the result of the new trial. *McLenaghan v. Hood*, 15 Man. L. R. 510, 1 W. L. R. 422, 25 Occ. N. 19.

See APPEAL, V. 20, VI. 3, XII. 4, 5—BANKRUPTCY AND INSOLVENCY, 22—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 5—CARRIERS, 5—CONTRACT, VII. 4, IX. 5—CONVERSION, 2—COSTS, III. 8, V. 14—CRIMINAL LAW, I. 6, 9, III. 13, 14, 23, 34—DAMAGES, 3, 4, 8—DEED, 9—DISMISSAL OF ACTION, 8, 9—EJECTMENT, 3—EVIDENCE, I. 2, 4—FRAUDULENT CONVEYANCE, 1—INSURANCE, I.—MASTER AND SERVANT, II. 6, 7, 11, 21—NEGLIGENCE—PLEADING, IX. 3—RAILWAY, IV. 4, VI. 2, VII. 4, 7, X. 8—SALE OF GOODS, I. 7—STREET RAILWAYS, III. 1, 2—TRIAL, I. 1, 4, 6, 9, 11, IV. 1.

## NEWSPAPER.

See DEFAMATION.

## NON-REPAIR OF HIGHWAY.

See WAY, III.

## NONSUIT.

See DEFAMATION, 9—EVIDENCE, I. 10—NEGLIGENCE—RAILWAY, VII. 6—STREET RAILWAYS, III. 1—TRIAL, IV. 1.

## NOTARIAL ACT.

See DEED, 12.

## NOTARIAL NOTICE.

See DEFAMATION, 10.

## NOTARY.

See AFFIDAVIT, 2—OPPOSITION, 2—PRINCIPAL AND AGENT, 15.

## NOTICE.

See BANKRUPTCY AND INSOLVENCY—BANKS AND BANKING, 3—BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 1, III. 3—BILLS OF SALE AND CHATTEL MORTGAGES, 4—CHOSE IN ACTION, ASSIGNMENT OF—COMPANY, II. 1, 6, III., IV. 1—CONTRACT, VI. 6—COURTS, I.—EVIDENCE, II. 1—INSURANCE, II. 5, 7, 9, 12—LANDLORD AND TENANT, 25, 26—MASTER AND SERVANT, I., II. 22, 25—MUNICIPAL CORPORATIONS, XI. 1, XII. 4—OPPOSITION, 1—PARTITION—RAILWAY, IX. 5, 6—REGISTRY LAWS—SCHOOLS, 11—SUCCESSION—TRUSTS AND TRUSTEES, 3, 7, 13—VENDOR AND PURCHASER, I. 8, 20, 29, II. 7—WAY, III.

## NOTICE OF ACCIDENT.

See MASTER AND SERVANT, II. 31, III. 9.

## NOTICE OF ACTION.

**1. Pleading** — *Failure to allege—Right of action.*]—An inscription in law based upon the fact that the declaration does not allege that a notice of action was given to the defendants, the corporation of the city of Montreal, will be struck out, the omission of such allegation not constituting an absolute forfeiture of the right of action. *Cloutier v. City of Montreal*, 7 Q. P. R. 385.

**2. Public officer**—*Official wrongdoing—Particulars—Insufficiency—Dismissal of action.*] — When a public officer is charged with various acts of official wrongdoing, individual and combined, the notice of action must set forth said acts of wrongdoing, and the dates, times, and circumstances connected therewith, in a manner sufficient to enable the defendant to make tender and amends in respect of one or more or all of the specific acts complained of; otherwise the action will be dismissed on exception to the form. *Trudel v. City of Montreal*, 8 Q. P. R. 45.

**3. Public officer — Penalty—*Mala fides*.]**—A month's notice to a public officer is not required of an action for a penalty, unless some special statute requires it, art. 88, C. C. P., requiring such a notice only in actions for damages. Even in an action for damages, such a notice is not required if it is alleged that the defendant has acted in bad faith. *Boulay v. Saucier*, 7 Q. P. R. 344.

See PLEADING, VI. 5—SCHOOLS, 11—WAY, III. 11.

### NOTICE OF APPEAL.

See APPEAL—INDIAN, 2.

### NOTICE OF DISHONOUR.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

### NOTICE OF SALE.

See DISTRESS—MORTGAGE, 12, 15, 16.

### NOTICE TO QUIT.

See LANDLORD AND TENANT, 27.

### NOVA SCOTIA PROVINCIAL EXHIBITION.

**Expropriation of land**—Power to proceed by analogy to Halifax city charter—Conditions precedent—Interlocutory injunction. *Monaghan v. Provincial Exhibition Commission*, 1 E. L. R. 177.

### NOVATION.

See BANKRUPTCY AND INSOLVENCY, 4—CONTRACT, X. 6.

### NUISANCE.

**1. Electric wire—Proximity to highway — Injury to infant — Negligence—Neglect of duty — Evidence for jury.]**—The wires of the defendant company were strung upon poles across a ravine, which was private property, parallel and at least 14 inches from a bridge forming a

highway. The plaintiff, a boy of 8 years, who was crossing the bridge or playing thereon, pushed his arm through an opening in the lattice work of the railing of the bridge, and touched a wire. The insulation being imperfect, the boy's hand, where it had touched the wire, and his head, which touched part of the iron work of the railing, were burnt. The wire was at such a distance that it could not be touched accidentally by any one merely passing over or standing on the bridge or at the railing, or who was looking through or over the railing, or without intending to touch it, or without deliberately reaching out through the railing as far as the wire, and there was no evidence that there was anything of a character likely to entice or induce children to play with it or put their hands upon it:—*Held*, that there was no evidence upon which the jury could reasonably have found that the electric wire was a nuisance to those lawfully using the highway, or that there was any neglect of duty on the part of the defendant company to the public which could render them liable to the plaintiff. Judgment of TEETZEL, J., reversed. *Gloster v. Toronto Electric Light Co.*, 12 O. L. R. 413, 8 O. W. R. 57. (Reversed: see the next case.)

**2. Electric wire—Proximity to highway — Injury to child — Dedication—Neglect of duty.]**—Several years before 1894 the owner of land in the township of York built a bridge over a ravine for access to and from the city of Toronto, and about 1894 the defendants placed wires across the ravine about 10 feet from the bridge. In 1904 the bridge was reconstructed and made wider, being brought to within from 14 to 20 inches of the wires, which had become worn and ceased to be insulated. The plaintiff, a boy under 9 years of age, while playing on the new bridge, put his arm through the railing, and, his hand touching the wire, he was badly injured:—*Held*, that the plans and deeds in evidence shewed a dedication as a public highway of the bridge and land on each side of it, and such highway included the land over which the wires passed.—*Held*, also, that the wires in the condition in which they were at the time of the accident were dangerous to those using the highway, and the company were liable for the injury to G. Judgment of Court of Appeal, 12 O. L. R. 413, 8 O. W. R. 57, reversed. *Gloster v. Toronto Electric Light Co.*, 26 C. L. T. 847.

**3. Livery stable — Injunction—Injury to landlord's reversion—Damages in lieu of injunction—Parties — Tenants—Prospective change in nature of houses in locality.]**—1. A landlord is not entitled to

an injunction to prevent the carrying on of a livery and feed stable business in proximity to dwellings occupied by his tenants in a mainly residential locality so as to constitute a nuisance, without proof of injury to the reversion or that one or more of the tenants had left because of the annoyance from the stable, but such injunction may be granted at the suit of any tenant who proves such nuisance.—2. Although the nature of the occupancy of a locality is a large factor in deciding whether the carrying on of a certain trade there would or would not create a nuisance; yet, in deciding that question, no consideration need be given to the probability that in the near future, owing to the increase of population, the locality will become mainly a business instead of a residential district.—3. The plaintiffs being tenants from month to month only, it would not be a proper case for awarding damages instead of granting an injunction, as it could not be known how long the tenants might remain, and, besides, injuries of the kind in question cannot be fully compensated by damages, and it would be impossible to estimate such damages accurately in every case. *Jones v. Chappell*, L. R. 20 Eq. 539, followed. *McKenzie v. Kayler*, 15 Man. L. R. 660, 1 W. L. R. 290.

**4. Maintenance of pole on highway**—Injury to person driving—Negligence—Contributory negligence. *Dale v. British Columbia Telephone Co. (B.C.)*, 3 W. L. R. 292.

**5. Stable**—Landlord and tenant—Notice to landlord required. *Crowell v. Archbold*, 1 E. L. R. 169.

See CRIMINAL LAW, III. 24, 25—SHIP, 7—STREET RAILWAYS, III. 6.

## OBSTRUCTION OF HIGHWAY.

See CRIMINAL LAW, III. 25—WAY, IV.

## OFFICERS OF COMPANY.

See DISCOVERY, I., IV.

## OFFICERS OF MUNICIPAL CORPORATIONS.

See MUNICIPAL CORPORATIONS, X.

## OFFICIAL ADMINISTRATOR,

See MINES AND MINERALS, 2.

## OMISSION TO PROVIDE NECESSARIES FOR WIFE.

See CRIMINAL LAW, III. 26.

## ONTARIO ELECTION ACT.

See PENALTY, 4.

## ONTARIO MEDICAL ACT.

See MEDICAL PRACTITIONER, 1 — STATUTES, 3.

## OPENING OF HIGHWAY.

See WAY, V.

## OPPOSITION.

**1. Acte declaratoire—Costs—Notice—Insolvency.**—The opposant claimed the ownership of goods seized, in virtue of her marriage contract, and of an *acte déclaratoire et reconnaissance de dettes* from the defendant to her; she also asked that the plaintiff pay the costs, because he acted in bad faith, knowing that these goods belong to the opposant, for in another cause in which the plaintiff was a party, there was a return of *nulla bona* against the defendant:—*Held*, that the plaintiff contesting could not plead that this *acte déclaratoire* was of no value against third parties, and that it was passed when the defendant was insolvent; but he might allege that, notwithstanding the return of *nulla bona*, the defendant made opposition on the ground that there had been no discussion, *préalablement*, of his movables. *Nimard v. Drolet*, 8 Q. P. R. 40.

**2. Affidavit—Notary.**—The affidavit required by art. 647, C. P., to sustain an opposition *à fin d'annuler* may be made before a notary public. *Fleury v. Dufresne*, 7 Q. P. R. 410.

**3. Defendant opposing judgment—Declinatory exception—Deposit.**—If a defendant, in his opposition to judgment, declines the jurisdiction of the Court, he must proffer that plea by a distinct exception, accompanied by a special deposit and all the essential formalities of preliminary exceptions. *Knauth v. Lindley*, 8 Q. P. R. 111.

**4. Exhibit—Default in filing—Exception to form—Second opposition—Order.]**—The opposant's default in filing an exhibit in support of his opposition is no ground for an exception to the form.—No Judge's order is required on a second opposition filed by a new opposant. *Dupuy v. Prudhomme*, 8 Q. P. R. 121.

**5. Extension of time for filing—Grounds.]**—The absence of the defendant and other serious circumstances explained in an affidavit of the advocate will be sufficient to allow the filing of an opposition to a judgment after the time allowed for so doing. *Grothe v. Robillard*, 7 Q. P. R. 393.

**6. Filing — Want of presentation—Stay of execution—Order.]**—There is no reason to grant a *congé défaut* of a *tierce opposition*, once it has been filed, merely for want of presentation to the Court.—The order of *sursis* having been granted only for a limited number of days, the plaintiff is entitled to proceed with his execution, after the expiry of such delay, without any order of the Court. *Waterman v. Engle*, 7 Q. P. R. 432.

**7. Grounds of—Attachment by creditor of plaintiff.]**—A defendant cannot oppose the execution of a judgment rendered against him by setting forth an attachment after judgment issued in his hands by a creditor of the plaintiff. *Warin v. Werthemer*, 7 Q. P. R. 433.

**8. Grounds of—Chattels claimed by gift and by purchase.]**—In an opposition *à fin de distraire*, the opposant should indicate the chattels seized which have been given to him and those which he has bought. *Archambault v. Luneau*, 8 Q. P. R. 110.

**9. Grounds of—Sale of immovables by sheriff—New grouping of lots — Prescription.]**—A new grouping of lots in a sheriff's notice of sale, and the allegation of prescription incurred since the date fixed for the new sale, are facts subsequent to the proceedings by which the sale was stopped in the first instance, and are sufficient reasons for a new opposition. *Canada Industrial Co. v. Kensington Land Co.*, 7 Q. P. R. 463.

**10. Motion to dismiss—Judgment—Grounds.]**—When the grounds which prevented the defendant from appearing and pleading, have been found sufficient by the Judge who allowed his opposition to be filed, and the plaintiff does not contest the truth of such allegations, a motion to dismiss the opposition will be re-

jected. *Dupuis v. Le Club Jacques Cartier*, 7 Q. P. R. 348.

**11. Motion to set aside—Deposit.]**—A motion to set aside an opposition to a judgment, which opposition has been presented to and received by a Judge, because the deposit made with it is insufficient, is in the nature of a preliminary exception, and will be dismissed if it is not accompanied by a deposit. *Lévin v. Lalonde*, 7 Q. P. R. 481.

**12. Presentation — Service—Practice.]**—An opposition by a third party presented to and received by a Judge, and served upon the plaintiff the next day, is valid; it is not necessary that it should be served upon the opposite party before being presented to the Judge. *Archibald v. Polan*, 7 Q. P. R. 388.

**13. Summary dismissal — Unjust delay of sale—Discretion.]**—A Judge has a discretionary power summarily to dismiss, upon motion, and without requiring the ordinary rules of procedure to be observed, an opposition to a seizure under execution, made with the object of unjustly delaying the sale, or he may make such other order as will do justice in the premises. *Fontaine v. Payette*, Q. R. 14 K. B. 454.

See ATTACHMENT OF DEBTS, II. 8—COSTS, IV. 3, 6, V. 11—EXECUTION, 2—HUSBAND AND WIFE, V. 9—JUDGMENT, V. 5—SEQUESTRATION.

## OPTION.

See CONTRACT, III. 10—PRINCIPAL AND AGENT, 10—STREET RAILWAYS, I. 5, 6 — VENDOR AND PURCHASER, I. 9, 12, 15, 27.

## ORDERS IN COUNCIL.

See CROWN, 3—CROWN LANDS, 6.

## OVERHOLDING TENANT.

See LANDLORD AND TENANT, 1, 26, 27.

## OVERSEERS.

See PAUPER.

**PARENT AND CHILD.**

**1. Gift of land—***Oral promise to convey—Statute of Frauds—Improvements—Enforcement of promise—Equitable jurisdiction.*—The defendant made a gift of a piece of land to his son R. after his marriage for the purpose of erecting a house upon it in which to live. R. went into exclusive possession of the land with the defendant's consent, and made permanent improvements, including the erection of a house at a cost of between \$500 and \$600. The defendant, at various times, promised to give R. a deed of the land, but failed to do so, and, after the death of R., ejected his widow and resumed possession of the land with the improvements:—*Held*, that the Court, in the exercise of its equitable jurisdiction, would protect the donee and those claiming under him in the enjoyment of the property, and that it was not open to the defendant, after having made an oral gift of the land to his son; and the expenditures made on the faith of that gift, to avail himself of the defence of the Statute of Frauds, and that the plaintiff, who claimed as widow of R., was entitled to a conveyance of one undivided half of the land in question, or to a partition. *Dagley v. Dagley*, 38 N. S. R. 313.

**2. Services of child —** *Payment—Contract—Will—Executors — Infant—Quantum meruit.*—The plaintiff was induced to give up the employment at which she was earning her living, and to go and live with her mother, in consequence of her mother's promise to leave her all her property at her death. Upon a claim against the mother's executors for payment for the services rendered, it was shewn that during three years at least the plaintiff's services were understood not to be gratuitous. The mother having failed to make provision as agreed, the plaintiff was held entitled to recover on a *quantum meruit* for her services during the time stated.—It was also held that the plaintiff, who was divorced from her husband, must be assumed to be emancipated and not a minor. *In re Slaughenwhite*, 38 N. S. R. 47.

See DAMAGES, 3, 4—EXECUTORS AND ADMINISTRATORS, 14—EXTRADITION, 5—FRAUDULENT CONVEYANCE, 6—HUSBAND AND WIFE, II., VII. 1. IX. 1. 2—INFANT—MASTER AND SERVANT, I. 8, II. 13, 26—NEGLIGENCE, 10, 15—STREET RAILWAYS, III, 4.

**PARLIAMENT.**

See CONSTITUTIONAL LAW — PARLIAMENTARY ELECTIONS—TRIAL, III, 3.

**PARLIAMENTARY ELECTIONS.**

- I. CLAIM AGAINST CANDIDATE.
- II. CONTROVERTED ELECTION PETITION.
- III. CORRUPT PRACTICES.
- IV. PENALTIES.
- V. SCRUTINY.

See CONSTITUTIONAL LAW, 4—CRIMINAL LAW, III. 1, 9, 28—MANDAMUS, 1—PENALTY, 4.

**I. CLAIM AGAINST CANDIDATE.**

**Quebec Election Act—***Time for presentation — Approval of Judge.*—A person who has a claim against a candidate at an election for the Legislative Assembly of the province, in relation to the election, and has not sent it in to the agent of the candidate within one month after the day of the declaration of the election, but who afterwards obtains an approval of the same by a competent Judge, under s. 231 of the Quebec Election Act, 1903, has an action against the candidate to recover the amount. The true report of s. 231, notwithstanding its permissive form, is to take the claim out of the operation of the preceding s. 230, by which it would be barred, and to restore the right to enforce it at common law. *Pigeon v. Chaurest*, Q. R. 28 S. C. 469.

**II. CONTROVERTED ELECTION PETITION.**

**1. Application to substitute petitioner—***Delay in proceeding to trial—Parliament in session—Time—Necessity for respondent's presence at trial.*—Application was made on behalf of B. to be substituted as petitioner against the respondent's return to the House of Commons. The application was based primarily on the ground that more than three months had elapsed since the presentation of the petition without the day for trial being fixed:—*Held*, dismissing the application, *per FRASER J.*, that the presence of the respondent at the trial being shewn to be necessary, the time during which Parliament was in session was not to be computed, and the period of three months had, therefore, not elapsed.—*Per RUSSELL, J.*, that the fact that the respondent's presence at the trial was necessary, was a complete answer to the application to substitute another petitioner, in so far as that application was based on the petitioner's assumed default in not having proceeded with the trial.—TOWNSHEND, J., dissented. *In re Col-*



*Chester Dominion Election, Brenton v. Laurence*, 38 N. S. R. 232.

**2. Death of petitioner** — *Appointment of substituted petitioner—Rival applications.*]—The petitioner having died, the Court was moved on behalf of two persons each desiring to be substituted in his place, one being a person qualified to vote at the election, R., and the other the unsuccessful candidate, B. It was disclosed by the affidavits that R. was actively interested in securing the return of the respondent at the election, that he was a member of one of his committees, and that he was associated with leading members of the political party with which the respondent was identified:—*Held*, that, as R. was not, for these reasons, a person by whom the inquiry under the petition was likely to be prosecuted without partiality and with effect, his application, although prior in point of time, should not be granted, and that the interests of the electors concerned in the prosecution of the petition would be better served by the appointment of B.—*Held*, further, FRASER, J., dissenting on this point, that the appointment of B. should not be refused on grounds which would not have been available against him if he had been the original petitioner. *In re Pictou Dominion Election, Murray v. McDonald*, 38 N. S. R. 242.

**3. Order for examination of respondent**—Election Judges assigned before order acted on—Jurisdiction thereafter. *Halifax Election, Hetherington v. Roche*, 2 E. L. R. 109.

**4. Particulars** — *Scrutiny—Supplementary particulars—General Rules 20, 24—Invalid votes—Transfer certificates obtained without request.*]—The word "particulars" in Rule 24 of the General Rules respecting the trial of election petitions means particulars of "votes intended to be objected to," this being the language in Rule 20, and is not confined to further details of particulars already given.—Where for the purpose of a scrutiny the respondent had filed and served particulars of votes objected to by him, and the scrutiny had been begun but not completed, he was allowed (upon terms) to add new particulars of other votes objected to.—*Scmble*, that the votes of persons who voted on transfer certificates obtained from the returning officer without any personal or written request were invalid. *Re Port Arthur and Rainy River Provincial Election (No. 2), Preston v. Kennedy*, 12 O. L. R. 508, 8 O. W. R. 419.

**5. Petitioner**—*Affidavit of—Lack of information—Preliminary objection—Re-*

*ceipt for deposit—Error.*]—The total absence or lack of information of the petitioner necessary to enable him to make the affidavit required in support of an election petition under the Dominion Controverted Elections Act, affords no ground of preliminary objection to such a petition.—The receipt of the clerk of the Court for the deposit made as the security required on the presentation of an election petition is sufficient if it state that a deposit of \$1,000 has been made, though it should go on to give an erroneous description of the bills of which that sum consisted. *Pleau v. Amcs*, Q. R. 28 S. C. 455.

**6. Petitioner** — *Information as to facts alleged in petition—Examination of informants—Solicitors.*]—Where the petitioner in a controverted federal election petition declares that he does not know except by hearsay the facts which he has alleged in his petition, the respondent will not be allowed to interrogate by way of preliminary examination the person who had given such information to the petitioner, nor the petitioner's advocates upon the record. *Darlington v. Gallery*, 7 Q. P. R. 329.

**7. Preliminary objections—Appeal** — *Trial of petition—Record—Copies of documents—Practice.*]—The statute permitting, on the one part, an appeal from decisions upon preliminary objections, and for that purpose the transmission of the record to the higher Court, and prescribing, on the other hand, that the appeal shall not have the effect of staying the proceedings nor delay the trial of the petition, without at the same time prescribing a method of supplying the absence of the record transmitted: the Court which is to try the petition must, ex necessitate rei, in order to give effect to the statute, proceed with the trial, pending such an appeal, upon certified copies of the essential documents contained in the record. *Bergeron v. Brunet*, Q. R. 27 S. C. 389.

**8. Preliminary objections—Charges against returning officer—Misconduct—Corrupt practices—Common law of parliament.** *Re Lisgar Dominion Election, Re Selkirk Dominion Election, Re Brandon Dominion Election, Re Portage La Prairie Dominion Election (Man.)*, 3 W. L. R. 268.

**9. Preliminary objections—Status of petitioner—Evidence—Premature service—Return of member.]—On the hearing of preliminary objections to an election petition the status of the petitioner may be established by oral evidence not objected to by the respondent.—A petition alleging "an undue election" or "undue**

return" of a candidate at an election for the House of Commons cannot be presented and served before the candidate has been declared elected by the returning officer; *GIBOUARD and IDINGTON, JJ., dissenting.*—Judgment of *CRAIG, J.*, 2 W. L. R. 136, 435, reversed. *Yukon Election Case, Grant v. Thompson*, 37 S. C. R. 495.

**10. Trial—Commencement—Extension of time.**—An order fixing the time for the trial of an election petition at a date beyond the time prescribed under the Act operates as an enlargement of the time. *St. James Election Case*, 33 S. C. R. 137, and *Beauharnois Election Case*, 32 S. C. R. 111, followed. *Halifax Election Case, Hetherington v. Roche, Hetherington v. Carney, Roche v. Borden, Carney v. O'Mullin*, 26 C. L. T. 776, 37 S. C. R. 601.

**11. Trial—Distinction between certificate and report of Judges—Certificate that election voided—Report against personal charges—Effect of appeal.** *Shelburne Election, Cowie v. Fielding*, 1 E. L. R. 415.

**12. Trial — Enlarging time.** *Pictou Election, McDonald v. Bell*, 1 E. L. R. 262.

**13. Trial — Enlarging time—Fixing date for trial later than last day of enlarged period.** *Halifax Election, Hetherington v. Roche, Hetherington v. Carney*, 1 E. L. R. 255.

**14. Trial — Enlarging time—Setting down for trial not condition precedent to time being enlarged—Preliminary objection—Intituling papers—Waiver.** *Halifax Election, Hetherington v. Roche, Hetherington v. Carney*, 1 E. L. R. 122.

**15. Trial—Enlarging time after date fixed.** *Shelburne Election, Cowie v. Fielding*, 1 E. L. R. 369.

**16. Trial—Failure to bring on within six months — Order enlarging time for trial—Time does not run pending appeal as to preliminary objections.** *Shelburne Election, Cowie v. Fielding*, 1 E. L. R. 179.

### III. CORRUPT PRACTICES.

**1. Admission — Revocation—Candidate disbursing money through persons other than lawful agents—Presumption—Onus — Illegal expenditure — Agent or mandatary — Wilful ignorance—Voiding election—Disqualification of candidate.]—**An admission made and filed by a re-

spondent to a controverted election petition that illegal acts have been done by electors and agents of such a nature as to cause the avoidance of the election, cannot be revoked. A demand for revocation not supported by any reason, not even that of error, will be rejected.—A candidate at a Dominion election may disburse money for election expenses only through the medium of an agent or agents appointed in conformity with s. 143 of 62 & 63 V. c. 12 (D.), and a contravention of this provision of the statute is an indictable offence; it creates, besides, a presumption of fraud which the person contravening must rebut.—A candidate, having an agent as required by the section cited, who remits to another person a sum of money for the so-called legal purposes of the election, without controlling the use of it or asking for an account of it, and who destroys the documents furnished by his depositary shewing the use made of it, will be held to have approved or permitted the illegal use of it by the latter.—One who, to the knowledge of the candidate, approaches the electors on his behalf and takes charge of an important part of the election, whether in the way of intrigue or otherwise, becomes the mandatary and agent of the candidate, so that the latter is responsible for and suffers the consequences of his acts. The candidate cannot pretend ignorance of them; and his neglect to control them, his care to shut his eyes and keep himself in ignorance, are equivalent to an express authorization to commit them.—This implied mandate or agency is deduced from the circumstances, which may vary infinitely, and the appreciation of which is for the Court.—In the course of the trial in this case it was proved that the agents and mandataries of the respondent were guilty of corruption, personation, and fraudulent practices, for which the respondent was responsible, and which had the effect of disqualifying him and voiding his election. *Bergeron v. Brunet*, Q. R. 27 S. C. 389.

**2. Agency — Scrutineer—Burden of proof—Common law of Parliament—Irregularities—Saving clause—Scrutiny—Disqualification of voter—Crown land agent—Persons voting on transfer certificates—Agent — Names not on voters' list in poll book—Certificates issued in blank—Telegraphed certificates—Demand for tendered ballot.]—**A. was found guilty of corrupt acts at H., a polling place, on polling day. Before that day his sole connection with the respondent was that, being a livery stable keeper, he had driven the respondent, on a day before the nomination, from one place in the electoral division to another. The respondent on that occasion canvassed A. for his vote, but A.

made no promise, and the respondent did not ask him to vote for him. On the day before the polling, A. and one G. drove to H., arriving there in the evening. The trip was undertaken at the instance of G., who was held not shewn to be an agent of the respondent. In order to persuade A. to go to H., G. said he would procure a transfer of A.'s vote to H., and he afterwards brought and handed to A. a printed paper, signed by the respondent, apparently one of a number of scrutineer appointments which the respondent had signed in blank and left with one B., his agent. A.'s name was not inserted by the respondent, and there was no evidence to shew by whom it was filled in. The number of the polling place was left blank, and never was filled in. G. was not examined as a witness, and there was no proof of the means by which he became possessed of this paper:—*Held*, MEREDITH, J.A., dissenting, that the petitioner had failed to establish that A. was an agent for whose acts the respondent was responsible.—It was contended that the election should be set aside under the common law of Parliament because of the corrupt acts of A. and G. and of a number of irregularities in the conduct of the election by the officials, among which were the appointment of a non-voter as deputy returning officer at one poll and of a clergyman at another, contrary to the statute. The operations of A. and G. were, however, confined to a small portion of the electoral district; A. was the only person found by the trial Judges to have been guilty of corrupt practices, and they also found that there was no reason to suppose that corrupt practices extensively prevailed at the election:—*Held*, that if, in such circumstances, an election could be avoided, it should be only on overwhelming proof of corrupt acts of so extensive a nature as virtually to amount to a repression or prevention of a fair and free opportunity to the electors of exercising their franchise and electing the candidate they wished to represent them; and that all irregularities of the kind indicated, not affecting the result, were cured by s. 214 of R. S. O. 1897 c. 9.—In respect of votes attacked upon a scrutiny:—*Held*, that a Crown land agent under the Free Grants and Homesteads Act, authorized to take entries and make locations for free homesteads, but not to sell or to receive moneys for the sale of public lands, was not disqualified as a voter by s. 4 of the Ontario Election Act.—2. An elector engaged by a deputy returning officer to drive voters to the poll is not an agent, within the meaning of s. 94 (1) and (2) of the Act, who is entitled to the certificate of the returning officer enabling him to vote at a polling place other than the

one where by law he is otherwise entitled to vote.—3. The votes of agents who voted on transfer certificates, but whose names were not in fact on the poll books of the polling subdivisions from which they purported to be transferred, were improperly received; the right to vote was disproved by the production of the poll book, and the petitioner was not bound to shew that the names were not on the original voters' list.—4. The votes of persons voting at a polling place other than that at which they were entitled to vote without a transfer certificate enabling them to vote at the polling place at which they did vote, were improperly received, being in violation of s. 78 of the Election Act; except in the case of a tendered vote under s. 108, or a vote polled upon a transfer certificate under s. 94, no person is entitled to be admitted to vote unless his name appears on the list in the poll book.—5. The votes of persons voting on certificates issued in blank by the returning officer, whose names were afterwards filled in by the election clerk or other person, were improperly received, being against the provisions of s. 94.—6 and 7. Certificates given to constables and certificates sent by telegraph are not properly granted under s. 94, and cannot support votes received by virtue of them.—8. Upon the evidence W., an elector, did not tender his vote to the deputy returning officer at the proper polling place and did not demand or receive a tendered ballot in the manner required by s. 108, and, even if there had been a proper demand and an improper refusal, there was nothing more than an irregularity.—*Per* MEREDITH, J.A.:—W. was entitled to vote, but the rejection of the vote could be treated only as an irregularity which should have avoided the election only if it might have affected the result. *R. Port Arthur and Rainy River Provincial Election, Preston v. Kennedy*, 12 O. L. R. 453, 8 O. W. R. 46.

**3. Agency**—Sub-agent. *Shelburne Election, Cowie v. Fielding*, 1 E. L. R. 375.

**4. Evidence**—*Corrupt acts at former election*—*Agency*—*System of corruption*—A petition against the return of a member for the House of Commons at a general election in 1904 contained allegations of corrupt acts by the respondent at the election in 1900, which were struck out on preliminary objections. On the trial of the petition evidence of payments by the respondent of accounts in connection with the former election was offered to prove agency and a system, and was admitted on the first ground. A question as to the amount of one account so paid was objected to and rejected:—*Held*, that



such rejection was proper; that the question was not admissible to prove agency for agency was admitted or proved otherwise: nor as proof of a system, which could not be established by evidence of an isolated corrupt act.—*Held*, also, that where evidence is tendered on one ground, other grounds cannot be set up in a court of appeal. *Shelburne and Queen's Election Case, Cowie v. Fielding*, 26 C. L. T. 776, 37 S. C. R. 604.

**5. Evidence—Hiring vehicles — Conveying voters to poll—Agents—General corruption — Payment of electors—Pro-tended services—Expenditure of money—Account of expenses—Disqualification of candidate — Avoidance of election.]**—In the trial of an election petition, evidence of corrupt practices must be sufficiently clear to induce belief beyond reasonable doubt, and the respondent or party charged is entitled to the benefit of the doubt.—The hiring of vehicles for the conveyance of voters to the polls is a corrupt practice, and when the person who hires and directs the carter, etc., does so from a committee room, in the presence of the president of such committee, an agent of the candidate, the latter will be held responsible therefor.—The wholesale hiring of carriages from electors and conveyance of voters to the polls constitute the offence of general corruption.—The employment and payment of electors as chairmen and members of committees is not *ipso facto* a corrupt practice, but becomes such if the employment is merely colourable and is used as an indirect means to bribe.—The expenditure of money for election purposes by a candidate otherwise than through his election agent, though not declared a corrupt practice by the Dominion Elections Act, 1900, is presumed to have been made for corruption. Where an amount of from \$5,000 to \$7,000 is so expended, being handed in packages of several hundred dollars by the candidate to some ten agents styled presidents of committees, and by them distributed to electors colourably employed as locators, etc., the official account of the candidate's election expenses published by his election agent amounting to only \$291.35, and the personal expenses of the candidate by his own admission not exceeding \$35, there is established in evidence a system of general corruption, with the consequent avoidance of the election and disqualification of the candidate.—6. The failure to give any account whatever of amounts of \$400, \$700, and \$750, admitted by the candidate to have been spent, is evidence that they were used for corrupt purposes with the like consequence, of the avoidance of the election and disqualification of the candidate. *Darlington v. Gallery*, Q. R. 28 S. C. 50.

**6. Personal corruption—Inference—Charge in petition—Amendment—Evidence.]**—On a charge of personal corruption by the respondent, if the adjudication by the trial Judges does not contain a formal finding of such corruption, this Court may insert it, if the recitals and reasons given by the Judges warrant it.—The respondent, the night before the election, took a sum of over \$4,000 and divided it into several parcels of sums ranging from \$250 to \$1,500. He then, after midnight, visited all his committee rooms and gave to the chairman of each committee, personally and secretly, one of such parcels. His financial agent had no knowledge of this distribution, and no evidence was produced of the application of the money to legitimate objects:—*Held*, that the inference was irresistible that the money was intended for corruption of the electors, and the respondent was properly held guilty of personal corruption.—Allegations in the petition that the respondent had himself given and procured, and undertaken to give and procure, money and value to electors and others named his agents, to induce them to favour his election and vote for him, for the purpose of having such money and value employed in corrupt practices, were sufficient to cover the offence, which the respondent was found guilty. *St. Ann's Election Case, Gallery v. Darlington*, 26 C. L. T. 775, 37 S. C. R. 500.

#### IV. PENALTIES.

**1. Nova Scotia Election Act—Bribery—Action for penalty—Discretion of Judge as to amount.** *Davidson v. Armstrong*, 2 E. L. R. 73.

**2. Nova Scotia Election Act — Bribery—Action for penalty — Evidence of status of person bribed.** *Davidson v. Hall*, 2 E. L. R. 75.

#### V. SCRUTINY.

**Ruling of trial Judge as to disqualification of class of voters—Appeal to Court of Appeal—Jurisdiction—Finality of voters' lists.]**—Upon proceeding with the scrutiny consequent upon the judgment of the Court of Appeal, 12 O. L. R. 453, TEETZEL, J., one of the Judges who tried the petition, made a general ruling to the effect that in cases of objection to votes on the ground that the persons who voted were under the age of twenty-one years or were aliens, although their names were on the voters' lists, he would receive evidence to shew

minority or alienage, notwithstanding the provisions of the Voters' Lists Act declaring that upon a scrutiny the voters' lists shall be final and conclusive:—*Held*, that no appeal lay to the Court of Appeal from such ruling.—*Per* MEREDITH, J.A., dissenting, that an appeal was competent, and should be entertained and allowed and the ruling reversed. *Re Port Arthur and Rainy River Provincial Election* (No. 3), *Preston v. Kennedy*, 13 O. L. R. 17, 8 O. W. R. 606.

See *ante*, II. 4, III. 2.

### PART PERFORMANCE.

See CONTRACT, X. 7—EVIDENCE, I. 1—MUNICIPAL CORPORATIONS, XI. 1—SALE OF GOODS, I. 4—VENDOR AND PURCHASER, I. 13, 31, 32, 33—WAY, V. 3.

### PARTICULARS.

**1. Motion for—Time for answering plea—Lapse.**—A party, having neglected to file with his inscription in law, or within the delays, his answer to a plea, is *de facto* foreclosed from doing so, and cannot make a motion for particulars. *Demers v. Brien dit Durocher*, 7 Q. P. R. 467.

**2. Statement of claim—Infringement of patents—Other claims—Postponement till after discovery—Difference in English practice.** *Copeland-Chaterson Co. v. Business Systems Limited*, 7 O. W. R. 274, 348.

**3. Statement of claim—Slander—Names of persons to whom uttered—Exclusion of evidence at trial—Disclosing names of witnesses.** *Moon v. Mathers*, 7 O. W. R. 422.

**4. Statement of defence—Action to establish will—Defences of want of testamentary capacity and revocation.** *Kennedy v. Hill*, 7 O. W. R. 875.

**5. Statement of defence—Knowledge of defendants.** *Campbell v. Lindsay*, 7 O. W. R. 560.

**6. Statement of defence—Demand of particulars after close of pleadings—Absence of special circumstances—Examination for discovery.** *Savage v. Canadian Pacific R. W. Co. (Man.)*, 3 W. L. R. 522.

See CRIMINAL LAW, III. 9, 20—MASTER AND SERVANT, II. 16—MEDICAL

PRACTITIONER, 1—MUNICIPAL ELECTIONS, 8, 11—NOTICE OF ACTION, 2—PARLIAMENTARY ELECTIONS, II. 4—PLEADING—PROHIBITION, 3.

### PARTIES.

I. JOINDER AND ADDITION OF DEFENDANTS.

II. JOINDER AND ADDITION OF PLAINTIFFS.

III. THIRD PARTIES.

See ASSESSMENT AND TAXES, 16, 17—COMPANY, III. 4, IV. 8—CONTRACT, IV. 4, VI. 1, VIII. 4—COSTS, III. 2, VI. 4—EJECTMENT, 4—EQUITABLE EXECUTION, 1—FIRE, 2—FRAUDULENT CONVEYANCE, 1—HUSBAND AND WIFE, V.—JUDGMENT, III. 1—MECHANICS' LIENS, 1—MORTGAGE, 7, 8, 19—NUISANCE, 3—PENALTY, 5—PLEADING, VIII. 6, 7, 17, IX. 7—SCHOOLS, 5—SHIP, 21—SOLICITOR, 4—STAY OF PROCEEDINGS, 3—TRESPASS TO LAND, 1—WATER AND WATERCOURSES, 7—WAY, II. 3—WRIT OF SUMMONS.

I. JOINDER AND ADDITION OF DEFENDANTS.

**1. Adding defendants—Motion by original defendant—Damage to land by drain—Municipal corporations—Highway—Non-repair—Dividing line between townships—Joint liability for repair.** *Donaldson v. Township of Dereham*, 7 O. W. R. 617.

**2. Adding defendant—Replevin—Counterclaim—Third party procedure—Rules of Court.** *Imperial Paper Mills of Canada v. McDonald*, 7 O. W. R. 412, 472.

**3. Adding defendants—Motion by original defendants—Guarantors of promissory note—Adding makers.**—In an action against the guarantors of a promissory note for \$1,935.46, given by a company for machinery bought from the plaintiffs, it appeared that the company before the maturity of the note were claiming from the plaintiffs \$933.68 for breaches of the contract of sale, and it was alleged that when the note was given it was agreed that the exact amount should be adjusted during its currency. The defendants paid into Court \$1,195.91 as the amount justly due, and moved for an order adding the company as defendants:—*Held*, that the defendants were entitled to the order. *Reid v. Gould*, 13 O. L. R. 51, 8 O. W. R. 642.

**4. Deposit with Provincial Treasurer—Action to recover—Other claimants.]**—A plaintiff in an action to recover a sum of money deposited by the debtor at the office of the Provincial Treasurer, in the circumstances mentioned in art. 1198, R. S. Q., must bring before the Court as parties the other claimants in order to ascertain whether their claims are well founded or not.—Conversely, such claimants brought in as parties are in a position to contest the action by setting up the grounds based upon their claims. *Connolly v. Etna Life Insurance Co.*, Q. R. 29 S. C. 6.

**5. Joinder of causes of action—Conspiracy—Pleading.]**—An action may be brought against a number of defendants jointly for an illegal conspiracy, though they joined the conspiracy at different times, there being in substance only one cause of action, namely, the conspiracy to injure.—In such case, however, the jury may differentiate and assess separate damages against the separate defendants according to the respective dates when they became members of the conspiracy. *O'Keefe v. Walsh*, [1903] 2 Ir. R. 681, followed. *Copeland-Chatterton Co. v. Business Systems Limited*, 11 O. L. R. 292, 7 O. W. R. 42, 72,

**6. Joinder of defendants—Cause of action—Pleading—Negligence.** *Campbell v. Cluff*, 8 O. W. R. 740, 780.

**7. Joinder of defendants — Joint tort-feasors—Con. Rule 186—3 Edw. VII. c. 19, s. 609 (O.)]**—In an action for damages against the corporation of a city for allowing planks and lumber to remain on one of its streets, which had been negligently piled and wrongfully left there by the other defendants, and which fell on the plaintiff and injured him:—*Held*, that the defendants were not joint tort-feasors, and that Con. Rule 186 was not so amended by 3 Edw. VII. c. 19, s. 609 (O.), as to authorize the action as constituted, and the plaintiff was ordered to elect against which defendant he would proceed. *Hinds v. Town of Barrie*, 6 O. L. R. 656, *Rice v. Town of Whitby*, 25 A. R. 191, and *Chandler and Massey, Limited, v. Grand Trunk R. W. Co.*, 5 O. L. R. 589, followed. *Tate v. Natural Gas and Oil Co. of Ontario*, 18 P. R. 82, and *Langley v. Law Society of Upper Canada*, 3 O. L. R. 245, distinguished. *Baines v. City of Woodstock*, 10 O. L. R. 694, 6 O. W. R. 601.

**8. Joinder of defendants—Pleading—Joint cause of action—Master and servant — Injury to servant.]**—In an action brought against the Guelph and

Goderich R. W. Co., the Canadian Pacific R. W. Co., and the Canada Foundry Co., jointly, in which it was alleged that the plaintiff was employed by the Canadian Pacific R. W. Co. to work upon the construction of a line of railway being constructed by them under the name of the Guelph and Goderich Railway, leased and operated by the Canadian Pacific R. W. Co., on which the Canada Foundry Co. agreed to construct a steel bridge, and the plaintiff was ordered by his employers to assist in that work and did so; that "the defendants" undertook the placing of the necessary girders, and the plaintiff assisted on his employers' orders; that the work of placing the girders was so negligently done that he was injured; that the apparatus used, including the roadbed, was under the control of "the defendants;" that they were negligent in not providing a safe road-bed and efficient apparatus; that there were defects in the derrick and plan adopted; and that "the said accident happened by reason of the said negligence of the said defendants, and by reason thereof the plaintiff suffered the injuries herein complained of:"—*Held*, that the statement of claim sufficiently alleged a joint cause of action, and the plaintiff was not bound to elect against which of the several defendants he would proceed. *Symon v. Guelph and Goderich R. W. Co.*, 13 O. L. R. 47, 8 O. W. R. 320.

**9. Joinder of defendants—Pleading—Specific performance—Motion to compel plaintiff to elect to proceed against one of two defendants—One claim against both defendants.** *Davies v. Sovereign Bank*, 8 O. W. R. 484, 554.

**10. Joinder of defendants—Pleading—Statement of claim — Multifariousness—Embarrassment.** *Howland v. Chipman*, 8 O. W. R. 640.

**11. Order adding — Desistment—Amendment — Delay in filing defence—Costs — Pleading — Will.]**—Desistment from a judgment giving leave to add certain parties may be considered as an amendment to the declaration, and filed without the intervention of the Court.—Therefore, there is no reason, after the filing of such a desistment, to allow parties added under the judgment from which the plaintiff has desisted, to file a defence to the action.—If the delay in the filing of the defence has been caused by reason of a misunderstanding between the parties, or has been occasioned by irregularities in the declaration, the Court of Review will not grant costs upon a judgment reversing the decision of the Court below and refusing such leave.—

In these circumstances the Court will reserve to the party so added the right to plead to the action or to take such other proceeding as he may think proper.—A party added as a defendant in an action to set aside a will may demand not the dismissal of the action as to him and his discharge from the record on the ground that his interest is identical with that of the plaintiff, but only the dismissal of the action so far as the adjudication to pay costs demanded against him is concerned. *Hébert v. Roy*, 8 Q. P. R. 89.

**12. Striking out and adding names—Assignment for benefit of creditors.]—**Where, after a suit was brought for a declaration that stock-in-trade in possession of the defendants belonged to the plaintiffs, the defendants made an assignment for the benefit of their creditors, and their assets were insufficient to pay their liabilities in full, the names of the defendants were ordered to be struck out and that of the assignee added. *Gault Bros. Co. Ltd. v. Morrell*, 26 C. L. T. 318, 3 N. B. Eq. 173.

**13. Unnecessary party — Costs.]—**Where C. was brought in as a defendant upon an objection taken by the original defendants that he was a necessary party, and the result of the action shewed that he was not a necessary party, he was held entitled to costs against the original defendants, but no costs of any attempt to prove a contract with them. *Phillips v. City of Belleville*, 11 O. L. R. 256, 7 O. W. R. 49.

**14. Will — Validity—Action against executors—Addition of heirs.]—**In an action *en pétition d'hérédité* for a part of a succession against executors, in which the question of the validity of the will and of the powers of the defendants under it has to be decided, the Court, before final adjudication, will order that all those interested as heirs be made parties to the suit. *Coleman v. Stevens*, Q. R. 28 S. C. 365.

## II. JOINDER AND ADDITION OF PLAINTIFFS.

**1. Adding co-plaintiff—Action for breach of contract made on behalf of company to be formed—Adding company as plaintiff — Trustee and cestui que trust.]—**The defendant contracted to sell and deliver to the plaintiff all the bricks he should make during the year. It was stated in the contract that the plaintiff entered into it on behalf of a company to be afterwards incorporated under the name of the Manitoba Construction Company. After the incorporation of such

company the plaintiff brought this action in his own name for an injunction to restrain the defendant from committing breaches of the contract and for damages for breaches already committed:—*Held*, that the plaintiff should not be allowed to amend his statement of claim by adding the company as a co-plaintiff:—*Held*, also, that the plaintiff should not be allowed to amend his statement of claim by adding claims for damages for himself as trustee for the company and also for the company as *cestui que trust*. *as in* in which it has been held that a trustee may enter into a valid contract on behalf of a *cestui que trust* not in existence at the time, as, for example, an unborn child, distinguished. *Cass v. Mc'utcheon*, 15 Man L. R. 667, 669, 1 W. L. R. 435.

**2. Adding co-plaintiff—Rule 242 (b)—**Consent in writing by agent of added party—Insufficiency — Addition of defendant. *Watt v. Popple* (Man.), 4 W. L. R. 519.

**3. Assignee of plaintiff—Re-assignment—Objection taken in Court of Appeal.]—**A defendant may demand, even in the Court of Appeal, when the cause is before that Court upon an incidental appeal, that the assignee of the plaintiff shall be made a party, even if there has been a re-assignment. *Vallières v. Besudoin*, 7 Q. P. R. 330.

**4. Assignee of plaintiff's claim pendente lite—Motion of defendant.]—**A defendant being sued upon a claim, which was, subsequently to the filing of the plea, transferred by the plaintiff to another, may ask, by motion, that the assignee be added as a plaintiff. *Besudoin v. Vallières*, 7 Q. P. R. 445.

**5. Attorneys-General—Action for injunction — Inference with supply of water — Navigable stream—Conflicting leases from Dominion and Provincial Governments—Necessity for consents — Scope of action: *Eddy v. Booth*, 7 O. W. R. 75.**

**6. Consent—Power of attorney—Insufficiency—Reference—Powers of referee—Amendment—Application to strike out amendments—Appeal.]—**An action, involving mainly the taking of accounts, was referred to the district registrar, the referring order giving that officer all the powers of a Judge as to certifying and amending. On this authority the district registrar, on application, added certain parties plaintiffs, upon the plaintiff filing a consent thereto of the parties so added. The writ of summons and statement of claim were afterwards amended. The defendant H. took out a summons to



strike out the amendments to the writ and pleadings, on the ground that the amendments were made without an order of the Court or a Judge thereof, and that, as to the plaintiffs added, no proper consent signed by them had been filed. The documents purporting to be consents were filed by the plaintiff under a power of attorney authorizing him to sue for, recover, and receive the amount of a certain judgment debt recovered in another action:—*Held*, that the action in which the consents were filed was a new action; that the power of attorney was, in the circumstances, insufficient; and that the amendments made in pursuance of such consents so filed must be struck out.—*Held*, also that the order conferring on the district registrar power to amend, would also authorize him to add parties.—*Held*, also, that the application to strike out the amendments made by the district registrar was not an appeal, but a substantive application to strike out certain amendments made by the district registrar.—But, *semble*, on the authority of *Hayward v. Mutual Reserve Association*, [1891] 2 Q. B. 236, that an appeal would lie to a Judge in Chambers. *Hill v. Hambly*, 12 B. C. R. 253.

**7. Creditors' action — Payment of plaintiff's debt—Addition of new creditor as co-plaintiff — Costs.]** — Where a creditor, who has brought an action on behalf of himself and other creditors to vacate a transfer of property, has before judgment received payment of his debt, but not of his costs, the Court will not sanction the addition of another creditor as a co-plaintiff, but will allow the controversy to be settled as between the plaintiff and the defendants, leaving the creditor seeking to intervene to begin an independent action. *Drifill v. Ough*, 13 O. L. R. 8, 8 O. W. R. 496.

**8. Interpleader issue—Who should be plaintiff—Insurance moneys — Rival claimants—Residence abroad — Security for costs.]**—By the terms of an insurance policy it was made payable to the wife of the insured, mentioning her name. The insured had lived for many years in this province with a person who passed as his wife, and by whom he had a family, and who had possession of the policy; but shortly before his death he made a will whereby he left the policy in question to a person of the same name, who resided out of the province, whom he described as his wife, and to a daughter by name. On settling an interpleader issue to try the right to the policy, the Master in Chambers directed that the legatees under the will should be plaintiffs, and that they should not be required to give security for costs, the difficulty having

been caused by the deceased himself; while it might be assumed that the costs of all parties would be made payable out of the fund. The order was varied, on appeal, by directing that the plaintiffs should give security for costs, and that the costs of the appeal and cross-appeal should be costs in the cause. *Bruce v. Ancient Order of United Workmen*, 11 O. L. R. 633, 7 O. W. R. 177.

### III. THIRD PARTIES.

**1. Addition of third parties—Action for negligence of ferry company—Claim for relief over against municipal corporation—Neglect to fence wharf—Contract—Indemnity.** *Donn v. Toronto Ferry Co.*, 7 O. W. R. 154.

**2. Company—Payment of dividends out of capital — Action by liquidator against directors — Claim of relief over against shareholders—Joinder of as third parties—Rule 209—Scope of.]**—In an action by the liquidator of an insolvent company against the directors, specifying several alleged illegal acts, amongst which was that of payment of dividends out of capital, the Master in Chambers, at the instance of two of the defendants, who claimed indemnity over against the shareholders for any amounts so paid, issued the usual third party order, under Con. Rule 209, directing that two out of a large number of shareholders should be joined as third party defendants, as a test case, but no order for their representing the class was obtained, though it was stated that if they appeared such order would be applied for. On appeal by the plaintiff and the third parties to a Judge in Chambers, the order was set aside. An appeal therefrom by the defendants to a Divisional Court was dismissed, the plaintiff undertaking that any moneys realized in the action would not be distributed without notice to the defendants and without leave therefor being obtained from the local Judge. *London and Western Trusts Co. v. Loscombe*, 13 O. L. R. 34, 8 O. W. R. 327, 406, 494.

**3. Directions for trial—Discretion of Court — Setting aside notice — Con. Rules 209, 213.]** — On a motion for directions for the trial of an action under Con. Rule 213, it is in the discretion of the Court to determine whether, having regard to the nature of the case, it is a proper one for the application of the third party procedure, notwithstanding that an appearance has been entered to the third party notice. *Miller v. Sarnia Gas and Electric Co.*, 2 O. L. R. 546, and

*Holden v. Grand Trunk R. W. Co.*, 2 O. L. R. 421. considered. *Donn v. Toronto Ferry Co.*, 11 O. L. R. 16, 6 O. W. R. 920, 973.

**4. Indemnity or relief over**—Application to bring in third party—Lateness of application—Postponement of trial. *Smith v. Matthews*, 7 O. W. R. 598.

**5. Indemnity or relief over**—*Bringing in third party en garantie*—*Delay—Connexity—Independent action.*]—A defendant in a personal action has always an action *en garantie* against a third person who is bound by law or contract between them to indemnify him against a judgment or to share the burden with him. The defendant has a right, for this purpose, to the delay allowed by art. 183, C. P. C.; but, if this delay has expired, his demand *en garantie* will no longer be an obstacle nor an occasion for delay of the trial of the principal action.—There must be connexity between the principal demand and the demand *en garantie*, but it is not necessary that they should both arise out of the same right or title.—The defendant may, if he chooses, proceed against the third person by an independent action, instead of bringing him into the original action. *Gosselin v. Martel*, Q. R. 27 S. C. 364.

**6. Indemnity or relief over**—Negligence—Joint tort-feasors—Motion for directions as to trial—Setting aside third party notice. *Cliff v. New Ontario S. S. Co.*, *Hepder v. New Ontario S. S. Co.*, 7 O. W. R. 804.

**7. Master and servant**—*Relief over—Damages—Multiplicity of actions.*]—The action was brought by the personal representatives of a person killed while in the defendants' employ, as a conductor upon a train in use in the erection of a bridge on a line of railway in course of construction. The defendants averred that the whole cause of the accident was the subsiding of the track, for which they were not responsible, but wished to serve a third party notice on the railway company, to which the plaintiff objected:—*Held*, that this was not a proper case for a third party notice, because (1) according to the defendants the accident was caused by something for which they were not responsible, and so they were not liable; (2) besides this action, there were two other pending actions on behalf of other workmen, and it would be improper that the railway company should be subject to have any damages for which they were liable assessed piecemeal; (3) the plaintiff would, for rea-

sons mentioned in the judgment, be prejudiced and unnecessarily delayed if the third party notice were allowed. *Mahoney v. Canada Foundry Co.*, 12 O. L. R. 514, 8 O. W. R. 651.

**8. Motion for leave to serve notice**—Delay—Prejudice to plaintiff. *Irvine v. Prendergast*, 1 O. W. R. 719.

**9. Service of notice on third party out of jurisdiction**—“*Proceeding*”—3 *Edw. VII. c. 8. s. 13 (O.)*—*Con. Rule 162 (c)*—*Breach of contract within Ontario—Indemnity.*]—A third party notice is a “proceeding” within the meaning of 3 *Edw. VII. c. 8. s. 13 (O.)*, providing that in *Con. Rule 162* the word “writ” shall be deemed to include any document by which a matter or proceeding is commenced; but, when applying *Con. Rule 162 (c)* to service out of Ontario of a third party notice, the word “action” must be read as if it were “third party proceeding”—the effect being that service can be allowed only where the third party proceeding is founded on a breach within Ontario of a contract, wherever made, which is to be performed within Ontario; and in this case there was no breach within Ontario, because the contract under which indemnity was sought by the defendants against the third parties was one under which the obligation to indemnify did not arise until judgment had been recovered and the amount paid by the defendants, and the defendants were in the same action opposing the recovery of judgment.—Order of *ANGLIN, J.*, reversed. *Montgomery v. Saginaw Lumber Co.*, 12 O.L.R. 144, 7 O.W.R. 619, 729.

See ANTE. I. 2—APPEAL. V. 19—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 7. 8.

## PARTITION.

**Report of referee—Homologation—Notice to advocates—Filing of exhibits—Time.**]—The report of a referee in a partition of a succession should not be declared void on account of want of notice to advocates, when the parties do not suffer any prejudice thereby.—The filing of exhibits and documents by the referee in support of his report at the time of the hearing of the motion to homologate the report, is sufficient, especially when the parties have been previously required by the notary to place in his hands all the documents which they wish to file. *Lecuir v. Pepin*, 5 Q. P. R. 112.

See MUNICIPAL CORPORATIONS, XIV. 8—SPECIFIC PERFORMANCE, 4—SUBSTITUTION, 2, 3.

## PARTNERSHIP.

**1. Account stated—Admission of liability—Promise to pay—Evidence to vary—Admissibility.]**—On the dissolution of a partnership the partners signed a statement shewing an amount as due to the plaintiff as his share, and containing a declaration that "for the sake of peace and quiet and to avoid friction and bother," the plaintiff was willing to waive investigation of the firm's books and to agree that the balance as stated should be deemed to be the amount payable by the defendants to the plaintiff:—*Held*, that a promise to pay the amount of the balance so stated to be due should be implied from the admission of liability which the parties had so signed.—In an action on the account stated, the defendants alleged that the plaintiff had agreed not to sue upon it, and that the document was merely intended to shew the amount which would be payable to the plaintiff at such time as collections might be made of outstanding debts due to the firm:—*Held*, that these contentions tended to contradict, vary, and annul the terms of the written instrument, and, consequently, did not constitute collateral agreements in respect of which parol evidence would be admissible.—Judgment of the Court below, 2 W. L. R. 379, reversed. *Jackson v. Drake*, 26 C. L. T. 315, 37 S. C. R. 315.

**2. Action against firm—Procedure—Service of process—Firm name—Partners—Amendment.]**—The service of process upon a firm in the partnership name at its office by a bailiff upon a grown-up person is a good service upon the firm and each of the partners individually. Therefore, a person who has been served as transacting business with a partner under two partnership names at two different places, when in fact he transacts business alone in one of these two names, and appears by attorney, is before the Court for all purposes, as well to conform to orders for amendment of the pleadings which he attacks, as to submit to final judgment, which may be pronounced against him in one or other of his capacities.—It is within the discretionary power of the Court, in the above circumstances, to allow an amendment of the writ of summons by striking out the name of one of the defendants and adding that the other trans-

acts business alone under a firm name. *Sykes v. Dillon*, Q. R. 28 S. C. 230,

**3. Action by commercial firm—Members of—Some out of province—Security for costs—Procuration.]**—A commercial partnership is not a legal person or entity distinct from the several members who compose it. It cannot be a plaintiff in an action, and, as all the individual partners must be named as such in the writ, any one of them who does not reside in the province may be required to give security for costs.—In an action brought by a partnership doing business in the province, a member of it who resides outside is represented by those who reside within and who have the right to commit the firm to such an act of administration as the institution of a suit. He is therefore not bound to produce a power of attorney. *Broune v. Taylor*, Q. R. 28 S. C. 462.

**4. Action for account pro socio—Formation of partnership—Unsettled conditions—Actual dealings as partners.]**—When two persons agree to form a commercial partnership, and, before having definitely fixed the conditions of the contract, one of them leases a shop, where the other deposits goods, and advances a part of his share of capital in the future firm, and both transact business upon the premises leased, under the projected firm name, for two months and a half, and finally separate without having been able to come to an understanding, claims arising from that state of affairs can only give rise to an action *pro socio* for an account. An action of debt by one of the contracting parties against the other for the recovery of advances and a salary for services rendered is irregular and will be dismissed. *McDowell v. Wilcock*, Q. R. 28 S. C. 226,

**5. Claim against partner—Set-off against claim of partnership—Payment—Equitable decree—Small debt jurisdiction.** *Hawes v. Kinsey* (N. W. T.), 3 W. L. R. 183.

**6. Death of one partner—Winding-up of partnership—Account—Evidence of surviving partner—Absence of corroboration—Mining ventures—Hotel business—Contract—Conveyances—Declaration of trust—Receipts—Burden of proof—Credits—Real estate—Tenants in common—Improvements—Remuneration for services.** *Keating v. Olsen* (Y. T.), 4 W. L. R. 351.

**7. Dilatory exception—Dissolution—Demand—Change of position.]**—

Where a partner is sued personally, a dilatory exception on his part will be dismissed if it does not shew that a demand for dissolution of the partnership made in such exception, will have the effect of changing the position of the parties as members of the partnership. *Labelle v. Paquette*, 8 Q. P. R. 69.

**8. Dissolution — Book-debts — Account.]**—When upon the dissolution of a partnership by mutual consent, one of the partners takes over the assets for due consideration, and agrees to share with his late partner any amount of the book-debts he may collect in excess of a stated amount, he becomes liable to such partner and his legal representatives, to account to them for collections so made. *O'Meara v. Ouellet*, Q. R. 28 S. C. 418.

**9. Dissolution**—Claim against withdrawing partner—Moneys of firm used for private purposes—Sale of interest without deduction — Construction of agreement—Reformation—Fraud. *Greig v. Macdonald*, 8 O. W. R. 61.

**10. Dissolution — Evidence — Continued use of firm name—Omission to give notice of dissolution or file certificate—Treasurer of corporation—Mixing of funds—Liability.]**—On the evidence set out in this case a partnership in a private banking business which had existed between the defendant and one H. was held to be dissolved; but, as the business continued to be carried on in the firm name, and no notice of the dissolution was given, or any certificate thereof under the Copartnership Act. R. S. O. 1887 c. 130, s. 7, was filed, the defendant's liability to persons dealing with the firm continued.—After the dissolution of the partnership, H., who was also treasurer of a municipal corporation, received, as such, moneys belonging to the corporation, out of which, and other moneys, he made certain payments for the corporation and deposited the balance in a chartered bank where the firm kept its account, subsequently using it in the firm's business:—*Held*, that the defendant was not liable therefor, for in dealing with the moneys H. did so either as the corporation's authorized agent or in breach of his duty; if as agent, his knowledge that the defendant was not a partner must be attributed to the corporation; and if in breach of his duty, his improperly mixing them with his own moneys, in which the defendant had no interest, could not render the defendant liable. *Town of Oakville v. Andrew*, 10 O. L. R. 709, 6 O. W. R. 454.

**11. Dissolution**—Reference to take accounts — Partnership articles — Covenant for payment of specified sum—Lien for—Report of Master—Special circumstance. *Cameron v. Peters*, 8 O. W. R. 359.

**12. Payment of debt by partner — Subrogation.]**—Under the principles of the common law as it obtains in England and in Ontario a partner who pays a partnership debt cannot be subrogated to the rights of the creditor against his co-partner.—The law as applied in similar cases by the Courts of Quebec and of the United States discussed. *Res v. Connor*, 26 C. L. T. 527, 10 Ex. C. R. 183.

**13. Voluntary liquidation — Discharge of liquidator.]**—When all the parties have themselves liquidated the partnership heretofore existing between them, the functions of the liquidator having terminated, he will be discharged on a petition to that effect. *Pepin v. Lamouche*, 7 Q. P. R. 430.

**14. Winding-up — Receiver — Costs — Landlord's lien — Rents paid by sub-tenants—Priority.]**—A liquidator or a receiver of a partnership cannot be ordered personally to pay costs, when such order is not asked for, and there has been no negligence or misconduct on his part which would justify such an order.—The principal landlord has no lien upon the moneys which the sub-tenant has paid to the principal tenant: his lien extends to the goods of the sub-tenants up to the amount of the rent which they owe, but not the rent which they have paid.—The costs and expenses of the receiver or liquidator, as well as those of his advocates, must be paid in preference to the claim of the owner upon the moneys representing the rents of the sub-tenants. *Bédard v. Owens*, 8 Q. P. R. 81.

See APPEAL, II. 3 — BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 17 — CONTRACT, VI. 2, IX. 2—CONVERSION, 2—COSTS, VIII. 2—COVENANT, 3—DISCOVERY, I. 1, IV. 2—EVIDENCE, III. 5 — HUSBAND AND WIFE, VI. 2, VIII. 2—MONEY IN COURT—MORTGAGE, 21—PLEADING, VIII. 18—RECEIVER, 2—SET-OFF, 1, 3—TRUSTS AND TRUSTEES, 10—WAREHOUSE RECEIPTS—WRIT OF SUMMONS, 18.

## PARTY WALL.

See VENDOR AND PURCHASER, II. 1.



**PASSENGERS.**

See CARRIERS—RAILWAY, VI.—STREET RAILWAYS, II.

**PATENT.**

See CROWN LANDS.

**PATENT FOR INVENTION.**

**1. Combination**—Absence of novelty — Device — Want of inventive merit. *Cooper v. Jacobi*, 7 O. W. R. 36.

**2. Crown's right to use** — Compensation — Condition precedent to right of action.] — Apart from the statute, the Crown has the power, if it sees fit to do so, to use a patented invention without the assent of the patentee, and without making any compensation to him therefor.—By s. 44 of the Patent Act, the Government of Canada may at any time use the patented invention, paying to the patentee such sum as the Commissioner of Patents reports to be a reasonable compensation therefor:—*Held*, on demurrer, that a report by the Commissioner is a condition precedent to any right of action for such compensation. *McDonald v. The King*, 26 C. L. T. 779,

**3. Improvement in automatic drill turners** — Patentability—Use of friction as a motive power—Novelty—Anticipation — New combination of old elements — Infringement—Colourable imitation. *Woodward v. Oke*, 7 O. W. R. 881.

**4. Infringement**—*Interlocutory injunction* — Discretion — Appeal.] — An interlocutory injunction to restrain the defendant from using a patented device, will not be granted in a suit for damages arising from infringement and for a perpetual injunction, when the patent is recent and has not been established by a judgment at law.—2. The Court is at all times very reluctant to interfere in appeal with the discretionary power of the Court and Judges of original jurisdiction in issuing an injunction, and will only do so to avoid some grave injustice or to conform to an established rule of law. *Ottawa and Hull Power and Manufacturing Co. v. Murphy*, Q. R. 15 K. B. 230.

**5. Infringement**—Prior foreign patent.]—Judgment of the Exchequer Court

of Canada, 9 Ex. C. R. 399, affirmed. *Chamberlain Metal Weather Strip Co. v. Peace*, 37 S. C. R. 530.

**6. Infringement**—Sale for a reasonable price—Use of patented device—Contract—Patent Act, R. S. C. c. 61. s. 37—Evidence.]—The patentee of a device for binding loose sheets sold the defendant H. binders, subject to the condition that they should be used only in connection with sheets supplied by or under the authority of the patentee. H. used the binders with sheets obtained from the other defendants, contrary to the condition. In an action for infringement of the patent:—*Held*, that the condition in the contract with H. imposing the restriction upon the manner in which he should use the binders was not a contravention of the provisions of sec. 37 of the Patent Act, R. S. C. c. 61, in respect to supplying the patented invention at a reasonable price to persons desiring to use it, and that the use so made of the binders by H. was in breach of the condition of the contract licensing him to make use of the patented device and an infringement of the patent.—Judgment appealed from, 10 Ex. C. R. 224, affirmed. *Hatton v. Copeland-Chaterson Co.*, 26 C. L. T. 846, 37 S. C. R. 651.

**7. Manufacture and sale**—Patent Act, s. 37 — Unconditional sale — License.]—The condition in s. 37 of the Patent Act that a patent shall become void if the patentee does not within two years of the date of the patent, or any authorized extension of such period, commence and after such commencement continuously carry on in Canada the construction or manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making or constructing it in Canada, should be construed to mean that the patentee must not only manufacture his invention in Canada, but manufacture it in such a manner that any person who desires to use it may buy or obtain an unconditional title to it at a reasonable price.—(2) It is not a compliance with the above condition that a person who desires to buy or obtain an unconditional title to the patented invention is put in a position to obtain the use of it at a reasonable rental. *Hildreth v. McCormick Manufacturing Co.*, 26 C. L. T. 782.

**8. Patent Act, s. 37**—"Reasonable price" — Infringement resulting from breach of agreement—Infringing by inducing others to infringe.]—Section 37

of the Patent Act, R. S. C. c. 61, provides, among other things, that the patentee must, within a certain time after the date of his patent, commence and continuously carry on the manufacture of the invention patented, in such a manner that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price. For the plaintiffs it was contended that such price need not be a money price, but that conditions may be imposed, the value of which may constitute part or the whole of the price for which the thing covered by the invention is sold:—*Held*, that while there is nothing in the Act to prevent parties from entering into a binding agreement embodying such conditions, the patentee cannot prescribe his own conditions as part of such price and impose them upon all persons who may desire to use the invention. The "reasonable price" mentioned in the statute means a reasonable price in money; and for such a price the purchaser is entitled in Canada to acquire the complete ownership of the thing that the patentee is bound to manufacture or permit to be manufactured in Canada.—2. The defendant H., having purchased a binder from the plaintiffs on the condition that it was to be used only with sheets sold by or under the plaintiffs' authority, contrary to such condition used the binder sheets supplied by the defendants G.:—*Held*, that H. had not only broken his contract, but had also infringed the patent.—3. One who knowingly and for his own ends and benefit, and to the damage of the patentee, induces or procures another to infringe a patent, is himself guilty of an infringement.—4. The defendants G., being aware of the terms upon which the defendant H. had purchased a binder from the plaintiffs, viz., that only sheets that were supplied by or under the authority of the plaintiffs were to be used in it, furnished H. with sheets prepared and adapted by them for use in such binder, and to induce him to buy sheets from them they undertook to indemnify him against any action the plaintiffs might bring against him in that behalf.—*Held*, that the defendants G. had thereby infringed the patent. *Copeland & Chatterton Co. v. Hatton*, 26 C. L. T. 528, 10 Ex. C. R. 224.

**9. Pneumatic straw stackers—**  
*Combination — Assignment — Right of assignor to impeach validity of patent—Right to limit construction—Estoppel.*—The assignor of a patent, sued as an infringer by his assignees, is estopped from saying that the patent is not good; but he is not estopped from shewing what it is good for, i.e., he can shew the state of the art or manufacture at

the time of the invention, with a view to limiting the construction of the patent.—2. In an action for infringement against the assignor of a patent for improvements in pneumatic straw stackers, it appeared that an earlier patent assigned by the defendant to the plaintiff excluded everything but the narrowest possible construction of the claims of the second patent. In the latter, speaking generally, the combination was old, each element was old, and no new result was produced; but in respect of one of the elements of the combination there was a change of form that was said to possess some merit. Beyond that there was no substantial difference between the earlier and later patents:—*Held*, that while, as between the plaintiff and any one at liberty to dispute the validity of the later patent, it might be impossible on these facts to sustain the patent—as against the assignor, who was estopped from impeaching it, it must be taken to be good for a combination of which the element mentioned was a feature. *Indiana Manufacturing Co. v. Smith*, 26 C. L. T. 458, 10 Ex. C. R. 17.

**10. Sale of rights—Exploitation in common—Transfer by vendor to third person—Action by purchaser to rescind—Material furnished.**—The vendor of a patented process under condition of its exploitation by the purchaser for their common profit, who agrees to furnish the material necessary for that purpose, and who sues to set aside a transfer made by the purchaser to a third person of his rights, the subject of the sale, is not confined in his demand to the patented process, but has the right to include the material furnished. *Mergenthaler Linotype Co. v. Toronto Type Foundry Co.*, Q. R. 14 K. R. 458.

**11. Steadying device in cream separators — Improvement — Narrow construction—Writ of sequestration.**—The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine, (in this case a tubular cream separator):—*Held*, that the patent must be given a narrow construction and be limited to a device substantially in the form described in the patent and specification.—The plaintiffs after judgment applied for a writ of sequestration to enforce compliance with an injunction restraining further infringement by the defendants of the patent. The writ was refused. *Sharples v. National Manufacturing Co.*, 25 Occ. N. 146, 9 Ex. C. R. 460.

See CONTRACT, X. 8—COURTS, IX. 2  
—DISCOVERY, IV. 8—HIRE OF CHATTELS  
—PARTICULARS, 2.

**PAUPER.**

**1. Relief and maintenance—Place of settlement—Statute changing boundaries of districts—Uncertainty in description—Right of action.]—**By an Act defining the boundaries of polling districts in the county of Antigonish, the division line between district No. 1 (defendants) and district No. 4, was changed in such a way as to take an area from the former and transfer it to the latter district, but there was an *hiatus* in the description contained in the Act which left it uncertain whether a farm upon which a pauper, to whom the plaintiffs afforded relief and maintenance, had a settlement, and which, prior to the Act, was situated in the defendant district, had been transferred or not.—In an action to recover for the relief and maintenance afforded the Court was equally divided:—*Held, per TOWNSHEND and FRASER, JJ.*, affirming the judgment appealed from, that the pauper having acquired a settlement in the defendant district would retain it until she gained another in some way pointed out by the statute; that the Act relied upon by the defendants was ineffective for this purpose, and the defect could only be remedied by further legislation.—*Per GRAHAM, E. J.*, and *RUSSELL, J.*, that, as the farm upon which the pauper had her settlement could only be brought within the defendant district by reading the description in the Act in such a way as to divide the farm diagonally into two parts, and make the owner pay taxes on each part in a different district, such an intention on the part of the legislature would not be assumed; also that while, as a matter of construction, legislation annexing part of one polling district to another, for the convenience of voters, will not effect a similar transfer in respect to poor districts, the question in this case was controlled by an admission, made for the purposes of the trial, that the polling districts and poor districts were co-terminous, and that, in such case the area being transferred, the burden of supporting the poor settled in the portion of the district from which the area was taken, would be transferred with it.—*Per TOWNSHEND, J.* (other members of the Court expressing no opinion on the point), that since R. S. N. S. 1900 c. 50 the only right of action for necessary expenses of removal of a pauper, and for relief prior to such removal, is against the treasurer of the municipality in which such pauper has a settlement. *Town of Antigonish v. Arisaig Overseers of the Poor*, 38 N. S. R. 112.

**2. Settlement—**Medical services rendered by direction of one overseer—Over-

seers liable in their corporate capacity. *Irvine v. Stanley Overseers*, 2 E. L. R. 5.

See ATTACHMENT OF DEBTS, II. 2.

**PAYMENT.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 10 — BOND — COMPANY, III.—CONTRACT, III. 14, IX. 5, 6—GURANTY, 2 — ILLEGAL DISTRESS — MECHANICS' LIENS, 8—MORTGAGE, 4, 20 — PARENT AND CHILD, 2—PARTNERSHIP, 5, 12— PRINCIPAL AND AGENT—PRINCIPAL AND SURETY, 3—SHIP, 23—VENDOR AND PURCHASER, I. 1, 5, 8, 9, 15, 16, 23, 34.

**PAYMENT INTO COURT.**

**Funds in hands of trustee de son tort—**Constructive or express trustee—Trustee Relief Act — Infant cestui que trust—Jurisdiction of Court to order infant's money into Court on summary application — Contract between original trustee and transferee of fund. *Re Preston*, 8 O. W. R. 828.

See BILLS OF SALE AND CHATTEL MORTGAGES, 3 — CONTRACT, VIII. 8—DEFAMATION, 8—JUDGMENT, IV. 4, 11 — PLEADING, IX. 3—SALE OF GOODS, V. 6—VENDOR AND PURCHASER, I. 5.

**PAYMENT OUT OF COURT.**

See JUDGMENT, IV. 4—MONEY IN COURT—MORTGAGE, 21.

**PEDIGREE.**

See EVIDENCE, II. 2.

**PEDLARS.**

See HAWKERS AND PEDLARS—MUNICIPAL CORPORATIONS, VII. 1.

**PENALTY.**

**1. Action for — Forum — Statute — Superior Court — Jurisdiction — Evidence—Order of Board of Health—Proof of—Contravention by municipal corporation.]—**A statute with penal clauses

which declares that a suit for the recovery of the penalties prescribed may be begun before a named court, is in this respect permissive only, and does not take away the jurisdiction of the ordinary courts. Therefore, a penalty recoverable by virtue of such a statute in the Circuit Court is equally recoverable in the Superior Court, if it exceeds \$100 or \$200.—In a suit to recover a penalty for contravention of a statute resulting from the neglect of a municipal corporation to conform to an order of the board of health, it is sufficient to produce a copy, certified by the secretary of the board, of the notice served upon the corporation containing the order issued. It is not necessary to add thereto a copy of the resolution by which the board decided to issue it. *Village of St. Denis v. Benoit*, Q.R. 15 K. B. 278.

**2. Action for—Violation of Public Health Act—Ratepayer—Qui tam action—Affidavit.]**—A plaintiff who sues to recover penalties for violation of the Public Health Act, is not subject to have his action dismissed upon exception to the form for having declared that he sues as well in his own name as in the name of the Provincial Board of Health.—An affidavit of the plaintiff alone is sufficient to sustain such an action.—Every ratepayer has a sufficient interest to claim penalties for violation of the Provincial Health Act.—*Benoit v. Village of St. Denis*, 7 Q. P. R. 424.

**3. Alien Labour Act — Recorder's Court — Jurisdiction—Limitation of actions—Period of prescription.]**—Penalties concerning the importation and employment of aliens mentioned in 1 Edw. VII. c. 13, s. 1, may be recovered before the recorders, subject to the formalities therein mentioned.—The prescription of an action, suit, or information for any penalty is of two years, according to s. 930 of the Criminal Code. *Montreal Harbour Commissioners v. Recorder's Court*, 8 Q. P. R. 63.

**4. Ontario Election Act—Disqualified person voting — "Postmasters in cities" — Sub-postmaster.]**—A sub-postmaster appointed by the Postmaster-General to the charge of a sub-postoffice in a city is not a "postmaster," within the meaning of s. 4 of the Ontario Election Act, and is not liable to the penalty imposed by that section if he votes at an election for the Legislative Assembly.—Judgment of MEREDITH, J., 10 O. L. R. 604, reserved. *Lancaster v. Shaw*, 12 O. L. R. 66, 7 O. W. R. 502,

**5. Penal action—Writ of summons — Praecipe — Affidavit — Crown —**

*Parties — Fines — Municipality — Watercourse.]*—The filing of a praecipe and of an affidavit to obtain a writ of summons in a penal action, such as is mentioned in art. 5716, R. S. Q., is only necessary in the causes in which the Crown has an interest.—An action for a penalty for neglect to maintain a watercourse may be brought by the plaintiff alone in his own name.—All the fines imposed by the Municipal Code belong to the corporation alone, when such fines are not due by the corporation, and to the Crown, when they are due by the corporation. *Lalumière v. Bouthillier*, 8 Q.P.R. 47.

See CONTRACT, I. 3. II. 2. IX. 2—COSTS, V. 12—CRIMINAL LAW, IV. 5—MUNICIPAL CORPORATIONS, I. 2. VII. 2—MUNICIPAL ELECTIONS, 5 — NOTICE OF ACTION — PARLIAMENTARY ELECTIONS—SHIP, 26—STATUTES, 1, 2—STREET RAILWAYS, I. 3, 4.

## PENSION.

See BENEFIT SOCIETY, 1, 2.

## PEREMPTION.

**1. Capias after judgment—Service—Delay in execution—Waiver — Pleading.]**—A writ of *capias* after judgment is a mode of executing a judgment, and is not affected by art. 120, C. C. P., but remains valid beyond the delay of 6 months therein mentioned, until it is executed.—**2.** Even if it be a writ of summons, the peremption in the above article is not absolute, and is waived by failure of the defendant to plead it in the manner and within the delay prescribed in the case of irregularities in such writs. *Demers v. Girard*, Q. R. 28 S. C. 542, 7 Q. P. R. 347.

**2. Incidental demand — Cross-demand — Contract — Common issues.]**—When the principal demand is to have a contract fulfilled, while the incidental demand is founded on an alleged breach of it, and asks consequent damages, this cross-demand arises out of the same cause as the principal demand, and does not constitute a separate instance. — Such cross-demand cannot be perempted while the principal demand subsists. *Dauphin v. Starke Cooperage Co.*, 7 Q. P. R. 454.

**3. Motion for—Service — Domicile.]**—A notice of motion for peremption must be served upon the opposite party at the domicile elected by his attorney.

and not at the record office. *St. Louis v. Montreal Street R. W. Co.*, 7 Q. P. R. 373.

**4. Motion for — Service of notice—Vacation.]**—A notice of motion for peremption may be validly served at a time during which the Courts are not obliged to sit. *Kimpton v. Deline*, 7 Q. P. R. 438.

**5. Petition for interlocutory injunction.]**—Peremption of suit does not extinguish the right of action, but only the suit, or proceeding or instance; so a petition for an interlocutory injunction cannot be perempted, such a petition not being, before the issue of the writ of summons, an action, instance, or process. *Watson v. Massicotte*, 8 Q. P. R. 24.

See TRIAL, I. 3.

### PERJURY.

See CRIMINAL LAW, III. 27, 28—EXTRA-DITION, 7—JUDGMENT, III. 3.

### PERPETUATION OF TESTIMONY.

See CONTRACT, VIII. 4.

### PERSONA DESIGNATA.

See COURTS, VI. 1.

### PERSONATION.

See CRIMINAL LAW, III. 28.

### PETITION.

See PARLIAMENTARY ELECTIONS.

### PETITION OF RIGHT.

See CROWN LANDS, 5.

### PHYSICIANS AND SURGEONS.

See MEDICAL PRACTITIONER—STATUTES, 3.

### PICKETTING.

See TRADE UNION, 1.

### PILOTAGE DUES.

See SHIP, 23.

### PLANS.

See ARCHITECT — DEED, 9—MINES AND MINERALS, 3—MUNICIPAL CORPORATIONS, XI. 2 — RAILWAY, IX. 3—WAY, II. 2.

### PLEADING.

- I. ANSWER TO PLEA.
- II. CLOSE OF PLEADINGS.
- III. DECLARATION.
- IV. EXCEPTION.
- V. INSCRIPTION IN LAW.
- VI. PLEAS.
- VII. REPLY.
- VIII. STATEMENT OF CLAIM.
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See ACCOUNT, 1—APPEAL, VI. 2—ARBITRATION AND AWARD, 1—COMPANY, IV. 10—COPYRIGHT, 2 — DEFAMATION, 5, 8, 11—DISCOVERY, I. 3—EJECTMENT, 4—EVIDENCE, I. 5—EXECUTORS AND ADMINISTRATORS, 2—FIRE, 1, 2—GIFT, 4—HUSBAND AND WIFE, II., V. 9—JUDGMENT, II. 3—MALICIOUS PROSECUTION AND ARREST, 3—MASTER AND SERVANT, I. 8 — MECHANICS' LIENS, 2—MORTGAGE, 4—MUNICIPAL CORPORATIONS, I. 2, XIII. 1—MUNICIPAL ELECTIONS, 8 — NOTICE OF ACTION, 1—OPPOSITION—PARTICULARS—PARTIES — PEREMPTION — SAISIE-CONSERVATOIRE, 2—SET-OFF, 4—VENDOR AND PURCHASER, I. 11, 22, 36—WATER AND WATERCOURSES, 15, 21—WAY, V. 3.

### I. ANSWER TO PLEA.

**Amendment — Inscription in law—Time.]**—An inscription in law, coupled with an amendment of the plaintiff's answer to plea, being not an amendment to the answer originally filed, but a distinct plea, must be communicated and filed at the same time as the original answer. *Barber v. Grand Trunk R. W. Co.*, 8 Q. P. R. 8.



## II. CLOSE OF PLEADINGS.

**Lapse of time—Direction of Court—Rules 263, 612.]** — The noting of the pleadings as closed being a mere preliminary step to a motion for judgment or other kindred relief to ensure thereupon, by analogy to the practice prescribed by Rule 612, the officer of the Court should not, notwithstanding the terms of Rule 263, is any case in which more than a year has expired since the time at which the party seeking to have the pleadings noted became entitled to that relief, note the pleadings closed without the direction of the Court or a Judge; and, unless in exceptional circumstances, that direction should not be given without notice to the party to be adversely affected by such noting. *Radford v. Barwick*, 10 O. L. R. 720, 6 O. W. R. 765.

See *post*, IX. 8.

## III. DECLARATION.

**1. Action by company—Allegation of incorporation.]** — In an action in a County Court by a company, it is sufficient to describe the plaintiffs as an incorporated company, and the mode of incorporation need not be stated. *Waterous Engine Works Co. v. Campbell*, 22 N. B. R. 503, distinguished. *McLaughlin Carriage Co. v. Quigg*, 37 N. B. R. 86.

**2. Amendment — Heirs — Costs.]** — When the declaration is not so defective as to justify dismissal of the action, a motion by the plaintiffs to put into the declaration information as to the manner in which they have become legal heirs will be granted with costs against them. *Mireault v. Parker*, 7 Q. P. R. 450.

**3. Contract for hire — Promise to pay—Breach.]** — An allegation in a County Court writ that the defendant is indebted to the plaintiff in the sum of \$400 for money payable by the defendant to the plaintiff for the use and hire of divers horses and divers carriages by the plaintiff let to hire to the defendant at his request, and containing the common counts, but which does not allege any promise to pay or conclude with the common breach and *ad damnum* clause, is good on demurrer. *Dubé v. Pond*, 37 N. B. R. 138.

**4. Motion to strike out — Irrelevancy — Railway Act.]** — Allegations contained in a declaration in an action for damages for personal injuries, to the effect that the defendants, who were not a railway company, acted in contraven-

tion of the provisions of the Dominion Railway Act of 1903, are irrelevant and will be struck from the record on inscription in law. *Hence v. Standard Chemical Co.*, 7 Q. P. R. 451.

**5. Negligence—Bodily injuries—Allegation that persons dependent on plaintiff — Irrelevancy.]** — In an action for damages for bodily injuries, the plaintiff alleged that he was "the only support of a young wife, feeble and incapable of working, as well as of a mother 60 years old and having need of her son's assistance in order to live;" and that the defendants had put the plaintiff in a position in which he was not able to aid, sustain, and succour those of whom he had the charge as well by nature as by law:—*Held*, that these allegations should be struck out as irregular, useless, and having no connection with the liability of the defendants. *Lefrançois v. Dominion Bridge Co.*, 7 Q. P. R. 338.

**6. Unnecessary counts—Application to strike out — Grounds of general demurrer.]** — The Court will not, on a summary application before trial, strike out counts of a declaration merely because there are more than are necessary to sustain the action, or because they are repetitions of other counts, but will leave it to the Judge at the trial to compel the plaintiff to elect upon which count or counts he will take his verdict. An objection which is a ground of general demurrer can not be taken on a summary application to strike out or amend pleadings. *Babincau v. LaForest*, 37 N. B. R. 77.

See RAILWAY, VII. 9—SALE OF GOODS, VI. 1.

## IV. EXCEPTION.

**1. Deposit — Certificate—Service of notice — Insufficient deposit — Pounds payable to prothonotary.]** — A defendant who asserts a preliminary exception by way of motion is not obliged to serve upon the plaintiff a copy of the certificate of the prothonotary stating that the necessary deposit has been made; it is sufficient if he gives him notice of it.—The insufficiency of the deposit made when filing a declinatory exception in the case provided for by art. 170, C. P. C., does not affect the validity of such a pleading, and, the action failing, it must be maintained if the deposit is completed before judgment.—The defendant in making such deposit is not bound to add the pounds payable to the prothonotary. *Rock City Cigar Co. v. Arpin*, Q. R. 29 S. C. 3.

**2. Time for filing.]**—When the time for the filing of a preliminary exception expires upon a Saturday, the exception may be validly served and filed on the Monday following. *Martin v. Drew*, 7 Q. P. R. 435.

**3. Time for filing—Interruption—Irregular motion.]**—A motion of the defendant to compel the plaintiff to produce a power of attorney, declared irregular because the notice was not stamped as required by law, does not interrupt the time allowed for pleading by way of preliminary exception or on the merits. *Duncan v. Payette*, 7 Q. P. R. 478.

See COSTS, V. 18.

#### V. INSCRIPTION IN LAW.

**Filing—Defence on merits.]**—An inscription in law must be filed at the same time as a defence on the merits, and the Court will not adjudicate upon such inscription until after the filing of the defence. *Leach v. Pelletier*, 8 Q. P. R. 71.

#### VI. PLEAS.

**1. Amendment after hearing.]**—A motion to amend the conclusions of a plea in order to make them agree with the allegations of the plea and with the evidence adduced will be granted, when the plaintiff does not take exception to either the allegations or the evidence. *Campbell v. Eno*, 8 Q. P. R. 128.

**2. Amendment — Time — Reply.]**—The defendant has the right to file an amended plea without costs or leave of a Judge, before the plaintiff has served his reply, even if there is an order for particulars.—The delays for replying to the amended plea only run from the filing of the amendment. *Hudon v. McDonald*, 7 Q. P. R. 374.

**3. Contradictory allegations—Admissions.]**—The defendant, by his plea to an action in *saisie gagerie*, admitted that the plaintiffs were the universal legatees of the deceased; but alleged that D. was the testamentary executor, and that an agreement existed between him and the defendant that no action would be brought pending certain negotiations:—*Held*, that these allegations were not contradictory, and would not be struck out on inscription in law. *St. Aubin v. Crevier*, 7 Q. P. R. 403.

**4. Inconsistent pleas—Building contract — Particulars.]**—The defendants,

sued with others for the price of work done and materials furnished in connection with the erection of a building upon the property of all the defendants, may plead that they are in no way responsible to the plaintiff; that the plaintiff never did the work mentioned in the account; and that his account is exorbitant, and the prices claimed therein are too high; and will not be bound to give particulars of the last mentioned ground of defence. *Grothé v. Robillard*, 7 Q. P. R. 375.

**5. Irregularity—Notice of action—Want of particularity — Exception to form.]**—The defendant in an action for damages in a plea to the merits alleged the irregularity of the notice of action, without saying in what it consisted:—*Held*, that this plea was in itself irregular and was properly attacked by an exception to the form. *Jones v. City of Montreal*, 8 Q. P. R. 23.

**6. Special denial—General denial—Option.]**—A special denial of all the paragraphs of a declaration amount to a general denial, and if special matters of defence are set forth in the following paragraphs, the defendant will be ordered to optate between the general denial and the special plea. *Mallette v. Aubrain*, 7 Q. P. R. 390.

**7. Striking out as false.** *McLaughlin Carriage Co. v. Borden*, 1 E. L. R. 86.

**8. Striking out as false—Action for damages for illegal destruction of liquor—Plea denying title and value.** *Townshend v. Beckwith*, 1 E. L. R. 198.

#### VII. REPLY

**1. Departure — New title.]**—The plaintiff, in his reply, cannot abandon the original claim that he was vendor of a piano and substitute a new title, that of transferee of the piano. *Hurtcau v. Dupuis*, 7 Q. P. R. 371.

**2. Departure — Rejoinder.]**—The Court will allow a defendant to allege new facts in his reply if they are necessary for the trial of the cause; the opposite party will then be allowed to rejoin specially to such new allegations. *Town of St. Lambert v. Barsalou*, 8 Q. P. R. 49.

See REPLEVIN, 4.

#### VIII. STATEMENT OF CLAIM.

**1. Action by creditor in name of assignee—Claim for payment of debt to**

creditor—Venue. *Tierney v. Slattery*, 7 O. W. R. 489.

**2. Action for damages for breach of contract by brokers to purchase and deliver shares**—No allegation of tender or payment of price—Amendment. *Collier v. Heintz*, 8 O. W. R. 632.

**3. Action on "lien note"** — Consideration—Particulars — Interest—Motion to strike out pleading—Embarrassment. *McLeod v. Delaney* (N.W.T.), 3 W. L. R. 321.

**4. Amendment.** *Webber v. Pearson*, 1 E. L. R. 228.

**5. Amendment**—New causes of action—Allowance of, on terms—Statute of Limitations—Costs. *Canadian Pacific R. W. Co. v. Harri*, 7 O. W. R. 782.

**6. Amendment—Parties—Joinder of causes of action—Specific performance—Recovery of land.**]—The plaintiff Lee, being the assignee of a contract of sale of land by the defendants P. and M. to the defendant G., paid the balance due under the contract to P. and M., and received from them a transfer under the Real Property Act. He then discovered that one L. was in possession of part of the land, claiming title by prescription. This prevented Lee from getting his transfer registered, and he brought this action for recovery of possession from L., joining, by leave of a Judge obtained under Rule 258 of the King's Bench Act, a claim for specific performance of the contract as against G. and damages by way of compensation or otherwise. This was an application for leave to amend the statement of claim by adding a claim against P. and M. for specific performance of the contract alleged to have been made with them directly with Lee when he paid his money to them and they gave him the transfer, or for compensation in default:—*Held*, that, under s.-s.(k) of s. 38 of the King's Bench Act, the amendments asked for should be allowed. *Krutz v. Spence*, 36 Ch. D. 770, followed.—The test as to whether an amendment ought to be allowed is whether or not the other party would be placed in such a position that he could not be compensated by an allowance for costs or otherwise. *Stewart v. Metropolitan Tramway Co.*, 16 Q. B. D. 180, followed.—That the amendment asked for sets up a new cause of action is not of itself a sufficient ground for refusing to allow it. *Budding v. Murdoch*, 1 Ch. D. 42, and *Hubbock v. Helms*, 56 L. J. Ch. 539, followed.—The contention that leave to join another cause of action with one for the recovery of land can only be granted before the commencement of the

action, is not supported by the authorities, which shew that such leave is granted whenever the Court thinks it reasonable to do so. *Rushbrook v. Farley*, 52 L. T. 572, *Hunt v. Tensham*, 28 Sol. J. 253, and *White v. Ramsay*, 12 P. R. 626, followed. *Lee v. Gallagher*, 15 Man. L. R. 677, 2 W. L. R. 305.

**7. Amendment—Real Property Act—Caveat—Cloud on title—Action for removal—New cause of action—Alternative relief—Securities — Subrogation—Parties.** *Bennett v. Gilmour* (Man.), 4 W. L. R. 196.

**8. Amendment after issue joined and parties examined for discovery—Leave to set up fraud—Discretion—Appeal—Costs.** *Harrison v. Boswell*, 8 O. W. R. 635.

**9. Animal killed on railway track—Railway Act.** *Rysdale v. Wabash R. W. Co.*, 7 O. W. R. 677.

**10. Embarrassment—Claim on behalf of third person—Interest—Defective allegations—Amendment.** *Slater v. Tunncliffe* (N.W.T.), 3 W. L. R. 447.

**11. Embarrassment — Motion to strike out — Unnecessary allegations—Particulars—Application for dual relief—Costs.** *Pershing v. Nason* (N.W.T.), 4 W. L. R. 10.

**12. Frivolous or vexatious action—Municipal corporation — Contract for purchase of plant — Allegations against mayor—Alteration in contract—Ratification by council—Injunction — Con. Rule 261 — Amendment.**]—Under Con. Rule 261, an order to stay an action or to strike out a statement of claim as disclosing no reasonable cause of action will only be granted in the clearest case.—A statement of claim in an action by the plaintiff, on behalf of himself and the other ratepayers of a city, alleged that an agreement was entered into on the 17th July, 1905, by the city with an electric light company, which was duly authorized by by-law, whereby the city were to acquire for \$200,000 the company's plant, together with supplies up to \$3,000 not converted into plant; but that the defendant, the mayor, without any authority, altered the agreement, by inserting after the word "supplies" the words "on the 30th of April," the effect of which was to deprive the municipal corporation of a large amount of supplies. Motions made by the several defendants to strike out the statement of claim as disclosing no reasonable cause of action, and to stay or dismiss the action as frivolous and vexatious, were dismissed.—It is not es-



essential in such an action to allege fraud; but there should be an allegation of a refusal by the corporation to bring an action; and where, with knowledge of the alleged alteration, the corporation had allowed six months to elapse without taking proceedings, and as a defence to the action a resolution of the council was produced, authorizing such defence, which, it was alleged, amounted to acquiescence and ratification on the corporation's part, this was held to constitute evidence of such refusal, and the defendant was allowed to amend so as to specially allege it.—*Semble*, ratification of the act alleged would, in the circumstances, constitute a breach of trust on the part of the corporation. *Black v. Ellis*, 12 O. L. R. 403, 7 O. W. R. 490, 869.

**13. Joinder of causes of action—**Action for damages for death of workman—Claims at common law and under Workmen's Compensation Act—Alternative claims. *Beutenmiller v. Grand Trunk R. W. Co.*, 7 O. W. R. 266.

**14. Joinder of causes of action—**Joinder of defendant—Conspiracy—Company — Indemnity. *Martel v. Mitchell* (Man.), 3 W. L. R. 144.

**15. Joinder of causes of action—**Malicious prosecution—Trespass—Exclusion or separate trial — Inconvenience—Jury—Premature application. *Coates v. Pearson* (Man.), 3 W. L. R. 1.

**16. Mistake as to credit—**Amendment — Effect of judgment for part of claim—Action proceeding for balance—Interlocutory judgment. *Lisle v. DeLion* (Y.T.), 3 W. L. R. 510.

**17. Motion to strike out—**Embarrassment—Irrelevancy—Prayer for relief—Damages—Parties—Company. *Hart v. Hutcheson*, 7 O. W. R. 695.

**18. Non-conformity with writ of summons—**Statute of Limitations—Action begun by co-partnership—Statement of claim in name of incorporated company. *Muir v. Guinane*, 7 O. W. R. 54, 132.

**19. Order for delivery — Rules of Court.]—**The Court has jurisdiction under Order XXX. to direct the delivery of a statement of claim. Orders XX. and XXX. may be read together for this purpose.—Decision of MORRISON, J., in *British Columbia Anchor Wire Co. v. Smith*, 4 W. L. R. 251, reversed. *British Columbia Wire and Nail Co. v. Ottawa Fire Ins. Co.*, 12 B. C. R. 212.

**20. Particulars — Settled accounts.]**—In order to open settled accounts on

the ground of mistake specific errors must be alleged and proved. General allegations are not sufficient, and if made must be supplemented by particulars. *Ontario Lumber Co. v. Cook*, 11 O. L. R. 111, 7 O. W. R. 58, 132.

**21. Striking out—**Embarrassment—Fraud — Setting out facts and circumstances—Anticipating defence—Leave to amend. *Wagar v. Carscallen*, 8 O. W. R. 426, 486.

See VENUE, 18.

## IX. STATEMENT OF DEFENCE AND COUNTERCLAIM.

**1. Action for conspiracy—**Members of trade union—Denial of fact not alleged—Argumentative claims of right—Striking out pleading. *Vulcan Iron Works Limited v. Winnipeg Lodge No. 122, International Association of Machinists* (Man.), 4 W. L. R. 313.

**2. Amendment—**Costs. *McLaughlin Carriage Co. v. Borden*, 1 E. L. R. 85.

**3. Amendment —** Damages — New trial—Payment into Court. *Stephens v. Toronto R. W. Co.*, 7 O. W. R. 39.

**4. Amendment—**Motion for leave to add counterclaim — Refusal. *Union Investment Co. v. Polushie* (N.W.T.), 4 W. L. R. 552.

**5. Attorney-General —** Action to avoid Crown mining leases—Misrepresentation—Jurisdiction—Discretion of Attorney-General—Land Titles Act—Cautions.]—Where an action was brought by the Attorney-General for the province to avoid mining leases of public lands as having been granted by the Crown through misrepresentation and fraud on the part of the defendants, and the latter set up in their defence matter attacking the plaintiff's status as suing not in the interest of the public, but at the private solicitation of interested individuals:—*Held*, that this portion of the defence was objectionable and should be struck out, because the discretion of the Attorney-General, as representing the Crown in the commencement and conduct of litigation, is not subject to investigation or control by the Court.—A "caution" under the Land Titles Act, R. S. O. 1897 c. 138, amounts to no more than the notice of an adverse claim equivalent to a *lis pendens*, and expires by lapse of time, or otherwise as may be directed by the Court in an action.—It does not form a blot on the title, and no pleading is

necessary to have it vacated.—Matter proper for petition of right cannot be set up by way of counterclaim. *Attorney-General for Ontario v. Hargrave*, 11 O. L. R. 530, 7 O. W. R. 368, 455.

**6. Counterclaim** — Exclusion of — Terms—Action for conspiracy against three defendants—Counterclaim by one defendant on promissory note—Division Court jurisdiction. *O'Leary v. Gordon*, 8 O. W. R. 145.

**7. Counterclaim**—Motion to strike out —Irrelevancy — Company — Parties — Joinder of plaintiffs—Costs. *Woodruff Co. v. Colwell*, 8 O. W. R. 747.

**8. Default in delivery** — Noting Pleadings closed—Setting aside note and leave to defend—Terms—Costs. *Copeland-Chatterton Co. v. Lyman Brothers*, 8 O. W. R. 876.

**9. Defences to counterclaim**—Motion to strike out paragraphs—Contract—Breach—Agency—Conclusion of law—Joint agreement—Foreign defendants—Submission to jurisdiction by pleading to counterclaim. *Yapp v. Peuchen*, 8 O. W. R. 569.

**10. Indefinite averment** — Set-off — Counterclaim. *McLaughlin Carriage Co. v. Borden*, 1 E. L. R. 84.

**11. Motion to strike out**—Embarrassment—Evasion—Assignment for benefit of creditors — Proof of creditors' claims—Distribution of assets—Motion partly successful — Costs. *Cockshutt Plow Co. v. Wilkerson* (N.W.T.), 3 W. L. R. 175.

**12. Motion to strike out**—Embarrassment—Rules of pleading—Evasion.]—The plaintiffs sued for the price of goods alleged to have been sold and delivered to the defendant, and, in the alternative, claimed damages for non-acceptance of the goods and non-payment for the same. By the 3rd paragraph of the statement of defence, the defendant denied that she had purchased or received the goods, and then proceeded as follows: "And the defendant is informed that the alleged claim of the plaintiffs for the said brushes (part of the goods), if any, arose prior to the time when the defendant started in business, and if the same exists at all, which the defendant does not admit, it is against the estate of the defendant's late husband and not against the defendant."—*Held*, that the part of the paragraph quoted was embarrassing, and should have been struck out, because it was not stated positively but only on information, and was thus in violation

of Rule 306 of the King's Bench Act, and also because it sought to raise an immaterial issue.—*Odgers on Pleading*, pp. 103, 106, and *Jones v. Turner*, [1875] W. N. 239, referred to.—Paragraph 5 was in part as follows: "The defendant says that she never agreed to purchase mufflers from the plaintiffs for the price and sum of £129 15s. 1d., as alleged by the plaintiffs."—*Held*, that this was an evasive or ambiguous denial, containing a "negative pregnant," and was not in compliance with Rule 241, which requires a specific denial, if any is made, as the statement would be true even if the fact was that the defendant had purchased the goods for £129 15s., and that this paragraph must be amended or in default struck out.—Paragraph 7 alleged that some of the goods referred to in the statement of claim, if ordered at all, which was not admitted, were ordered under a contract set out in another paragraph setting up a counterclaim, a contract which was in no way identified with that sued upon, and alleged a breach of such other contract and went on to set up two quite different defences:—*Held*, that this paragraph also was embarrassing and should be amended, or in default struck out as conflicting with Rule 309. *Schweiger v. Vineberg*, 15 Man. L. R. 536, 2 W. L. R. 266.

**13. Striking out as false and frivolous.** *Austen Brothers v. Piers*, 1 E. L. R. 227.

**14. Striking out part**—Rules 261, 298.]—The jurisdiction conferred by Rule 261 may not be invoked for the excision of portions of a pleading only.—*Held*, also, in this case, that the portions of the statement of defence in question did not so plainly disclose no reasonable answer to the plaintiff's claim that they should be summarily stricken out. *Smith v. Traders Bank*, 11 O. L. R. 24, 6 O. W. R. 748.

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## PLEAS.

See PLEADING, VI.

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## PLEDGE.

**1. Railway bonds** — Rights of pledgee — Railway Act — Registration—Transfer—Coupons.]—The pledgee of the bonds of a railway company, deposited with him as security for the repayment of advances to the company, cannot use them as if he were a holder for value.

and is not a bondholder within the meaning of the Railway Act, 3 Edw. VII. c. 58, ss. 111, 116. He cannot, therefore, cause them to be registered in his name, nor in that of parties to whom he has transferred them; nor deal with them as if they were his property, eg., by detaching coupons therefrom, so as to change their appearance and reduce the extent of their nominal value. *Atlantic and Lake Superior R. W. Co. v. Galindez*, Q. R. 14 K. B. 161.

**2. Securities — Contract — Construction — Remedies of creditor.]—**An agreement by which a debtor consents that his creditor shall become the owner of securities which he delivers to him as collateral security for the principal debt, upon his default in payment of that debt, is not a new binding contract, but an extension of the contract of pledge. It gives to the creditor, at maturity, the choice of two alternatives: either to appropriate the pledge in payment without recourse to a judgment and execution, or to recover his debt by the ordinary ways upon other goods of his debtor, subject to the obligation of remitting the pledge as soon as it is paid in full. *Holman v. Scott*, Q. R. 15 K. B. 193.

See COMPANY, IV. 7.

## POISON.

See NEGLIGENCE, 3.

## POLICE BENEFIT FUND.

See BENEFIT SOCIETY, 1, 2.

## POLICE COMMISSIONERS.

See MUNICIPAL CORPORATIONS, X. 1.

## POLICE MAGISTRATE.

**1. Jurisdiction in city and county —Subsequent appointment of magistrate for county — Conviction.] —** Motion to quash a conviction made by a police magistrate for a city, appointed under R. S. O. 1877 c. 72, and afterwards appointed police magistrate for the county in which the city was situate, under 41 V. c. 4, s. 9 (O.), for an offence committed in the county outside the city limits. A salaried police magistrate was subsequently appointed for the county

under 48 V. c. 17, s. 1 (O.): R. S. O. 1887, c. 72, s. 8:—*Held*, that the conviction was good, as the later appointment was not "in the place and stead" of the first, and that the convicting magistrate had jurisdiction in both city and county.—*Per* BRITTON, J.:—The city police magistrate is *ex officio* a justice of the peace for the county, and could, as police magistrate, sitting alone, do anything that two justices of the peace sitting together could do. *Rex v. Spellman*, 13 O. L. R. 43, 8 O. W. R. 700.

**2. Jurisdiction —** Summary punishment of sailors for disobedience to orders of master of ship—Seamen's Act—Ship of Canadian registry—Absence of agreement—Certiorari—Collateral inquiry as to jurisdiction. *Rex v. Olsen* (B. C.), 4 W. L. R. 108.

See ATTACHMENT OF DEBTS, I. 3—CONSTITUTIONAL LAW, 12 — CRIMINAL LAW, IV. 1, 17—JUSTICE OF THE PEACE—LIQUOR LICENSES, 11—PROHIBITION, 3—STIPENDIARY MAGISTRATE.

## POLICE OFFICER.

See MUNICIPAL CORPORATIONS, X. 3.

## POLICE PROTECTION.

See MUNICIPAL CORPORATIONS, XIV. 9.

## POLL TAX.

See CARRIERS, 2 — MUNICIPAL ELECTIONS, 9.

## POOR LAW.

See PAUPER.

## PORTWARDENS.

**Fees of office—Competition.]—**Portwardens appointed by the city of St. John have no exclusive right to examine hatches of vessels arriving at the port so as to entitle them to fees for the services paid to an outside person. *St. John Portwardens v. McLaughlan*, 26 C. L. T. 385, 3 N. B. Eq. 175.

## POSSESSION.

See EJECTMENT — LIMITATION OF ACTIONS, I.

**POST OFFICE.**

See BAILMENT—CROWN, 13.

**POSTMASTER.**

See PENALTY, 4.

**POSTPONEMENT OF TRIAL.**

See TRIAL, III.

**POWER OF ATTORNEY.**

See COSTS, V. 18—PARTIES, II. 6—PARTNERSHIP, 3.

**POWER OF SALE.**

See MORTGAGE, 15, 16, 19, 21.

**PRACTICE.**

**1. Appeal to Judicial Committee**—Motion to make judgment of Judicial Committee a judgment of New Brunswick Court. *Robertson v. Fairweather*, 2 E. L. R. 134.

**2. Chambers application**—Affidavit filed—Direction for cross-examination of deponent—Service of subpoena—Necessity for shewing original—Defective affidavit of service and notice—Misdescription of parties—Necessity for order for cross-examination. *Fey v. Seimer* (Y.T.), 4 W. L. R. 145.

**3. Entry of action in wrong district**—Nullity or irregularity—Transfer—Summons to set aside proceedings—Failure to state objections—Irregularity—Enlargement.]—Held, that the entry of an action in the wrong judicial district, contrary to s. 4, s.-s. 2, of the Judicature Ordinance (C. O. 1898 c. 21), is an irregularity, not a nullity, and the defect may be cured under Rule 538, by transferring it to the proper judicial district. (Reversed on appeal.)—(2) That in case of an irregularity in a summons to set aside irregular proceedings, in not stating the objections relied upon, pursuant to Rule 540, the summons should not be discharged, but on the objections being stated on the return of the summons, it should be enlarged at the request of the party called upon. *Saskatchewan Land Co. v. Leadley*, 6 Terr. L. R. 18.

**4. Reference for trial**—Motion for judgment—[Costs.]—Where there is a reference to a Master or referee to try an action and dispose of the costs, a motion to the Court for judgment on his report is necessary. *Murphy v. Corry*, 12 O. L. R. 120, 7 O. W. R. 574.

See ACCOUNT—ADMINISTRATION ORDER—AFFIDAVIT—ALIMENTARY ALLOWANCE—APPEAL—ARBITRATION AND AWARD—ARREST—ATTACHMENT OF DEBTS—ATTACHMENT OF GOODS—ATTACHMENT OF PERSON—BANKRUPTCY AND INSOLVENCY, 14, 19—CERTIORARI—COLLECTION ACT—COMPANY, III., IV. 8—CONSOLIDATION OF ACTIONS—CONTEMPT OF COURT—COSTS—COURTS—CRIMINAL LAW, IV.—DEFAMATION, 3, 5, 8, 11—DISCOVERY—DISMISSAL OF ACTION—DOMICILE—EJECTMENT—EQUITABLE EXECUTION—EVIDENCE, III.—EXCHEQUER COURT OF CANADA, 2—EXECUTORS AND ADMINISTRATORS—FAITS ET ARTICLES—HABEAS CORPUS—HUSBAND AND WIFE, I. 2, 6, III. V., VII. 2, 3, 5, 7—INFANT, 1, 4—INJUNCTION (INTERIM)—INTERPLEADER—INTERVENTION—JUDGMENT DEBTOR—LANDLORD AND TENANT, 29—LUNATIC—MECHANICS' LIENS, 1, 2, 10—MINES AND MINERALS, 7—MONEY IN COURT—MORTGAGE, 8, 9, 17, 19, 21—MUNICIPAL ELECTIONS, 8, 11, 12—NOTICE OF ACTION—OPPOSITION—PARLIAMENTARY ELECTIONS, II.—PARTICULARS—PARTIES—PARTITION—PARTNERSHIP, 2, 3, 7, 13, 14—PAYMENT INTO COURT—PENALTY—PEREMPTION—PLEADING—PROHIBITION—RECEIVER—REFERENCE—REPLEVIN—SAISIE-CONSERVATOIRE—SCIRE FACIAS—SET-OFF—SHIP, 3, 5, 17, 21—SMALL DEBT PROCEDURE—SOLICITOR—STAY OF PROCEEDINGS—SUBSTITUTION—TRIAL—TUTOR—VENDOR AND PURCHASER, II. 8—VENUE—WRIT OF SUMMONS.

**PRAIRIE FIRES ACT.**

See FIRE, 3.

**PRECATORY TRUST.**

See WILL, I. 35.

**PRE-EMPTION.**

See CROWN LANDS, 5.

**PRE-EMPTION RECORD.**

See LAND ACT, B. C.

**PREFERENCE.**

See BANKRUPTCY AND INSOLVENCY.

**PRELIMINARY OBJECTIONS.**

See PARLIAMENTARY ELECTIONS, II.

**PRESCRIPTION.**

See ASSESSMENT AND TAXES, 18—CERTIORARI, 1—EASEMENT, 1, 4—EVIDENCE, I, 7—GIFT, 6—HUSBAND AND WIFE, VII, 4—LIMITATION OF ACTIONS—OPPOSITION, 9—PENALTY, 3—WAY, V, 3, VI.

**PRESIDENT OF BANK.**

See BANKS AND BANKING, 5.

**PRESUMPTION.**

See BANKRUPTCY AND INSOLVENCY—CARRIERS, 3—CONTRACT, X, 11—HUSBAND AND WIFE, VIII, 3—LIQUOR LICENSES, 9—PARLIAMENTARY ELECTIONS, III, 1—WAY, VI.

**PRESUMPTION OF DEATH.**

See DISTRIBUTION OF ESTATES.

**PRINCIPAL AND AGENT.**

**1. Accounts** — Interest — Costs of preparing receipt—Inventory of estate—Costs of suit—Trustee.]—An agent refusing to give an account and pay over balance is chargeable with interest.—Costs disallowed to an estate agent of preparing a receipt containing a schedule of leases and securities delivered up to the principal.—Costs of suit against an agent for an account ordered to be paid by him where he had disregarded requests for an account, and had filed an improper account in the suit. *Simonds v. Coster*, 3 N. B. Eq. 329, 1 E. L. R. 544.

**2. Action by principal for price of goods sold**—Agent holding himself out as principal—Right of purchaser to set off debt of agent. *Wood v. John Arbuthnot Co.* (Man.), 4 W. L. R. 305

**3. Agent's commission on sale of goods**—Time for payment—Rate of commission — Contract — Correspondence—Payment for samples sent to agent. *Hovenden v. O. C. Hawkes Limited*, 7 O. W. R. 132, 437.

**4. Agent's commission on sale of land** — Introduction of prospective purchaser — Subsequent sale—Revocation—Agency—Dealings with another agent—Scheme to deprive agent of commission. *Hunter, Cooper, & Co. v. Bunnell* (Man.), 3 W. L. R. 229.

**5. Agent's commission on sale of land** — Purchaser found by principal—Subsequent negotiations with agent. *Lawrence v. Moore* (Man.), 3 W. L. R. 139.

**6. Agent's commission on sale of land** — Purchaser introduced by third person — Sub-agency of third person—Evidence of. *Prittie v. Richardson*, 8 O. W. R. 981.

**7. Agent's commission on sale of land** — Revocation of agency—Special agreement — Breach — Damages—Sale by owner. *Richardson v. McCleary* (Man.), 3 W. L. R. 141.

**8. Agent's commission on sale of land** — Sub-agent—Failure to establish employment as agent. *McGill v. Leveseur* (N.W.T.), 4 W. L. R. 14.

**9. Agent's commission on sale of mill**—Employment of agent — Evidence—Remuneration. *Monsees v. Tait* (N. W.T.), 4 W. L. R. 322.

**10. Agent's commission on sale of mine**—Option given to agent to purchase—Estoppel—Termination of agency—Revival—Onus.] — The plaintiff obtained from the defendants an option on a mining property, to expire on the 31st May, 1902, under an agreement by which he undertook to find a purchaser for the property for \$27,000 for a commission of \$5,000, but with a provision that, in case it might be found necessary to make a reduction in the price of the property, the commission payable to the plaintiff should be 20 per cent. on the purchase price. Some time before the expiration of this option, on the 12th March, 1902, the plaintiff wrote the defendants informing them that he had failed to bring about a sale of the property, but that he had induced a person whose name was mentioned to join with him in purchasing it, and making a cash offer of \$15,000 for the property as it stood, payable in 30 days, and saying, among other things: "This is only a game of chance as far as I am concerned, for I am now a buyer



instead of a seller. . . . this is a cash offer . . . and it is all I can afford or will offer whether accepted or rejected." The offer was not carried into effect, and the defendants having subsequently made an arrangement to sell the property to other persons, the plaintiff claimed commission:—*Held*, that the relationship established between the plaintiff and defendants under the first arrangement, which was practically that of principal and agent, was terminated when the plaintiff made his offer of the 12th March, and that the plaintiff, having then elected to associate himself with the parties who were proposing to purchase the property, was estopped from claiming remuneration from the defendants in connection with the sale made subsequently; also, that the relationship between the plaintiff and defendants having been severed on the 12th March, the burden was on the plaintiff to shew, by express evidence, that it was subsequently revived. *Fleming v. Withrow*, 38 N. S. R. 492, 1 E. L. R. 6.

**11. Collection of rents**—Failure to account — Laches and acquiescence of principal — Repudiation by agent of agency. *Pick v. Edwards*, 2 E. L. R. 232.

**12. Contract** — Authority of agent, scope of—*Ratification* — *Conflicting evidence*—*Reversing finding of trial Judge*.]—The defendant, the owner of a summer resort hotel, engaged a person to manage and conduct it for a season, agreeing that the latter should have the entire control and management of the hotel. Out of the gross receipts 15 per cent. was to be paid to the defendant for rent, and all profits were to be equally divided:—*Held*, that a contract for advertising the hotel was within the scope of the manager's authority as agent for the defendant, and that the defendant was bound by it.—*Held*, also, upon conflicting evidence, reversing the finding of the trial Judge, that the contract was in fact authorized or ratified by the defendant.—*Per BOYD, C.*:—Where two witnesses of apparently equal credibility contradict each other as to particular statements or conversations, acceptance should be given rather to one who remembers what happened than to one who denies, probably because he does not remember. Another rule for dealing with such conflicts of evidence is, to consider what facts are beyond dispute and to examine which of the two accounts in conflict best accords with those facts according to the ordinary course of human affairs and the usual habits of life or business.—Judgment of STREET, J., reversed. *H. W. Kastor & Sons Advertising Co. v. Coleman*, 11 O. L. R. 262, 6 W. R. 791.

**13. Contract** — *Mandatory*—*Account*—*Salary*—*Condition precedent*.]—Where a person agrees, in consideration of a fixed monthly salary, to obtain custom and business in Montreal for a firm of brokers in New York, and, for that purpose, is constituted and holds himself out to the public as their representative, the contract between them is one of mandate rather than of lease and hire of work, and the obligation arises from it for the mandatory to account to his principal, as provided in art. 1713, C. C. This obligation is a condition precedent to the exercise by the mandatory of the right to bring suit for wages or salary. *Violett v. Nerton*, Q. R. 14 K. B. 360.

**14. Moneys advanced by bank to agent**—Liability of principal—Evidence—Authority of agent—Letter—Construction—Burden of proof. *Merchants Bank v. Sterling*, 7 O. W. R. 67, 741.

**15. Notary** — Authority to receive moneys of client—*Inference*.]—The authority of a notary to receive funds due to his client cannot be inferred from the fact that he has the documents under which the funds were invested, nor from the fact that he is authorized to receive the interest, nor that he is in general the client's man of business. *Gerrais v. McCarthy*, Q. R. 14 K. B. 420.

**16. Sale of land** — Authority to make contract—*Specific performance*.]—The defendant gave a real estate agent the exclusive right, within a stipulated time, to sell, on commission, a lot of land for \$4,270 (the price being calculated at the rate of \$40 per acre on its supposed area), an instalment of \$1,000 to be paid in cash, and the balance, secured by mortgage, payable in four annual instalments. The agent entered into a contract for sale of the lot to the plaintiff at \$40 per acre, \$50 being deposited on account of the price, the balance of the cash to be paid "on acceptance of title," the remainder of the purchase money payable in four consecutive yearly instalments, and with the privilege of "paying off the mortgage at any time." This contract was in form of a receipt for the deposit and signed by the broker as agent for the defendant:—*Held*, affirming the judgment appealed from (15 Man. L. R. 205, 1 W. L. R. 417), that the agent had not the clear and express authority necessary to confer the power of entering into a contract for sale binding upon his principal.—*Held*, further, that the term allowing the privilege of paying off the mortgage at any time was not authorized and could not be enforced against the defendant. *Gilmour v. Simon*, 26 C. L. T. 456, 37 S. C. R. 422.

**17. Undisclosed principal — Sale of goods to agent on his credit—Payment to agent—Discharge of principal.]**—A person who sells goods to the agent of an undisclosed principal, believing the agent to be the principal, may sue the principal on discovery of the facts, and the principal will not be discharged from liability by having made payment to the agent before such discovery, unless the conduct of the seller has been such as to make it unjust for him to call upon the principal for payment, or unless the character of the business is such as naturally to lead the principal to suppose that the seller would give credit to the agent alone. *Irvine v. Watson*, 5 Q. B. D. 102, and *Heald v. Kenworthy*, 10 Ex. 739, followed. *Arbuthnot v. Dupas*, 15 Man. L. R. 634, 2 W. L. R. 445.

See ARCHITECT, 5—ATTACHMENT OF DEBTS, I. 2—BILLS OF EXCHANGE AND PROMISSORY NOTES, II. 1—COMPANY, II. 6—CONTRACT, V. 2—CRIMINAL LAW, III. 42—HUSBAND AND WIFE, VI. 2—INSURANCE, II. 2, 4, 7, 12—MECHANICS' LIENS, 12—MUNICIPAL ELECTIONS, 7—PARLIAMENTARY ELECTIONS—PRINCIPAL AND SURETY, 5—SALE OF GOODS, III. 3—SPECIFIC PERFORMANCE, 3—TRUSTS AND TRUSTEES, 3—VENDOR AND PURCHASER, I. 2, 18, 19, 21, 22, 25, 32—WRIT OF SUMMONS, 12.

## PRINCIPAL AND SURETY.

**1. Assignment of debts — Promise to make good—Suretyship — Benefit of discussion — Indication of property of debtor.]**—A buyer of immovables who acknowledges in a *contre-lettre* that a cash payment mentioned in the deed of sale consists in reality in the transfer of debts of an equivalent amount due him in New York, of which he undertakes to make a valid assignment to the seller, "*avec promesse de faire valoir*," becomes the surety of the assigned debtors and bound to pay on their default.—A surety, to avail himself of the benefit of discussion, must indicate to the creditor the distrainable property of the debtor, situated in the province, and advance the money necessary to obtain the discussion. *Maucotel v. Tétrault*, Q. R. 28 S. C. 251.

**2. Bond for fidelity of agent of insurance company — Advances to agent and premiums not paid over—Construction of bond—Application to existing agreement between agent and company—Withholding from surety informa-**

**tion as to material facts—Release.** *Chicago Life Insurance Co. v. Duncombe*, 8 O. W. R. 898.

**3. Promissory notes — Deposit of collateral securities—Ear-marked fund—Payment — Appropriation of proceeds —Set-off—Release of principal debtor—Constructive fraud—Discharge of surety — Right of action—Common counts — Equitable recourse.]**—K. owed the corporation \$33,527.94 on two judgments recovered on notes for \$10,000 given by him to R., and a subsequent loan to him and R. for \$20,000. M., at the request of and for the accommodation of R., had indorsed the notes for \$10,000, and deposited certain shares and debentures as collateral security on his indorsement. K. and R. deposited further collateral security on negotiating the second loan, but K. remained in ignorance of M.'s indorsements and collateral deposit until long after the release hereinafter mentioned. These judgments remained unsatisfied for over six years, but, in the meantime, the corporation had sold all the shares deposited as collateral security, and placed the money received for them to the credit of a suspense account, without making any distinction between funds realized from M.'s shares and the proceeds of the other securities, and without making any appropriation of any of the funds towards either of the debts. On the 28th February, 1900, after negotiations with K. to compromise the claims against him, the agent of the corporation wrote him a letter offering to compromise the whole indebtedness for \$15,000, provided payment was made some time in March or April following. This offer was not acted upon until November, 1901, when the corporation carried out the offer and received the \$15,000, having a few days previously appropriated the funds in the suspense account, applying the proceeds of M.'s shares to the credit of the notes he had indorsed. These negotiations for compromise and the final settlement with K. took place without the knowledge of M., and K. was not informed of his remaining liability towards M. as surety:—*Held*, by SEDGEWICK, (GROUARD, DAVIES, and IDINGTON, JJ. (reversing the judgment appealed from, 11 B. C. R. 402), that the secret dealings by the corporation with K. and with respect to the debts and securities were, constructively, a fraud against both K. and M.; that the release of the principal debtor discharged M. as surety; and that he was entitled to recover the surplus of what the corporation received applicable to the notes indorsed by him as money had and

received by the corporation to and for his use.—*Held*, by MACLENNAN, J., that, on proper application of all the money received, the corporation had got more than sufficient to satisfy the amount for which M. was surety, and that the surplus received in excess of what was due upon the notes was, in equity, received for the use of M., and could be recovered by him on equitable principles or as money had and received in an action at law. *Milne v. Yorkshire Guarantee and Securities Corporation*, 26 C. L. T. 456, 37 S. C. R. 331.

**4. Guarantee policy — Fidelity of manager of company — Misappropriation of money — Release of surety — Material untrue statements — Incorporation by reference.]—Held, following *Hay v. Employers' Liability Co.*, 6 O. W. R. 117, that the application in this case, and the statements made by the plaintiffs' president, fully set out in the previous reports, 8 O. L. R. 117 and 9 O. L. R. 569, were incorporated into the policy or contract of guarantee, and made part thereof, and were, in the circumstances, binding on the plaintiffs, though not apparently authorized by any resolution, and that such statements—distinguishing the above case in this respect—were materially untrue, and therefore avoided the policy.—Judgment of a Divisional Court, 5 O. W. R. 349, 9 O. L. R. 569, affirmed. *Elgin Loan and Savings Co. v. London Guarantee and Accident Co.*, 11 O. L. R. 330, 7 O. W. R. 109.**

**5. Guarantee of payment of promissory note—Note not presented for payment—Principal and agent—Contract to supply goods to agent—Proviso against liability for damages for non-delivery—Latter clause void as repugnant—Waiver of terms.** *Massey-Harris Co. v. Zwickler*, 2 E. L. R. 59.

See BANKRUPTCY AND INSOLVENCY, 4—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 1, 15, 24, 25—BOND—CRIMINAL LAW, IV. 3—EXECUTORS AND ADMINISTRATORS, 9—GUARANTY—LIQUOR LICENSES, 14—MORTGAGE, 7.

## PRIVATE INTERNATIONAL LAW.

**Interpretation of contracts—Lex loci—Right of action—Condition precedent — Mortgage — Remedies.] — Parties to a contract are presumed to adopt the law of the place where it is made as governing the nature of the obligations that spring from it and the incidents which arise in the course of its develop-**

**ment.**—Where a purchaser of real estate in New York executes guarantee bonds there, in favour of a mortgagee, in consideration of the latter's forbearance to foreclose for a period, after which he does foreclose, but does not realize enough to pay his debt, and the law of New York provides that, under such circumstances, no other action shall be commenced or maintained by the mortgagee to recover any part of the mortgage debt without leave of the Court in which the foreclosure proceedings were had, no action will lie on the bonds in the Superior Court here without such leave first obtained, as a condition precedent.—The law in question is not one of forms of remedies and modes of proceedings, but one which affects the nature of the obligation and the right to enforce it at all. *German Savings Bank v. Tétrault*, Q. R. 27 S. C. 447.

## PRIVATE WAY.

See WAY, VI.

## PRIVILEGE.

See CRIMINAL LAW, I. 3, III. 10—DEFAMATION—DISCOVERY.

## PRIVY COUNCIL.

See APPEAL, IX.—PRACTICE, 1.

## PROBATE.

See WILL—WRIT OF SUMMONS, 9.

## PROBATE COURT.

See COSTS, III. 10—COURTS, IV.—WILL, I. 2.

## PROCURATION.

See COSTS, V. 18—PARTNERSHIP, 3.

## PRODUCTION OF DOCUMENTS.

See DISCOVERY, IV.



**PROFIT A PRENDRE.**

See CONTRACT, III. 12.

**PROHIBITION.**

**1. Judge of Sessions of Peace—Conviction—Right of appeal.]**—The writ of prohibition is an extraordinary remedy, strictly confined to cases where none other exists, and will not be granted against the enforcement of a conviction by a Judge of the Sessions of the Peace, after sentence, when the party aggrieved can seek relief by means of appeal. *Bastien v. Amyot*, Q. R. 13 K. B. 22.

**2. Magistrate** — Criminal prosecution — Motion — Forum — Jurisdiction of magistrate — Submission. *Re Hodge and Kerr*, 7 O. W. R. 131.

**3. Police magistrate** — Conspiracy — Particulars — Preliminary Investigation — Scope of inquiry — Jurisdiction.] — Prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or Court dealing with the proceedings sought to be prohibited. —The defendant, having been arrested and brought before a police magistrate charged with conspiracy under s. 394 of the Criminal Code, objected to the sufficiency of the charge and asked for particulars of the deceit, etc., charged, with dates and names. The magistrate overruled the objection and refused the particulars, on the ground that the proceeding before him was an investigation, whereupon the defendant applied for prohibition, which was refused. *Rex v. Phillips*, 11 O. L. R. 478, 7 O. W. R. 418.

See ATTACHMENT OF DEBTS, II. 6—CONSTITUTIONAL LAW, 9—COURTS, V. 3, 4, 6, 7, VII.—CRIMINAL LAW, IV. 10—JUSTICE OF THE PEACE, 8—MUNICIPAL CORPORATIONS, IV. 2—STATUTES, 6.

**PROHIBITION ACT.**

See CANADA TEMPERANCE ACT.

**PROMISSORY NOTES.**

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III.

**PROPERTY QUALIFICATION.**

See MUNICIPAL ELECTIONS.

**PROSPECTUS.**

See COMPANY, I. 4.

**PROTESTANT SEPARATE SCHOOLS.**

See SCHOOLS, 5.

**PROVINCIAL COURTS.**

See CONSTITUTIONAL LAW, 9.

**PROVINCIAL LANDS.**

See CONSTITUTIONAL LAW, 7, 10, 15.

**PROVINCIAL LEGISLATURE.**

See CONSTITUTIONAL LAW.

**PUBLIC HEALTH.**

**Board of Health—Order issued by officer—Municipal by-law—Jurisdiction—Uncertainty — Conviction.]** — Annexed to an information for an offence against a health by-law, was an order issued by an officer of the Board of Health, and not by the Committee of Health itself, which alone has jurisdiction by the terms of s. 29 of by-law 105 of the city of Montreal concerning health:—*Held*, that the order was illegal and void for want of jurisdiction, and also because it was vague and uncertain and did not indicate or describe what works or repairs the Board of Health deemed necessary, and a conviction based thereon was quashed. *Riopel v. City of Montreal*, 7 Q. P. R. 342.

**PUBLIC HEALTH ACT.**

See COURTS, V. 3—PENALTY, 1, 2.

**PUBLIC HIGHWAY.**

See WAY.

**PUBLIC INQUIRIES ACT.**

See CLUB, 2.

**PUBLIC INSTRUCTION ACT.**

See SCHOOLS, 11.

**PUBLIC OFFICER.**

See ATTACHMENT OF DEBTS, I. 3 —  
CROWN, 8—NOTICE OF ACTION, 2, 3.

**PUBLIC POLICY.**

See CONTRACT, IV. 1.

**PUBLIC SCHOOLS.**

See SCHOOLS.

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**RAILWAY.**

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**I. ANIMALS ON TRACK.**

1. **Absence of fence — Liability—**  
Railway Act, 1903, s. 199, s-s. 3—**Lands**  
“not improved or settled, and inclosed.”  
*Schellenberg, v. Canadian Pacific R. W.*  
*Co. (Man.)*, 3 W. L. R. 457.

2. **Cattle at large—Intersection of**  
**railway and highway—Negligence — Lia-**  
**bility — Railway Act.** — On the prop-  
er construction of s. 237, s-s. 4. of the  
Railway Act, 1903, 3 Edw. VII. c. 58  
(D.), while it is unlawful for the owner  
of cattle to permit them to be at large  
within half a mile of the intersection of a  
highway with a railway, and while if  
killed at the intersection, the rail-  
way company are exempt from li-  
ability — if by reason of the fail-  
ure of the company to comply with  
the statutory requirements as to  
fencing, construction of cattle guards,  
etc., the cattle reach the line of railway  
and are killed or injured at a point on  
the railway other than the intersection,  
the company are liable, unless they can  
establish affirmatively that the owner was  
guilty of negligence. The mere fact  
that the cattle were at large, or the  
fact that they were not in charge of a  
competent person, does not prevent the  
plaintiff's recovery. *Arthur v. Central*  
*Ontario R. W. Co.*, 11 O. L. R. 337,  
7 O. W. R. 527.

3. **Defect in fence — Knowledge—**  
**Escape of animals from adjoining land**  
—Railway Act, 1903, s. 237, s-s. 4. *Cer-*  
*ruthers v. Canadian Pacific R. W. Co.*  
*(Man.)*, 3 W. L. R. 455, 4 W. L. R. 441.

4. **Escape to highway from en-**  
**closure — Open gate from highway to**  
**track — Negligence — Liability.]—Sec-**  
**tion 237, s-s. 4, of the Dominion Rail-**

way Act, 1903, provides that if an animal at large upon the highway gets upon the property of the railway company and is killed, the owner may recover the amount of his loss from the company, unless it be proved that the animal got at large through the owner's negligence.—The plaintiff's horse escaped, without any negligence on his part, from a pasture field adjoining the railway, and got upon the highway, and then going a short distance, passed through an open gateway into the defendants' freight yards, and then on to the track, where it was killed by a passing train:—*Held*, that the defendants were liable. *Lebu v. Grand Trunk R. W. Co.*, 12 O. L. R. 590, 8 O. W. R. 418.

**5. Fences — Trespass—Negligence—Onus.]**—A railway company are liable for damages for killing a cow, which was at large on the highway with the knowledge of the owner, contrary to the Railway Act, 1903, and which strayed from the highway to the land of D., and from there to the railway track through a defective fence which the company were obliged to maintain.—The company are liable for damage done to the land of an adjoining owner by cattle of a neighbour trespassing by reason of a defective fence which it was the duty of the company to maintain. *Lizotte v. Temiscouata R. W. Co.*, 37 N. B. R. 397, 1 E. L. R. 365.

**6. Negligence — Liability—Fences—Railway Act, 1903, s. 237 — "Otherwise."]**—Cattle being pastured in common by the occupiers of improved lands bordering on the defendants' railway found their way to the track, and were killed by a passing train of the defendants. It was proved that the defendants' fence along the common pasture was defective, that they had notice of the defect and neglected to repair it, but there was no evidence as to how the cattle got on the track:—*Held*, that under the Railway Act it might be inferred that the cattle found their way to the track through the defendants' defective fence, and a verdict for the plaintiff should have been sustained.—Sub-section 4 of s. 237 of the Act provides that when any cattle or other animals at large upon the highway or "otherwise" get upon the property of the company and are killed or injured by a train, the owner shall be entitled to recover for the loss or injury from the company, unless they shew the negligence or wilful act or omission of the owner.—*Held*, that the word "otherwise" means "otherwise at large," and not otherwise at large in a place *ejusdem generis* with a highway. *Daigle v. Temiscouata R. W. Co.*, 37 N. B. R. 219.

**7. Railway Act, 1903, s. 237—Negligence—Burden of proof—Jury.]**—In an action for damages for the loss of a horse killed by a train upon the defendants' track, the jury found that the horse was killed upon the property of the defendants, and that the defendants were responsible for that:—*Held*, that upon the proper construction of s. 237, s. 4. of the Dominion Railway Act, 1903, a finding that the horse was killed upon the property of the defendants was sufficient to entitle the plaintiff to recover unless it was shewn by the defendants that the animal got at large through the negligence of the owner or custodian, and such negligence was sufficiently negated, in view of the Judge's charge, by the finding of the jury that the defendants were responsible. Judgment of the County Court of Simcoe reversed. *Bacon v. Grand Trunk R. W. Co.*, 12 O. L. R. 196, 7 O. W. R. 753.

**8. Straying animals—Negligence—Duty to trespassers]**—A railway company are not charged with any duty in respect to avoiding injury to animals wrongfully upon their line of railway until such time as their presence is discovered: *LDINGTON, J.*, dissenting, though concurring in the judgment on other grounds. Judgment of the Court below, 1 W. L. R. 356, reversed. *Canadian Pacific R. W. Co. v. Eggleston*, 26 O. L. T. 74, 36 S. C. R. 641.

See PLEADING. VIII. 9.

## II. BOARD OF RAILWAY COMMISSIONERS.

**1. Ex parte order — Jurisdiction—Crossing order — Appeals from Board—Right of way — "As now enjoyed"—Construction—Railway Act, 1903.]**—On the sale and conveyance of land to a railway company, on which there existed a bridge or viaduct spanning a valley, the vendors reserved "the right of way under the said bridge as now enjoyed by the vendors." At that time the only use made of the right of way was by persons on foot, or with horses, carts, etc.:—*Held*, that "as now enjoyed" meant "as now used," i.e., for farm purposes, and did not justify the laying and using a railway under the bridge. *Dand v. Kingscote*, 6 M. & W. 174, and *United Land Co. v. Great Eastern R. W. Co.*, L. R. 17 Eq. 158, 10 Ch. 586, distinguished.—The defendants obtained an *ex parte* order from the Board of Railway Commissioners authorizing them to construct, maintain, and operate certain sidings involving the crossing of the right of way of another railway. The plain-

tiffs, on becoming aware of this order, moved against it before the Board, under ss. 25 and 32 of the Railway Act, 1903, 3 Edw. VII. c. 58 (D.), but the Board confirmed it:—*Held*, that by such application to vary or amend the order the plaintiffs had submitted to the jurisdiction of the Railway Commissioners, and were concluded within the scope of their judgment, and could not now go behind the orders in the present action, which was for damages and an injunction; and this, whether the application for the *ex parte* order could be considered an application under s. 177 of the Railway Act for a crossing order, or not.—The plaintiffs objected that the Railway Commissioners had no jurisdiction because the line in question being a branch line, the plans were not filed in the registry office, pursuant to s. 175, s.-s. 2, and s. 122 of the Act:—*Held*, that they could not raise the question of jurisdiction in this way, the Act specially providing by s. 44 for an appeal from orders of the Board to the Supreme Court of Canada on such questions.—By virtue of s. 7 of the Railway Act, 1903, where one railway crosses another which is subject to the Act, the Board of Railway Commissioners have exclusive jurisdiction. *Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co.*, 12 O. L. R. 320, 7 O. W. R. 814.

**2. Jurisdiction—Appeal to Supreme Court.]**—The Board of Railway Commissioners granted an application of the James Bay Railway Company for leave to carry their line under the track of the Grand Trunk Railway Company, but, at the request of the latter, imposed the condition that the masonry work of such under-crossing should be sufficient to allow of the construction of an additional track on the line of the Grand Trunk. No evidence was given that the latter company intended to lay an additional track in the near future, or at any time. The James Bay Company, by leave of a Judge, appealed to the Supreme Court of Canada from the part of the order imposing such terms, contending that the same was beyond the jurisdiction of the Board:—*Held*, that the Board had jurisdiction to impose said terms.—*Held*, *per* SEDGEWICK, DAVIES, and MACLENNAN, JJ., that the question before the Court was rather one of law than of jurisdiction, and should have come up on appeal by leave of the Board or been carried before the Governor-General in council. *James Bay R. W. Co. v. Grand Trunk R. W. Co.*, 26 C. L. T. 382, 37 S. C. R. 372.

**3. Jurisdiction — Construction of subway — Apportionment of cost—Company interested or affected—Street rail-**

*way — Agreement with municipality.]*—The power of the Board of Railway Commissioners, under s. 186 of the Railway Act, 1903, to order a highway to be carried over or under a railway, is not restricted to the case of opening up a new highway, but may be exercised in respect of one already in existence. The application for such order may be made by the municipality as well as by the railway company.—The Board, on application by the corporation of the city of Ottawa, ordered a subway to be made under the tracks of the Canada Atlantic Railway Company where they cross Bank street, the cost to be apportioned among the city corporation, the Canada Atlantic Railway Company, and the Ottawa Electric Railway Company. By an agreement between the electric company and the city corporation the company were given the right to run their cars along Bank street and over the railway crossing, paying therefor a specified sum per mile. The company appealed from that portion of the order making them contribute to the cost of the subway, contending that the city corporation were obliged to furnish them with a street over which to run their cars, and they could not be subjected to greater burdens than those imposed by the agreement:—*Held*, that the electric company were a company "interested or affected" in or by the said work, within the meaning of s. 47 of the Railway Act, and could properly be ordered to contribute to the cost thereof.—*Held*, further, that there was nothing in the agreement between the company and the city to prevent the Board making the order, or to alter the liability of the company so to contribute. Decision of the Board affirmed. *Ottawa Electric R. W. Co. v. City of Ottawa*, 26 C. L. T. 381, 37 S. C. R. 354.

**4. Jurisdiction—Traffic accommodation—Restoring connections.]**—On an application to the Board of Railway Commissioners for Canada, under the Railway Act, 1903, for a direction that a railway company should replace a siding, where traffic facilities had been formerly provided for the respondents with connections upon their lands, and for other appropriate relief for such purposes:—*Held*, that, under the circumstances, the Board had jurisdiction to make an order directing the railway company to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch, and receipt of freight in car-loads over, to, and from the line of railway. *Canadian Northern R. W. Co. v. Robinson*, 37 S. C. R. 541.

See CONSTITUTIONAL LAW. 13. — COURTS. IX. 3; see also post IV. 1. V. 1. X. 6.

### III. BONDS AND MORTGAGES AND SALE OF RAILWAY.

**1. Judicial sale—Jurisdiction under special Act — Interpretation — Tenders — Exchequer Court.]—**By 4 & 5 Edw. VII. c. 158, respecting the South Shore Railway Company and the Quebec Southern Railway Company, the Parliament of Canada, among other things, provided that the Exchequer Court might order the sale of the railways mentioned and their accessories, as soon as possible and convenient after the passing of the Act, and that such railways and their accessories, respectively, should be sold separately or together as, in the opinion of the Exchequer Court, would be best for the interests of the creditors of the said companies. An order for such sale was made and tenders received in accordance therewith.—*Held*, that in respect of the tenders so received the statute left it to the Court to determine which of them it was in the best interests of the creditors to accept. — 2. That, inasmuch as if the property were sold in part to one purchaser and in part to another, two new and diverse interests would arise, and it would be necessary to divide the property, both real and personal, and to make two transfers instead of one, it was in the best interests of the creditors, as well as of the public, to accept a tender for the property as a whole, although such tender was for a less sum, by some \$3,000, than the aggregate of two separate tenders for distinct portions of the whole property. *Minister of Railways and Canals for Canada v. Quebec Southern R. W. Co.*, 10 Ex. C. R. 139.

**2. Judicial sale—Purchase by solicitor of party — Capacity to purchase — Special statute—Discretionary order — Appeal.]—**Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by art. 1484, C. C.—The Act 4 & 5 Edw. VII. c. 158 directed the sale of certain railways separately or together, as, in the opinion of the Exchequer Court, might be for the best interests of creditors, in such mode as that Court might provide, and that such sale should have the same effect as a sheriff's sale of immovables under the laws of the province of Quebec. The Judge of the Exchequer Court directed the sale to be by tender for the railways *en bloc*, or for the purchase of each or any two of the lines of which they were constituted:—*Held*, that the Judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system, in preference to two separate tenders for

the several lines, at a slightly larger amount, and that his decision should not be disturbed on appeal. *Rutland R. R. Co. v. Beique, White v. Beique, Morgan v. Beique*, 26 C. L. T. 379, 37 S. C. R. 303.

**3. Mortgage—Bondholders—Working expenditure — Lien — Priorities — Railway Acts.]—**The Railway Act, 1888 (D.), after providing that a railway company may secure their debentures by a mortgage upon the whole of such property, assets, rents, and revenues of the company as are described in the mortgage, provides that such rents and revenues shall be subject in the first instance \* \* \* to the payment of the working expenditure of the railway. By the Railway Act, 1903 (D.), the lien is enlarged to apply to the property and assets of the company, in addition to their rents and revenues. A mortgage by the defendants, made in 1897, was foreclosed and property sold, the proceeds being paid into Court. In a claim for a lien thereon in priority to the mortgagee for working expenditure made after the commencement of the Act of 1903:—*Held*, that the lien under the Act of 1903 was not retroactive, and that, as the lien under the Act of 1888 was limited to rents and revenues, and did not apply to the fund in Court, the claim should be disallowed. *Barnhill v. Hampton and St. Martins R. W. Co.*, 3 N. B. Eq. 371, 2 E. L. R. 31.

### IV. CARRIAGE OF GOODS.

**1. Contract limiting liability for loss—Validity—Order of Board of Railway Commissioners—Judicial proceeding — Fraction of day.]—**On the 17th October, 1904, the plaintiff shipped three packages of household goods on the defendants' railway, and signed a special contract by which he undertook that no claim in respect of injury to or loss of the goods should be made against the defendants exceeding the amount of \$5 for any one of the packages. On the same day the Board of Railway Commissioners by order approved of the form of special contract signed by the plaintiff, under s. 275 of the Dominion Railway Act, 1903, providing that no such contract shall be valid unless "such class of contract" shall have been first authorized or approved by the Board. In an action to recover the value of the goods, which were lost by the defendants:—*Held*, that under ss. 23, 24, 25, and 275 of the Act, the Board had jurisdiction to make the order, the making of it was a judicial proceeding, and the order must be re-



garded as in full force during the whole of the 17th October, 1904; and therefore the contract was valid, and the plaintiff entitled to recover only \$15.—Review of cases bearing upon the rule that in judicial proceedings fractions of a day are not regarded. *Buskey v. Canadian Pacific R. W. Co.*, 11 O. L. R. 1, 6 O. W. R. 698.

**2. Injury to goods in transit—**Contract—Condition requiring notice of damage—Validity—Approval by Board of Railway Commissioners. *Hayward v. Canadian Northern R. W. Co.* (Man.), 4 W. L. R. 299.

**3. Loss —** Negligence—Contract limiting liability—Findings of jury—Recovery of amount fixed by contract — Costs. *Costello v. Grand Trunk R. W. Co.*, 7 O. W. R. 846.

**4. Negligence —** Loss of horses — Special contract exempting carriers from liability — Construction — Exclusion of negligence—Findings of jury—Proximate cause of loss — Avoidance of loss by reasonable care of plaintiff — Finding against evidence—New trial. *Booth v. Canadian Pacific R. W. Co.*, 7 O. W. R. 593.

## V. FARM CROSSINGS.

**1. Board of Railway Commissioners —** Jurisdiction — Appeal — Statutory contract.] — Orders directing the establishment of farm crossings over railways subject to the Railway Act, 1903, are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada. — The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company, cannot be enforced under the provisions of 16 V. c. 37 (Can.) incorporating the Grand Trunk Railway Company of Canada.—An application to have the appeal quashed, on the grounds that the cost of establishing the crossing demanded, together with the damages sought to be recovered by the plaintiff, would amount to less than \$2,000, and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the province of Quebec, was dismissed.—Judgment of the Court below reversed; IDINGTON, J., diss. as to damages and costs. *Grand Trunk R. W. Co. v. Perrault*, 26 C. L. T. 71, 36 S. C. R. 671.

**2. Overhead bridge and underpass—**Depriving owner of—Damages—Measure of — Reference. *McKenzie v. Grand Trunk R. W. Co.*, 7 O. W. R. 798.

See post IX. 2, 8.

## VI. INJURIES TO PASSENGERS.

**1. Action—Limitation clause in Act of incorporation—**"By reason of the railway"—"Works or operations of the company."—The plaintiff, on the 28th December, 1903, was injured on the defendants' tramway in Vancouver, in stepping off a movable platform provided by the defendants for the accommodation of passengers transferring at one of the junctions. The platform was necessary to enable passengers to alight, owing to the height of the car steps above the surface of the street, and was so placed that there was very close to it, and not easily observable by passengers leaving the car, a large hole, into which the plaintiff stepped, severely injuring her knee. On the 24th December, 1904, she brought an action to recover damages for her injuries. The defendants set up, *inter alia*, s. 60 of their Act of incorporation, c. 55 of the statutes of British Columbia, 1896, which enacted that "all actions or suits for indemnity sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage was sustained:"—*Held*, that the words "by reason of the tramway or railway or the works or operations of the company," should be read *separatim*, as describing different branches of the company's undertaking, and that the section did not apply to a case like that at bar, which was based on the defendants' duty to carry the plaintiff safely. *Sayers v. British Columbia Electric R. W. Co.*, 12 B. C. R. 102, 3 W. L. R. 44.

**2. Negligence—**Invitation to alight—Calling out name of station—Findings of jury—New trial. *Buck v. Canadian Pacific R. W. Co.*, 7 O. W. R. 71.

## VII. INJURIES TO PERSONS AND VEHICLES AT CROSSINGS.

**1. Destruction of carriage crossing track—Negligence—Engine moving reversely — Highway crossing—Speed of train.]—**A railway company who use a locomotive, rear end foremost, to haul a train, so that the driver cannot see the track immediately ahead, are guilty of negligence and liable to contribute to the loss arising from a carriage being run down at a railway crossing, when the accident might possibly have been averted, had the driver of the locomotive been able to see the carriage approach.—2. There is no statutory obligation to slacken the speed of a railway train at an ordinary railway crossing. *Grand Trunk R. W. Co. v. Daoust*, Q. R. 14 K. R. 548.

**2. Negligence — Failure to look for train—Contributory negligence—Case for jury.]**—In an action under the Fatal Accidents Act to recover damages for the death of a man who was struck by a light engine of the defendants when attempting to cross their track in a waggon with horses, it appeared that the deceased on approaching the track looked both ways, but did not look again just before crossing when he could have seen the engine. The jury found that the whistle was not sounded nor the bell rung, that such neglect was the proximate cause of the injury, and that the deceased could not by the exercise of ordinary care have avoided the injury:—*Held*, that the omission to look again was not such a circumstance as would have justified withdrawing the case from the jury; and a judgment for the plaintiffs upon the findings should not be disturbed. Decision of *MEREDITH, J.*, affirmed. *Misener v. Wabash R. W. Co.*, 12 O. L. R. 71, 7 O. W. R. 651.

**3. Negligence — Failure to look for train—Contributory negligence—Case for jury.]**—The plaintiff was injured by being run over at a highway crossing by a train moving reversely, and brought this action to recover damages for his injuries. The jury found that the plaintiff's injury was caused by the defendants' negligence in not using sufficient signals to attract his attention, that the conductor was not on the rear end of the car, and that the plaintiff could not by the exercise of ordinary care have avoided the injury. The train was coming from the east, and the plaintiff on approaching the track looked to the east and did not see it, his view being obstructed, and, his attention being directed to a train standing at the station to the west, did not again look to the east when, just before attempting to cross, he might have seen the train approaching: — *Held*, that it was not so clearly manifest that the plaintiff was the cause of his own injury that there was nothing to leave to the jury; although the plaintiff might be guilty of some neglect in approaching the track, it was for the jury to say whether the defendants might not still have avoided the accident if they had discharged their statutory duty; the case was properly left to the jury; and their findings were sufficient to support a verdict for the plaintiff. Decision of a Divisional Court reversed. *Wright v. Grand Trunk R. W. Co.*, 12 O. L. R. 114, 7 O. W. R. 636.

**4. Negligence — Failure to look for train—Contributory negligence—Case for jury—Unsatisfactory verdict—Damages—New trial.]**—The infant plaintiff was injured by being struck by the engine of a

train of the defendants while crossing their track at a level highway crossing. Had he looked, he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The infant plaintiff sought to recover damages for his injuries, and the adult plaintiff, the infant's father, claimed damages for loss and expense incurred by him in consequence of the injuries:—*Held*, affirming the decision of *STREET, J.*, 10 O. L. R. 330, that the case could not have been withdrawn from the jury; but that the findings were opposed to the great weight of evidence, and the damages recovered by the father excessive; and therefore there should be a new trial. *Sims v. Grand Trunk R. W. Co.*, 12 O. L. R. 39, 7 O. W. R. 648.

**5. Negligence—Finding of jury—Evidence.]**—A., as administratrix, brought an action against the defendants to recover compensation for the death of her husband by negligence, and alleged in her declaration that the negligence consisted in running a train at a greater speed than six miles an hour through a thickly peopled district, and in failing to give the statutory warning on approaching the crossing where the accident happened. At the trial questions were submitted to the jury, who found that the train was running at a speed of 25 miles an hour, that such speed was dangerous for the locality, and that the death of the deceased was caused by neglect or omission of the company in failing to reduce speed, as provided by the Railway Act. A verdict was entered for the plaintiff, and, on motion to the Court *en banc* to have it set aside and judgment entered for the defendants, a new trial was ordered, on the ground that questions as to the bell having been rung and the whistle sounded should have been submitted to the jury. The plaintiff appealed to the Supreme Court of Canada to have the verdict at the trial restored, and the defendants, by cross-appeal, asked for judgment: — *Held*, *IDINGTON, J.*, dissenting, that by the above findings of the jury the defendants were exonerated from liability on the other grounds of negligence charged, as to which they had been properly directed by the Judge, and the new trial was improperly granted on the ground mentioned. — *Held*, also, that, though there was no express finding that the place at which the accident happened was a thickly peopled portion of the district, it was necessarily imported in the findings given above; that this fact had to be proved by the plaintiff, and there was no evidence to support it; and that, as the evidence shewed it was not a thickly peopled portion, the plaintiff could

not recover, and the defendants should have judgment on their cross-appeal. Judgment in 2 W. L. R. 249 reversed. *Andreas v. Canadian Pacific R. W. Co.*, 26 C. L. T. 72. 37 S. C. R. 1.

**6. Negligence—Neglect of statutory warning—Collision at crossing—Contributory negligence—Nonsuit.]**—The deceased, who was well acquainted with the locality, while driving along a highway running in the same direction as and crossing a railway, was killed at the crossing by a locomotive, running alone, coming from a direction behind him. The trial Judge left it to the jury to say whether there was negligence on the part of the defendants, and whether the deceased could with ordinary diligence have seen the engine in time to avoid the collision, and whether he was guilty of any want of ordinary care and diligence which contributed to the accident. The jury found that the engine was going unusually fast; that the whistle was sounded at a crossing three-fifths of a mile off, but was not continued at the other crossings, and that the deceased was not guilty of contributory negligence:—*Held*, that the case had been properly left to the jury, and that the verdict not being against the weight of evidence ought not to be disturbed. *Peart v. Grand Trunk R. W. Co.*, 10 O. L. R. 753 (Privy Council.)

**7. Negligence—Omission to give warning of approach—Sidewalk—Way of access to station—Highway—Jury—Misdirection—New trial.** *Hanson v. Canadian Pacific R. W. Co.* (N.W.T.), 4 W. L. R. 385.

**8. Negligence—Speed of train—Fences—Watchman or gates at highway crossing.]**—A railway company is under no legal obligation to slacken the speed of its trains through a town, if its track is properly fenced.—2. The failure of a railway company to have a guardian, or gates, or some equivalent form of protection, at a street crossing, however dangerous from the lay of the land making it impossible to see approaching trains, is not a fault that will make the company liable for accidents by collision with its passing trains. *Quebec and Lake St. John R. W. Co. v. Girard*, Q. R. 15 K. B. 48.

**9. Pleading—Declaration—Irrelevant allegations.]**—In an action against a railway company to recover damages for the death of the plaintiff's husband from injuries received by being struck by a train at a crossing, allegations in the declaration that at the time of the casualty it was dark and there was much smoke caused by passing trains, and that

it was notorious that the defendants ran their trains upon the line in question at an excessive rate of speed, were struck out as irrelevant. *Desjardins v. Grand Trunk R. W. Co.*, 8 Q. P. R. 35.

## VIII. INJURIES TO SERVANTS.

**1. Action under Lord Campbell's Act—Limitation clause in Act of incorporation—Time for bringing action—Construction of statutes.]**—The deceased, a workman employed by the defendant (Cook on a contract work for the defendant company, was instantly killed by coming in contact with a live wire. The accident occurred on the 6th August, 1904, and the writ in the action, brought under the provisions of Lord Campbell's Act, was issued on the 15th July, 1905. The defendant company set up, as a bar to the action as against them, s. 60 of their Act of incorporation, which limits the time to six months within which an action may be brought against them for any damage or injury sustained by reason of the tramway or railway, or works or operations of the company:—*Held*, that Lord Campbell's Act is a special Act, creating a special cause of action; and this special cause of action, so specially provided for, does not come within the scope of a general limitation clause in a private Act, passed for the benefit of a private corporation.—Effect of the Public Authorities Protection Act, 1893, discussed. *Green v. British Columbia Electric R. W. Co.*, 12 B. C. R. 199. 4 W. L. R. 273.

**2. Negligence—Defective construction of road-bed—Dangerous way—Vis major—Evidence—Onus of proof—Latent defect.]**—The road-bed of the appellants' railway was constructed, in 1893, at a place where it followed a curve round the side of a hill, a cutting being made into the slope and an embankment formed to carry the rails, the grade being one and one-half per cent, or 78.2 feet to the mile. The whole of the embankment was built on the natural surface, which consisted, as afterwards discovered, of a layer of sandy loam of three or four feet in depth, resting upon clay subsoil. No borings or other examinations were made in order to ascertain the nature of the subsoil, and the road-bed remained for a number of years without shewing any subsidence except such as was considered to be due to natural causes and required only occasional repairs; the necessity for such repairs had become more frequent, however, for a couple of months immediately prior to the accident which occasioned the injury complained of. Water,



coming either from the berm-ditch, or from a natural spring formed beneath the sandy loam, had gradually run down the slope, lubricated the surface of the clay, and, finally, caused the entire embankment and sandy layer to slide away about the time a train was approaching, on the evening of the 20th September, 1904. The train was derailed and wrecked and the engine-driver was killed. In an action by his widow for the recovery of damages:—*Held*, that in constructing the road-bed, without sufficient examination, upon treacherous soil, and failing to maintain it in a safe and proper condition, the railway company were, *prima facie*, guilty of negligence which cast upon them the onus of shewing that the accident was due to some undiscoverable cause; that this onus was not discharged by the evidence adduced, from which inferences merely could be drawn, and which failed to negative the possibility of the accident having been occasioned by other causes which might have been foreseen and guarded against, and that, consequently, the company were liable in damages. *Great Western R. W. Co. of Canada v. Braid*, 1 Moo. P. C. N. S. 101, followed. *Quebec and Lake St. John R. W. Co. v. Julien*, 37 S. C. R. 632.

**3. Negligence — Defective construction of road-bed—Rails giving way—Action of water under road-bed—Onus.]—**The crumbling away of the earth under a railway and the sinking down of the rails is presumptive evidence of fault in construction at the place where it happens, and if an accident results from it, the burden is on the railway company to shew some cause which frees them of responsibility. Where in the course of railway construction work a cut is made upon a slope where beds of earth are likely to slide the one upon the other, or to be disintegrated by the action of water, the persons responsible for the construction should ascertain, by drilling or otherwise, whether there are hidden springs or veins of water, and if so do what is necessary to prevent their deleterious action. Neglect to do so is a fault which renders the company responsible for the injuries which ensue. In this case the company were held liable for the death of an engine-driver. *Quebec and Lake St. John R. W. Co. v. Duquet*, Q. R. 14 K. B. 482.

**4. Quebec Civil Code, art. 1056—**Construction—Widow's right of action—Benefit society—Indemnity—Contract that deceased shall have no claim—"Satisfaction"—Real and tangible indemnity.]—The right of action conferred by art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee, whose death has been caused by the fault of his employer, is an inde-

pendent and personal right, and not derived from the deceased or his representatives.—*Robinson v. Canadian Pacific R. W. Co.*, [1892] A. C. 481, followed.—*Held*, that the deceased could not be said to have "obtained satisfaction" from the respondent company, within the meaning of that article, unless he had obtained a real and tangible indemnity for the fault in question.—Where the deceased, as a condition of his employment, became a member of an insurance and provident society, a by-law of which provided that in consideration of the respondents' subscription thereto no member thereof or his representatives shall have any claim against the respondents for compensation on account of injury or death from accident; and it appeared from the society's provisions for sick allowance and insurance, that the respondents contributed only to the former, the latter being a scheme for mutual life insurance:—*Held*, that, assuming this by-law to be valid, the deceased had not obtained satisfaction, within the meaning of art. 1056. The insurance money did not proceed from the respondents, had no relation to their offence, and was equally payable in case of natural death. *Regina v. Grenier*, 30 S. C. R. 42, overruled. Judgment in *Grand Trunk R. W. Co. v. Miller*, 24 Occ. N. 77, 34 S. C. R. 45, reversed. *Miller v. Grand Trunk R. W. Co.*, [1906] A. C. 187, Q. R. 15 K. B. 118.

**5. Railways of two companies—Neglect of servant in joint service—Liability — Crown — Private company.]—**When the trains of two railways run over a section of the line of one of them, under an agreement which provides, *inter alia*, that the servants employed on the section in common use, shall be considered, and shall be in fact, in the joint employ of the owners of the two railways, the latter are both jointly and severally liable for the death of a servant of one caused by a collision of two trains belonging to one of them, by the fault or neglect of a servant so employed. If, therefore, one of the railways is the property of the Crown, and the other of a private company, the latter is liable in damages as sole tort-feasor. *Atkinson v. Grand Trunk R. W. Co.*, Q. R. 27 S. C. 227 (See *post* X. 1.)

**6. Section foreman in railway yard injured by engine—**Consequent death — Negligence—Contributory negligence—Jury. *Wallman v. Canadian Pacific R. W. Co.* (Man.), 3 W. L. R. 526.

## IX. LANDS.

**I. Damage—Trespass — Construction of railway — Compensation.] — The**

foundation of proceedings under s. 146 *et seq.* of the Railway Act, 1888, 51 V. c. 29 (D.), to determine the compensation to be paid a landowner for lands taken or injuriously affected by a railway company in the exercise of their statutory powers, is the notice to be served on the landowner thereunder; and in the absence thereof the railway company are, as to the lands damaged by the construction of the railway, trespassers, and like any other trespasser responsible to the person injured in damages to be recovered in the ordinary Courts of the country. — Where, therefore, without taking any proceedings under those sections, the defendants, a railway company, for the purposes of their railway, made a cutting, adjoining the plaintiff's lands, which caused a subsidence thereof, whereupon the plaintiff brought an action to compel the defendants to support his lands and prevent further subsidence, and recovered damages for the actual loss then sustained:—*Held*, that the plaintiff was entitled to a mandatory order and to the damages recovered; but, as he would be entitled to maintain actions for the recovery of damages as further loss was sustained, leave was given to the defendants to take proceedings under the above sections for the assessment of compensation so as to have future damages settled, the judgment being stayed for a limited time. *Hanley v. Toronto, Hamilton, and Buffalo R. W. Co.*, 11 O. L. R. 91, 6 O. W. R. 841.

**2. Expropriation—Compensation—Award — Increase on appeal — Damages from severance of farm—Access of cattle to springs—Farm crossing—Offer to provide—Statutory right—Railway Act, 1903, s. 198—Costs of arbitration.]**—The railway company took for the purposes of their railway 3.09 acres of a grain and dairy farm of about 195 acres. The railway crossed the farm, severing from the front part of it about 24 acres, including a field of 18 acres which contained springs affording a supply of water for the cattle and horses on the farm. Upon an arbitration to ascertain the compensation to be paid for the land taken and the damages sustained by reason of the exercise of the railway company's powers of expropriation, the owner of the farm claimed damages *inter alia* for the loss or serious impairment of the convenient use for the purpose of the farm of the springs in the field mentioned. The company contended that the loss would be minimized by the construction of a farm crossing across the railway, and offered to appear before the Board of Railway Commissioners and consent to an order

directing that such a crossing be constructed and maintained by them:—*Held*, applying *Vézina v. The Queen*, 17 S. C. R. 1, that the owner of the farm had no statutory right under s. 198 of the Railway Act, 1903, to a farm crossing sufficient to provide a satisfactory means of access for his cattle to and from the springs, and was entitled to damages in respect of this claim.—Construction of s.-ss. 1 and 2 of that section of the Railway Act.—*Held*, upon the evidence, that the sum of \$1,170 awarded by the majority of the arbitrators was not adequate compensation for the land taken and the injury done, and the amount was increased upon appeal to \$2,250.—Remarks upon the large costs and expenses incurred in arbitrations under the Railway Act and the harshness of the rule which throws them upon the land owner if the amount awarded is less than that offered by the company. *Re Armstrong and James Bay R. W. Co.*, 12 O. L. R. 137, 7 O. W. R. 713.

**3. Expropriation — Immediate possession — Necessity for — Station site — Plans not prepared. *Re Williams and Grand Trunk R. W. Co.*, 8 O. W. R. 277.**

**4. Expropriation — Owner — Trustee — Notice.]**—A bare trustee of land is not "the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken," within the meaning of s. 71 of the Dominion Railway Act, 1903; and notice under that section must be served upon all the *cestuis que trust*. *Re James Bay R. W. Co. and Worrell*, 10 O. L. R. 740, 6 O. W. R. 473.

**5. Expropriation — Special Act — General Act — Easement or interest — Sufficiency of notice—Immediate possession.]**—The defendants had, under their special Act, power to acquire "any privilege or easement required by the company . . . over and along any land, without the necessity of acquiring a title in fee simple thereto;" and the Act defined "land" as including any such privilege or easement, etc. In giving notice of expropriation the defendants did not state whether it was the fee simple, or merely some easement or privilege over the land, which they sought to acquire, but only that they proposed to acquire the land "to the extent required for the corporate purposes of the company:"—*Held*, that such notice was too uncertain a foundation for expropriation proceedings, and the defendants were not entitled to a warrant for immediate possession under s. 170 of the Railway Act

of 1903, 3 Edw. VII. c. 58 (D.) *Lees v. Toronto and Niagara Power Co.*, 12 O. L. R. 505, 8 O. W. R. 294.

**6. Expropriation — Submission to arbitration — Award — Notice — Entry on land—Trespass.]**—By statute in Nova Scotia the recompense for land taken for railway purposes and for earth, gravel, etc., removed, must be determined by arbitration. A railway company proposed to expropriate, and their engineer wrote to M., who had acted for them in similar matters before, instructing him to ascertain if the owners had arranged their title so that the arbitrators could proceed, and if so to act for the company and request the owners to appoint their man, the two to appoint a third if they could not agree. The engineer added in his letter: "I will send an agreement of arbitration, which each one can subscribe to, or, if they have one already drafted, you can forward it here for approval." No agreement was sent or received by the engineer, but the three arbitrators were appointed and met and investigated the damages, making an award, which the company refused to pay, and the owner sued:—*Held*, reversing the judgment in *McIsaac v. Inverness R. W. and Coal Co.*, 38 N. S. R. 80, that, as the company had not taken the preliminary steps required for expropriation, the award was not made under the statute, and was void for want of a proper submission.—Under the statute the company could enter upon the land prior to expropriation, on giving notice to the owner of their intention and stating the quantity of land they intended to take. Without giving such notice the company entered and cut down trees and removed gravel. The owner sued on the award and added an alternative claim for trespass. The trial Judge held the award bad, and dismissed the claim for trespass on the ground that the owner's sole remedy was by arbitration:—*Held*, that the entry on the land was not under the statute, and the remedy by action was not taken away, and the owner was entitled to a new trial on his claim for trespass. *Inverness R. W. and Coal Co. v. McIsaac*, 26 C. L. T. 189, 37 S. C. R. 134.

**7. Expropriation — Valuation by arbitrators — Improvements — Fixtures placed on land by company before filing plan — Compensation for — Irregular entry — Railway Act.]**—A railway company in 1900 entered upon lands and made valuable improvements, intending to take and use the lands for the purpose of their railway. In 1905 they obtained authority to take the lands, and

filed their plan under the Railway Act on the 23rd March, 1905. Arbitrators, in awarding compensation to be paid by the company for the lands, allowed to the claimants a sum for the improvements actually made by the company:—*Held*, that the company did not stand in the same position as an ordinary trespasser going upon lands; they had a statutory right to acquire a title, and entered after negotiation with the true owners, and with the permission of one who claimed to be, but turned out not to be, the true owner; although the improvements were fixtures, dedication to the land owners was not to be presumed, but the contrary; and the amount of the award should be reduced by the sum allowed for the improvements.—Section 153 of the Railway Act, which provides that the date of the deposit of the plan shall be the date with reference to which the compensation or damages shall be ascertained, does not mean that all the company's improvements made before depositing the plan go to the land owner; the lands dealt with in this section are the lands as the company obtained them, in the condition they were at the time they entered, valued as of the date of filing the plan; the claimants' right to compensation accrued at the date the lands were taken, and stood "in the stead of the lands by virtue of s. 173; and so the improvements were not put upon the lands of the claimants at all. *Re Ruttan and Dreifus and Canadian Northern R. W. Co.*, 12 O. L. R. 187, 7 O. W. R. 568.

**8. Injury by laying double tracks —Action for damages—Remedy by arbitration under Railway Act—Farm crossing—Blocking by heaping up snow—Actionable wrong—Limitation of time for bringing action—Blocking of drains—Assessment of damages—Costs.** *Knill v. Grand Trunk R. W. Co.*, 8 O. W. R. 870.

**9. Leasehold interest — Sublease — Covenant — Payment of rent — Acquisition of fee — Compensation — Interest — Agreement — Reference — Costs.** *Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co.*, 8 O. W. R. 299.

**10. Taking possession of land—Possessory title of occupant—Continuing trespass—Limitation of actions.** *Clair v. Temiscouata R. W. Co.*, 1 E. L. R. 524.

See post, X. 2.

## X. MISCELLANEOUS.

**1. Collision of trains—Negligence**—Traffic agreement—Negligence of employee—Joint employment—Crown—Master and servant.]—Where injuries resulted from a collision between two Intercolonial Railway trains negligently permitted to run in opposite directions on a single track of a portion of the Grand Trunk Railway, operated under the joint traffic agreement ratified by 62 & 63 V. c. 8 (D.), the railway company were held liable for the carelessness of the train despatcher engaged by the company and under their control and directions, notwithstanding that he was declared by the agreement to be in the joint employment of the Crown and the railway company, and that the Crown was thereby obliged to pay a portion of his salary; *TASCHEREAU, C.J.C., dubitante.*—Judgment in *Atkinson v. Grand Trunk R. W. Co.*, Q. R. 27 S. C. 227. (*ante* VIII. 5) affirmed. *Grand Trunk R. W. Co. v. Goudie*, *Grand Trunk R. W. Co. v. Huard*, 26 C. L. T. 71, 36 S. C. R. 655.

**2. Conviction for obstructing officer**—Railway Act, 1903, s. 291—Premises of company—Dedication of highway—Expropriation—Restricted use.]—Any person who obstructs or impedes an officer of a railway company in the execution of his duty upon any of the premises of the company, is liable to fine or imprisonment under s. 291 of the Dominion Railway Act, 1903.—2. The mere indication of a strip of land as a street, on a plan made by the city of Montreal and confirmed by the Superior Court under 37 V. c. 51, s. 171 (Q.), when not followed by expropriation proceedings, does not affect the rights of the owner in it nor make it a public thoroughfare.—3. The restricted use as a street of a strip of land allowed the public by the private owner, the restriction consisting for a period in gates closed at both ends at certain hours each day, after which they were removed and replaced by sign-boards marked "Private, no thoroughfare," does not amount to dedication. The owner's title to the property is not affected thereby, and when such owner is a railway company, the land continues to form part of its premises within the meaning of s. 291 of the Railway Act, 1903. *Rex v. Leclaire*, Q. R. 15 K. B. 214.

**3. Dominion undertaking**—Mechanics' liens—Provincial Act—Application of—Constitutional law. *Crawford v. Tilden*, 8 O. W. R. 548.

**4. Fire from engine**—Negligence—Spark-arrester—Neglect to adopt latest

safety devices—Conflict of expert evidence—Question for jury. *Oatman v. Michigan Central R. W. Co.*, 7 O. W. R. 81.

**5. Injury to child playing in yard**—Negligence—Unfenced Premises—Trespasser—Evidence—Onus.]—A boy, over eight years of age, entered from the adjoining highway the unfenced freight yard of the defendants, for the purpose of gathering pieces of coal dropped from the cars, and in doing so got under or alongside the wheels of a car, which, in being shunted, ran over and killed him, at a place over 400 feet from where he entered the yard:—*Held*, that he was wrongfully trespassing where he had no business or invitation to be.—*Held*, also, that the plaintiffs had not satisfied the onus cast upon them to establish by evidence circumstances from which it might fairly be inferred that there was reasonable probability that the accident resulted from the absence of a fence at the place where the boy entered. *Williams v. Great Western R. W. Co.*, L. R. 9 Ex. 157, and *Daniel v. Metropolitan R. W. Co.*, L. R. 3 C. P. 216, L. R. 5 H. L. 45, followed. *Newell v. Canadian Pacific R. W. Co.*, 12 O. L. R. 21, 7 O. W. R. 771.

**6. Protection of public at highway crossings**—Gates and watchmen—Liability of municipality—Orders of Railway Committee of Privy Council and Board of Railway Commissioners—Acquiescence. *Canadian Pacific R. W. Co. v. City of Toronto*, 8 O. W. R. 348.

**7. Receiver**—Appointment of—Jurisdiction—Legislation.]—The High Court of Justice, at the instance of a creditor of a railway company, has power to appoint a receiver, both where the company, being situate within the province, is under provincial legislative jurisdiction, and where it is under federal legislative jurisdiction, if there is no federal legislation providing otherwise. *Wile v. Bruce Mines R. W. Co.*, 11 O. L. R. 200, 7 O. W. R. 157.

**8. Trespass**—Running trial line—Cutting trees on land—Unnecessary damage—Right of action—New trial—Election. *Barrett v. Canadian Pacific R. W. Co.* (Man.), 3 W. L. R. 132.

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1. **Equitable execution** — Ex parte order — Local Judge — Appeal — For-

um — Extension of time for appeal—Previous ex parte application—Direction to serve notice—Non-disclosure—Interest under will—Income—Married woman—Restraint upon anticipation. *Wise v. Gaymon*, 7 O. W. R. 61.

2. **Management of business**—*Supervision and control*—*Laches*.]—The receiver of a partnership, who is directed by the Court to manage the business until it can be sold, should exercise the same reasonable care, oversight, and control over it as an ordinary man would give to his own business, and if he fails to do so he must make good any loss resulting from his negligence.—The fact that the receiver is the sheriff of the district does not absolve him from this obligation, though the parties consented to his appointment knowing that he would not be able to manage the business in person.—*TASCHEREAU*, C.J.C., and *MACLENNAN*, J., dissented, taking a different view of the evidence.—Judgment of the Court below, *Plisson v. Diemert*, 1 W. L. R. 359, reversed. *Plisson v. Duncan*, 26 C. L. T. 74, 36 S. C. R. 647.

See PARTNERSHIP, 14—RAILWAY, X. 7 —STAY OF PROCEEDINGS, 1.

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**REFERENCE.**

**Local Master**—Employment of, as solicitor for party, pending reference—Disqualification—Setting aside all proceedings — Costs. *Livingston v. Livingston*, 7 O. W. R. 830.

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**REGISTRY LAWS.**

**1. British Columbia Land Registry Act**—Amending Act, 1898—Fees on registration of transfer to new trustees—*Local Judge*.]—The fee payable for registration of a transfer of realty to new trustees is based on the value of the lands included in the conveyance to such new trustees.—A local Judge has jurisdiction to hear an application under the Act to determine the fees payable. *Re Hall Mining and Smelting Co.*, 11 B. C. R. 492.

**2. British Columbia Land Registry Act**—Mortgage—House built partly on lot not included—Rights of mortgagee—Purchaser for value—Notice—Registered title.]—The plaintiffs owned lot 19 and the defendant owned lot 20 of a certain subdivision in the city of Vancouver. Lots 19 and 20 were at one time owned by the same person, who built a house partly on both lots. The plaintiffs brought an action for a declaration that the house belonged to them, and based their action on the fact that

the original owner of the two lots had obtained a loan on lot 19 for the purpose of constructing the building in question, and that, being the owner of the two lots, they were entitled to the whole building, alleging that the defendant, the owner of lot 20, had constructive notice of the claim of the plaintiffs:—*Held*, that, under s.ss. 3 and 4 of s. 43 of the Land Registry Act, the defendant, being a purchaser for valuable consideration and claiming under the registered owner of lot 20, was not in any way affected by any relation that might exist between the original owner of lots 19 and 20 and the plaintiffs, in connection with the building having been erected with the proceeds of a loan obtained by the original owner from the plaintiffs. *Canadian Birkbeck Investment and Savings Co. v. Ryder*, 12 B. C. R. 92, 2 W. L. R. 158.

**3. Northwest Territories Land Titles Act**—Execution—“Instrument”—Unregistered equitable mortgage—Priority.]—Notwithstanding that by the Land Titles Act, 1894, differing in this respect from the Territories Real Property Act, an execution is declared to be an “instrument,” the principle established in *Wilkie v. Jellett*, 2 Terr. L. R. 133, 26 S. C. R. 283, still applies; and therefore an unregistered equitable mortgage takes priority over a writ of execution against lands delivered to the registrar subsequently to the creation of the equitable mortgage. *Sawyer and Massey Co. v. Waddell*, 6 Terr. L. R. 45.

**4. North-west Territories Land Titles Act**—Mortgages—Registration—Priority—Production of duplicate certificate of title. *Re American-Abell Engine and Thresher Co. and Noble* (N.W.T.), 3 W. L. R. 324.

**5. North-west Territories Land Titles Act**—Cancellation of lease—Jurisdiction of registrar—Re-entry of lessor on non-payment of rent, without process of law—“Legal proceeding.” *Re Tucker and Armour* (N.W.T.), 4 W. L. R. 394.

**6. Nova Scotia Registry Act**—Unrecorded deed—Constructive notice—Disseisin—Evidence—Certified copy.]—On the 8th May, 1888, N. M. made a deed of a piece of land to her son H. M., and about three years later made a second deed of the same piece of land to H. The grantee under the latter deed placed his deed on record about a month earlier than the deed to H. M., under which the plaintiff claimed:—*Held*, that *bona fide* purchasers for value claiming under H. were not affected with constructive notice

of the prior deed to H. M., although that deed had, in the meantime, been registered, and there was evidence that H. personally, at the time he took his deed, had knowledge of its existence.—*Held*, also, that evidence that the plaintiff, claiming under the unrecorded deed, took two years' hay off the property and arranged with F., who lived on an adjoining property, to look after it for him, and that F. cut logs and pastured cattle for a time as compensation for doing so, was not sufficient to support a disseisin, there being evidence on the other hand to shew that the land was not fenced, and was spoken of as the "commons," and that others pastured cattle there, and that subsequent purchasers obtained timber from it.—*Held*, also, that the trial Judge was in error in rejecting a copy of a deed from the registry office tendered on behalf of the defendant, which purported to have been executed by the grantor under whom both parties claimed.—It is not necessary, in order to procure the admission in evidence of a certified copy of a registered deed from the books of the registry office, to also prove the execution of the original deed, the statute respecting the registration of deeds requiring proof on oath of the execution of the deed before it is admitted to registry. *McDonald v. McDonald*, 38 N. S. R. 261.

**7. Ontario Land Titles Act** — Appeal—Time — Registration of caution—Application to vacate—Status of applicant—Registered owner attacking mortgage — Determination of invalidity of mortgage by local Master of Titles—Jurisdiction—Findings of fact. *Yemen v. Mackenzie*, 7 O. W. R. 701, 866.

**8. Quebec law—Judgment—Registration against land—Hypothec — Unregistered deed—Notice — Priority.**—The registration of a judgment against immovable property which, by the cadastre of the division in which it is situate, appears to belong to the judgment debtor, creates a legal hypothec thereon, even though the judgment creditor is aware of the existence of an unregistered deed, by which the property had been sold to a third party. *Aumais v. Ranger*, Q. R. 28 S. C. 269.

See ASSESSMENT AND TAXES, 17, 19, 20—ATTACHMENT OF INTEREST IN MINES —BANKRUPTCY AND INSOLVENCY, 25 — DEED, 8—EQUITABLE EXECUTION, 1, 2—ESTOPPEL, 2—JUDGMENT, V. 4 — LANDLORD AND TENANT, 25 — MECHANICS' LIENS — MORTGAGE, 14 — TRUSTS AND TRUSTEES, 13—VENDOR AND PURCHASER, I. 20, 37—WAY, II. 2.

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## REPLEVIN.

**1. Defendant not in possession of goods.]**—A *saisie-revendication* cannot be made against a defendant who is not in possession of movable effects which can be seized, especially when it is alleged in the proceeding itself that another person is in possession of the goods sought to be replevied. *Leonard v. Owens*, 8 Q. P. R. 3.

**2. Irregular issue of writ—**Defects in affidavit—Practice—Setting aside writ. *Thornquist v. Peters* (N.W.T.), 3 W. L. R. 488.

**3. Motion for possession—Merits.]**—A motion by the plaintiff for the possession of goods seized and revendedicated, by which the merits of the cause would be decided, will be dismissed. *La Société des Artisans Canadiens Français v. Gougeon*, 7 Q. P. R. 336.

**4. Pleading - - Declaration—Reply—***Stolen article.*—Where the plaintiff in

an action of replevin contents himself with indicating what is necessary to establish his right of property, he may by his reply rebut the title set up by the defendant and allege that the article replevied has been stolen, to the knowledge of the defendant. *National Cash Register Co. v. Menard*, 8 Q. P. R. 70.

See BANKRUPTCY AND INSOLVENCY, 14—EVIDENCE, I. 10—HIRE OF CHATTELS—LANDLORD AND TENANT, 2. 7, 8—PARTIES, I. 2—SALE OF GOODS, VI. 4—VENDOR AND PURCHASER, I. 18—WRIT OF SUMMONS, 2.

### REPLY.

See PLEADING, VII.

### REPORT.

See PARTITION—REFERENCE.

### RES JUDICATA.

See ACCOUNT, 2—CONTRIBUTION—CRIMINAL LAW, III. 28—EXECUTION, 2—EXTRADITION, 4—JUDGMENT, III. 2, 3—WRIT OF SUMMONS, 22.

### RESERVATION OF RIGHTS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 21.

### RESERVE FUND.

See COMPANY, I. 4.

### RESIDENCE.

See DOMICILE—VENUE—WRIT OF SUMMONS.

### RESIDUE.

See WILL.

### RESOLUTION.

See COMPANY, I. 6. II. 3. IV. 10.

### RESTRAINT OF TRADE.

**Covenant — Nullity — Injunction—Breach of contract — Liquidated damages.**—An injunction will not be granted to restrain a defendant from doing an act in breach of an agreement in which a sum is covenanted to be paid as liquidated damages in such a case.—2. A covenant not to promote or aid in promoting or carry on a trade or business, for a period of three years, is null and void as being in restraint of trade and unlimited in space. *Hamilton Powder Co. v. Johnson*, Q. R. 28 S. C. 450.

See CONSPIRACY, 1—COVENANT, 2, 3—INJUNCTION, 3—TRADE UNION.

### RESTRAINT ON ALIENATION.

See SUBSTITUTION, 3—WILL, II.

### RETURNING OFFICER.

See CRIMINAL LAW, III. 9 — PARLIAMENTARY ELECTIONS.

### REVENDEICATION.

See BANKRUPTCY AND INSOLVENCY, 14—HIRE OF CHATTELS — REPLEVIN—SALE OF GOODS, VI. 4.

### REVENUE.

**1. Customs—Infringement by importation of cattle without payment of duty—Intention to infringe—Exercise of ownership in Canada.**—Where cattle are liable to the payment of duty upon importation into Canada, the bringing of such cattle to a point within two or three miles of the boundary line between Canada and the United States constitutes an element in the offence of smuggling.—2. Where cattle are brought to Canada for pasturage, or to a point from which they themselves may drift into Canada for pasturage, if the owner in Canada exercises any control over them, a contravention of the Customs Act is complete, more especially where the control exercised is that of putting Canadian brands upon such cattle. *Spencer v. The King*, 26 C. L. T. 462, 10 Ex. C. R. 79.

**2. Succession duty—Deposit receipt—Person dying outside province.** *Res v. Lovitt*, 1 E. L. R. 513.

See WILL, I. 32.



**REVIVOR.**

See EXECUTORS AND ADMINISTRATORS, 6  
—JUDGMENT, V. 1—MORTGAGE, 8.

**RIPARIAN OWNERS.**

See WATER AND WATERCOURSES.

**RIVERS AND STREAMS.**

See WATER AND WATERCOURSES.

**ROAD.**

See WAY.

**ROMAN CATHOLIC SEPARATE SCHOOLS.**

See SCHOOLS, 9, 10.

**SAILORS.**

See SHIP.

**SAISIE-CONSERVATOIRE.**

**1. Right to—***Preservation of part of claim.*—A *saisie-conservatoire* may be joined with an ordinary action in order to preserve a part only of the total sum which is claimed in the action. *Laporte v. Robert*, 8 Q. P. R. 53.

**2. Setting aside —***Defendant in default for pleading—Creditor's remedy—Lien.*—A defendant, notwithstanding that the pleadings are noted closed against him, has a right to demand the setting aside of a *saisie-conservatoire* brought against him with the action.—A *saisie-conservatoire* can only be issued in the three cases mentioned in art. 955, C. P., and a creditor who has no special lien upon the goods of his debtor cannot exercise that remedy. *Mélançon v. Archambault*, 7 Q. P. R. 474.

See HUSBAND AND WIFE, III. 2, 3—LIEN, 5.

**SALARY.**

See ATTACHMENT OF DEBTS — MASTER AND SERVANT — PRINCIPAL AND AGENT, 13—SCHOOLS, 2, 3, 11.

**SALE OF DISEASED ANIMAL.**

See CRIMINAL LAW, III. 33.

**SALE OF GOODS.**

- I. ACTION FOR PRICE.
- II. CONDITIONAL SALE.
- III. CONTRACT.
- IV. SPECIFIC ARTICLE.
- V. WARRANTY.
- VI. MISCELLANEOUS.

See ATTACHMENT OF DEBTS, I. 2—CHOSE IN ACTION, ASSIGNMENT OF, 1, 4—COMPANY, III. 28—CONTRACT, V. 2, 4. VII.—COURTS, V. 6, IX. 4—GUARANTY—JUDGMENT, I. 2, II. 3—PRINCIPAL AND AGENT, 2, 3, 17—VENUE, 2—WRIT OF SUMMONS, 19.

**I. ACTION FOR PRICE.**

**1. Absence of bargain as to price**—Market value of goods at time of appropriation by defendants—Ascertainment—Reversing findings of trial Judge. *McCutcheon v. Northern Fuel Co.* (Man.), 4 W. L. R. 57.

**2. Account**—Delivery to agents—Oral agreement—Letters—Evidence—Findings of jury. *Drader v. Lang*, 7 O. W. R. 52.

**3. Alleged inferiority of part of goods supplied**—Failure to return. *O'Keefe Brewery Co. v. Gilpin*, 8 O. W. R. 581.

**4. Collateral Oral agreement**—Condition precedent—Waiver—Acceptance—Part performance—Consideration—Warranty—Failure to return goods. *New Hamburg Manufacturing Co. v. Klotz* (N.W.T.), 3 W. L. R. 404.

**5. Contract**—Money had and received—Interest—Costs. *Greenall v. Dunlop* (N.W.T.), 3 W. L. R. 369.

**6. Defence of accord and satisfaction**—Taking back goods sold—Evidence. *Boyce v. Soames* (Man.), 4 W. L. R. 215.

**7. Finding of contract by trial Judge**—Conflicting evidence—Appeal—Duty of Court of Appeal—Acceptance of horse—New trial—Discovery of fresh evidence. *Knight v. Hanson* (N.W.T.), 3 W. L. R. 412.

**8. Lien note—Warranty—Breach — Contract—Evidence to vary—Proof of warranty—Waiver—Costs.** *McKenzie v. McMullen* (Man.), 3 W. L. R. 460.

**9. Mistake as to essential matter —Setting aside sale.]** — Mistake is a ground for setting aside a sale of goods when it concerns the substance of the goods sold or some essential quality thereof. Thus where the buyer understands that he is buying a thresher with a separator for all grains, and especially for pease and oats, the seller does not fulfil his obligation by delivering a thresher which does not separate peas from oats, and he cannot recover the price. *Frost and Wood Co. v. Lacourse*. Q. R. 14 K. B. 320.

**10. Sale by sample—Goods delivered not corresponding with samples—Mistake —Evidence.** *McKenna-Thompson Co. v. Edmonton Clothing Co.* (N.W.T.), 4 W. L. R. 22.

**11. Statute of Limitations—Goods supplied to defendant's wife—Payment by defendant on account—Promise to pay—Evidence—Depositions taken under foreign commission—Admissibility without proof that witnesses beyond jurisdiction—Terms of order for commission—Notice of despatching commission.** *St. John v. Friel* (N.W.T.), 4 W. L. R. 126.

**12. Warranty—Breach—False representations—Horse's pedigree and age—Counterclaim—Damages—Costs.** *Griffin v. Ruller* (N.W.T.), 3 W. L. R. 374.

## II. CONDITIONAL SALE.

**1. Chattel mortgage — Coercion — Warranty—Breach — Executory contract —Return of chattel.]**—A lease of store premises was obtained by the plaintiffs through a guarantee of payment of the rent by the defendant. Subsequently, at the plaintiffs' request, the defendant took out in his own name a lease of the premises for a further term of four years, upon an agreement to assign it to them in consideration of their purchase from him of an automatic electric piano. The purchase price was \$750, upon which a payment of \$100 was to be made. The cash payment subsequently was waived and notes for the full amount of the purchase money given. After the purchase, the plaintiffs incurred an additional indebtedness to the defendant of about \$400. This amount, together with the notes, some of which were overdue, was outstanding when the plaintiffs asked for an assignment of the lease. This the

defendant demurred to giving, desiring to retain the lease as security. The plaintiffs then, but against the defendant's advice, executed a chattel mortgage of the stock-in-trade to him, whereupon he made over the lease to them:—*Held*, that the chattel mortgage should not be set aside on the ground of having been obtained by coercion.—While the rule, that in absence of agreement the purchaser of a specific chattel cannot return it on breach of warranty, may not apply to a sale providing that the property shall not pass until payment of the purchase price, it will apply in such case where the vendee in addition to keeping the chattel a longer time than reasonable or necessary for trial, has exercised the dominion of an owner over it, as by giving a chattel mortgage of it to the vendor. *Petropolous v. F. E. Williams Co.*, 3 N. B. Eq. 346, 1 E. L. R. 533.

**2. Failure to file agreement—Subsequent mortgage—Seizure by landlord—Priorities—Bills of Sale Act — Subrogation.** —W. & Co. sold a piano to W. under the terms of a memorandum in writing by which W. agreed to pay the purchase price within twelve months from date, the property in the meantime to remain in W. & Co.—W. & Co. failed to register the agreement, as required by the Bills of Sale Act, R. S. N. S. 1900 c. 142, and W. transferred the piano by chattel mortgage to the plaintiff, who also failed to file his mortgage until after W. & Co., the original owners, had regained possession by paying to G., who had caused the piano to be distrained for rent, the amount due him for rent and expenses of the distress, and by taking an assignment of the debt due to G.:—*Held*. LONGLEY, J., dissenting, that, as between W. & Co. and the plaintiff, the agreement entered into between W. & Co. and W., not having been filed, was null and void under the provisions of the Bills of Sale Act, s. 8 (4).—2. That the legal title having passed from W. to the plaintiff upon the execution of the chattel mortgage, W. & Co. were neither purchasers nor creditors within the meaning of the Act, s. 5 (3), as against whom the instrument would only take effect and have priority from the time of filing.—3. That, while W. & Co. had an interest in the property which would prevent them from being regarded as mere volunteers or meddlers, and would entitle them to be subrogated to the claim of the landlord as against the tenant, the right to subrogation, being purely an equitable one, could not be enforced as against the plaintiff, who, in addition to having the legal title, had equities equal to those of W. & Co.—*Miller v. Curry*, 25 N. S. R. 537, distinguished. *Lapierre v. McDonald*, 39 N. S. R. 24, 1 E. L. R. 41.

**3. Goods ordered in Nova Scotia and order accepted outside province**—Provincial Act as to registration not applicable—Factors Act. *National Cash Register Co. v. Lovett, Moore v. National Cash Register Co.*, 1 E. L. R. 321.

**4. Lien note**—Description of horse—Chattel mortgage—Repossession and re-sale—Title — Estoppel — Conversion—Registration of lien note—Copy—Affidavit—Sale of Goods Ordinance—Alteration of lien note—Damages for detention of horse. *Aricinski v. Arnold* (N.W.T.), 4 W. L. R. 556.

**5. Re-taking possession on default**—Chattel mortgages—Collateral securities—Rescission of contract—Failure of consideration.]—The defendant ordered from Massey & Co., Ltd., machinery, for the price of which he gave three promissory notes, which provided that "the title, ownership, and right to the possession of the property for which this note is given shall remain in Massey & Co., Ltd., until this note or any renewal thereof is fully paid with interest, and if default is made in payment of this or any other note in their favour, or should I sell or dispose of or mortgage my landed property, or if for any good reason Massey & Co., Ltd., should consider this note insecure, they have power to declare it and all other notes made by me in their favour due and payable at any time, and to take possession of their property, and hold it until this note is paid, or sell the said property at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price." The defendant gave two chattel mortgages as collateral security for the notes. The notes were afterwards indorsed by Massey & Co., Ltd., to the plaintiffs, who on default took possession of and sold the property mentioned in the notes, and applied the proceeds upon the amount unpaid. The plaintiffs sued for the balance, \$487.45, as due under the chattel mortgages:—*Held*, that, in the absence of provision in the notes that the plaintiffs could after sale recover the balance, the original agreement was rescinded by the sale.—(2) That, as the plaintiffs had no right to recover on the notes, they could not recover on the collateral security. *Massey-Harris Co. v. Loebe*, 6 Terr. L. R. 71, 1 W. L. R. 213.

See WILL, I. 33.

### III. CONTRACT.

**1. Appropriation of goods to contract** — Interception by assignment—

Fraud—Warehoused goods. *Metelli v. Roscoe*, 7 O. W. R. 166.

**2. Refusal of vendor to fulfil**—Return of money paid by purchaser—Damages — Counterclaim — Delivery—Acceptance. *Robson v. McMichael* (N.W.T.), 3 W. L. R. 58.

**3. Statute of Frauds** — Order for goods — Agency — Correspondence.] — The travelling salesman of a wholesale dealer is presumably not authorized by the customer who buys from him to sign a contract for the customer as purchaser; and this presumption is not rebutted by a written memorandum of the order being made in the purchaser's presence and a duplicate given to the latter: the entry of the purchaser's name made by the salesman is not evidence *per se* of his agency:—*Held*, upon the facts of this case, that there was nothing upon which the Court could conclude that the vendor's agent was acting as the agent of the purchaser, and the subsequent letters of the purchaser did not identify the contract; and therefore the Statute of Frauds was an answer to a claim for the price of goods for which an order was orally given by the defendant to the plaintiffs' agent, but which the defendant refused to accept.—Judgment of District Court of Algoma reversed. *Imperial Cap Co. v. Cohen*, 11 O. L. R. 382, 7 O. W. R. 128.

### IV. SPECIFIC ARTICLE.

**1. Defect** — Acceptance—Evidence—Warranty—Damages. *Thompson v. Cameron*, 2 E. L. R. 192.

**2. Machinery**—Absence of express warranty—Implied warranty—Evidence—Capacity of machine. *Mussen v. Woodruff Co.*, 8 O. W. R. 487.

**3. Manufactured article** — Action for price—Defence — Defects in article supplied—Implied warranty of fitness for particular purpose. *Frost and Wood Co. v. Ebert* (N.W.T.), 3 W. L. R. 69.

### V. WARRANTY.

**1. Failure of consideration**—Animals Contagious Diseases Act—Compensation—Set-off. *Conn v. Annis* (N.W.T.), 4 W. L. R. 332.

**2. Machinery**—Breach—Damages — Loss of profits—Wages paid while waiting for machinery. *Thompson v. Corbin*, 2 E. L. R. 84.

**3. Machinery — Breach — Defective working of machine—Damages—Counterclaim—Costs.** *Sumner v. Dobbin*, (Man.), 3 W. L. R. 382.

**4. Machinery—Breach—Payment of price.]—**A warranty by the vendor of a machine that it will work in a satisfactory manner must be applied having regard to the usage it receives in ordinary circumstances of place, work, and employment. Breach of the obligation arising from such warranty frees the purchaser from payment of the price. *Frost and Wood Co. v. Tremblay*, Q. R. 28 S. C. 46.

**5. Machinery—Defects—Implied warranty—Damages—Costs.]—**1. Under s. s. (d) of s. 16 of the Sale of Goods Act, R. S. M. 1902 c. 152, an express warranty in a contract for the sale of goods by description does not exclude the implied warranty provided for by s. 15 of the Act that the goods shall correspond with the description, and on the sale of a threshing engine by description there is an implied warranty that it shall be reasonably fit for the work that the vendor knew the buyer wanted it for, which is not inconsistent with any of the express warranties usually inserted in such a contract.—2. Where a contract for the sale of a threshing engine contains the usual warranties and also a provision that in case the engine is not satisfactory the company may supply another engine, and, if it does, "the terms of the warranty shall be held to be fulfilled, and the company shall be subject to no further liability," this should not be construed to mean that the company would be exonerated after supplying another engine, no matter whether it was as defective as the first one or not.—3. The defendant should be allowed interest on the amount allowed him as damages, as he had to pay interest on the promissory notes sued on. *North-west Thresher Co. v. Darrell*, 15 Man. L. R. 552, 2 W. L. R. 262.

**6. Threshing outfit—Incapacity of engine and boiler forming part of outfit—Contract — Warranty—Reduction in purchase money—Reference — Payment into Court—Promissory notes—Damages.** *Bell v. Goodison Thresher Co.*, 8 Q. W. R. 881.

See *ante*, I., II., III., IV.

## VI. MISCELLANEOUS.

**1. Action to set aside sale—Default in payment — Pleading — Posses-**

**sion.]—**An allegation by the plaintiff that the defendant is still in possession of chattels bought by him from the plaintiff, is sufficient to sustain a demand for the setting aside of the sale in default of payment of the price. *Pelletier v. Maranda*, 7 Q. P. R. 349.

**2. Article of food merchantable when shipped and unmerchantable when received by purchaser—Exceptional cause for deterioration — Onus of proof—Oysters.** *Barnes v. Waugh*, 2 E. L. R. 221.

**3. Description—Fruit Marks Act—Acceptance—Conduct amounting to.]—**In a memorandum of sale of apples, the expression "number one stock" means good, sound, clean, merchantable apples, which need not meet the requirements of the Fruit Marks Act, 1901, for fruit of the first quality.—A statement in the memorandum of the prices to be paid for certain kinds of apples, *e.g.*, "Fameuses, \$2.50, St. Lawrence, \$2.10," etc., does not mean that apples of kinds not mentioned are excluded from the bargain.—The acceptance by the buyer of the apples is sufficient evidence that they are according to contract, and when he writes to say he will not accept them, but deals with them as owner by having them sold at auction, such conduct amounts to an acceptance. *Minaker v. Cramer*, Q. R. 28 S. C. 443.

**4. Sale by weight—Determination of weight—Completion of sale—Revendication.]—**The sale of movables by weight, count, or measure, is not complete until they have been weighed, counted, or measured.—"The hay now found in a barn and two stacks, less so much as the vendor has need of for his own use," is an indeterminate quantity, and the purchaser of it at so much a ton does not become the owner and cannot revendicate it so long as the weighing and determination of it have not been made. *Brown v. Lauzon*, Q. R. 28 S. C. 10.

**5. Sale of lumber—Rejection of part—Action for value—Finding of Master—Interference by Court.** *Potter v. Orillie Export Lumber Co.*, 8 O. W. R. 804.

**6. Payment by exchange — Uncertain goods—Assignment by vendor for benefit of creditors—Right to specific goods—Bills of Sale Act.** *Harrison v. Smith* (Man.), 4 W. L. R. 249.

## SALE OF LAND.

See ASSESSMENT AND TAXES—COURTS, IV.—JUDICIAL SALE — MUNICIPAL

CORPORATIONS, XIV. 6—PRINCIPAL AND AGENT—SCHOOLS, 13—SPECIFIC PERFORMANCE—STAY OF PROCEEDINGS, 3—VENDOR AND PURCHASER—WRIT OF SUMMONS, 20.

## SALE OF RAILWAY.

See RAILWAY, III.

## SALVAGE.

See SHIP, 9, 25—WATER AND WATERCOURSES, 8.

## SCALE OF COSTS.

See COSTS, IV.

## SCHOOLS.

**1. North-west Territories public schools**—Meeting of trustees—Striking rate of taxation—Informal meeting—Minutes.]—A rate of taxation not struck at a regular or special meeting of a school board, but at an informal meeting, of which no minutes were kept, was held to be invalid.—*Quære*, whether the rate would have been validly struck, even if the meeting had been a regular or special meeting, without a proper minute. *Vienna School Trustees v. Rozkosz*, 6 Terr. L. R. 51.

**2. North-west Territories public schools**—Teacher—Dismissal of, by trustees—Appeal to commissioner of education—Affirmance of dismissal—Right to alter decision—Grounds of decision—Salary of teacher. *Clipsam v. Grand Prairie School District No. 833* (N.W. T.), 3 W. L. R. 313.

**3. North-west Territories public schools**—Teacher—Salary of—Contract—School Ordinance—Receipt—Estoppel—Rate of payment—Period of hiring. *Porter v. Fleming School District* (N.W. T.), 3 W. L. R. 186.

**4. Ontario high schools**—Constitution of high school district—Validity—By-law of county council—Assent of Lieutenant-Governor in council—Appointment of trustees—County and township by-laws—Organization of board—Term of office of trustees—Refusal to fill vacancies—High Schools Act—Construction—

Demand of trustees for money to carry on school—Mandamus. *North Plantaganet High School Board v. Township of North, Plantaganet*, 7 O. W. R. 17.

**5. Ontario Protestant separate schools**—Establishment—Failure to bring into operation—Municipal by-laws—Rates—Assessment—Inequality—Adjustment—Debentures—Collector's roll—Action—Declaration—Parties—Trustees—Fraud—Costs. *Ellice (No. 1) Public School Trustees v. Township of Ellice*, 7 O. W. R. 6.

**6. Ontario public schools**—Change in school site—Expenditure of money—Special meeting of ratepayers—Taking poll—Right of farmers' sons to vote—Public Schools Act—Injunction—Motion for judgment. *McFarlan v. Greenock School Trustees*, 8 O. W. R. 672.

**7. Ontario public schools**—Dissolution of union school section—Award—Reference back—Formation of new union and non-union sections—Including other lands—Jurisdiction of arbitrators.]—There being nothing in the Public Schools Act to bring an award of arbitrators, appointed under s. 46 of that Act, within the exception contained in s. 47 of the Arbitration Act, R. S. O. 1897 c. 62, there is power in the Court or a Judge to remit the matters referred or any of them for reconsideration to the arbitrators.—There is also power in such arbitrators, when dissolving a union school section, to form both a union and a non-union school section out of the lands which were comprised in the dissolved union section; and in doing so, although they cannot bring into the new non-union section any lands which did not form part of the dissolved union section, they have the power to include such other lands in the new union section; and there is no reason for limiting the arbitrators' jurisdiction to either action in exact conformity with the prayer of the ratepayers' petition or a rejection of their request.—*In re Sydenham School Sections*, 6 O. L. R. 417, 7 O. L. R. 49, distinguished. *In re Churchill and Townships of Goderich and Hullett*, 11 O. L. R. 284, 6 O. W. R. 586.

**8. Ontario public schools**—Municipal By-law—Altering boundaries of school sections—Motion to quash—Forum.]—A motion to quash a by-law of a municipality altering the boundaries of a school section, upon the ground that the by-law is invalid, must since the statute 6 Edw. VII. c. 53, s. 29, s.-s. 4 (O.), be made to the Judge of the County or District Court of the county or district in which the section is situate, and



not to the High Court, which has jurisdiction only upon an appeal as provided by the enactment. *Re Almonte Board of Education and Township of Ramsay*, 12 O. L. R. 486, 8 O. W. R. 147.

**9. Ontario Roman Catholic separate schools**—Formation of union school section—Defective proceedings—Declaration that school not legally established—Injunction. *Malden R. C. Separate School (No. 3a) Trustees v. Martin*, 7 O. W. R. 469.

**10. Ontario Roman Catholic separate schools**—Qualifications of teachers—Status of members of religious communities—Construction of statutes—"Persons"—History of legislation. *Re Qualification of Teachers in Roman Catholic Separate Schools in Ontario*, 7 O. W. R. 141.

**11. Quebec public schools**—Action against school commissioners—Notice of action—Public Instruction Act—Meetings of board—Notice—Service on members—Time—Collective dismissal of teachers—Invalidity—Recovery of salary—Deductions.]—The expression "any person performing public duties or functions" in art. 88, C. P. C., does not include corporations created by the Public Instruction Act under the denomination "The School Commissioners for the Municipality of . . ." Actions begun against such corporations are not subject to the condition of preliminary notice prescribed by that article.—A session of school commissioners called for a special object by notices which do not mention such object is not a regular session, within the terms of s. 223 of the Public Instruction Act.—A session of school commissioners at which all the members resident in the municipality are not present, and notice of which has not been served at least two days before the day fixed for such session, upon one of them, is not a regular session, within the terms of s. 223.—A resolution of school commissioners "that instructor X. and all the instructresses of this municipality, with the exception of Y., who has resigned, be notified that the school commissioners do not intend to continue their engagement as instructor and instructress for the next year (1903-1904)," is void because it involves the violation of s. 226 of the Public Instruction Act, which prohibits every notice of dismissal given collectively or simultaneously to the teachers.—The engagement of teachers cannot be cancelled by the commissioners upon any of the grounds mentioned in clause 2 of s. 215 of the Act, except after mature deliberation at a session called

for that purpose.—The breach by the school commissioners of obligations arising from the engagement of a teacher is ground for an action by the latter to recover the entire salary stipulated for. From this amount, however, the Court will deduct sums earned by the teacher, and expenses saved to him by the closing of the school, during the period of the engagement. *Lacavalier v. Ste. Philomène School Commissioners*, Q. R. 27 S. C. 521.

**12. Quebec public schools**—Election of commissioner—Contestation—Procedure—*Quo warranto*.]—The election of a school commissioner can be contested on the ground of incapacity from not knowing how to read or write, only in the manner prescribed by arts. 178 and 179 of the school code. The remedy of *quo warranto* is not open in such a case, even after the expiration of the time fixed for the contestation in the articles mentioned. *Duval v. Marchand*, Q. R. 28 S. C. 184.

**13. Quebec public schools**—Sale of school property—Officer of school board to sell at auction—Formalities—Entries in books.]—Section 232 of the Public Instruction Act, 62 V. c. 28 (O.), creates an exception to art. 1565, C. C., in prescribing that the sale of school properties shall be made at auction by the secretary-treasurer of the school board; and the latter sufficiently complies with art. 1566, C. C., when he enters in the minute books of the school board the name of the purchaser and the amount of the purchase money. *Edgar v. North British and Mercantile Ins. Co.*, Q. R. 27 S. C. 209.

See ASSESSMENT AND TAXES, 6—LANDLORD AND TENANT, 12—STATUTES, 7.

## SCIENTER.

See ANIMALS—CRIMINAL LAW, III. 33.

## SCIRE FACIAS.

**Procedure**—Information—Attorney-General—Action to repeal letters patent—Service of writ—Authorization of attorneys.]—The information by the Attorney-General mentioned in art. 1008, C. P. C., is, as regards a claim to set aside letters patent, what the declaration mentioned in art. 123 is in ordinary actions, that is to say, a document in which are set forth the causes of the demand and

the claims based upon them.—Service in a case of *scire facias*, or demand to set aside letters patent, is made by means of a writ issued in the ordinary manner, without affidavit of the petitioner, and without permission or order of a Judge or fiat of the Attorney-General.—The defendant is not allowed to plead default of authorization of the attorneys who signed the information for the Attorney-General. The latter alone can disavow them if there is ground. *Gouin v. McManis* Q. R. 28 S. C. 216.

See CROWN LANDS, 4.

### SCRUTINEERS.

See MUNICIPAL CORPORATIONS, V. 3 --  
PARLIAMENTARY ELECTIONS, III. 2.

### SCRUTINY.

See PARLIAMENTARY ELECTIONS,

### SEAL.

See COMPANY, I. 3, III. 13, IV. 10—  
COVENANT, 1 — EVIDENCE, II. 3—  
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### SEAMEN'S ACT.

See POLICE MAGISTRATE, 2—SHIP, 24.

### SEARCH WARRANT.

See CANADA TEMPERANCE ACT, 12—JUS-  
TICE OF THE PEACE, 13.

### SEARCHING FOR DOCUMENTS.

See COSTS, VII. 6.

### SECURITIES.

See BANKRUPTCY AND INSOLVENCY, 5. 6  
—GUARANTY, 2.

### SECURITY FOR COSTS.

See COSTS, V.

### SEDUCTION.

1. **Claim for payment in advance of expenses of confinement.**—In an action by the father of a girl under age for breach of promise of marriage and seduction, the plaintiff made a claim for payment provisionally and in advance of \$100 for the expense of the girl's expected confinement: — *Held*, that this claim could not be sustained, and *preuve avant de faire droit* was ordered. *Bolduc v. Corbeil*, 7 Q. P. R. 412.

2. **Daughter's evidence — Rape.**—*Held*, affirming the judgment of a Divisional Court, 10 O. L. R. 489, that the case was one to be submitted to the jury, to say whether upon the whole evidence they could find that the defendant seduced the plaintiff's daughter.—*Per Moss, C.J. O., MacLaren, J.A., and Clute, J.*—If the evidence should establish a case of rape and disprove a connection yielded to in the end though commenced with violence and resisted for some time, in fine a case of seduction, the plaintiff's right of action could only rest upon his daughter being his servant, which was not this case, and the provisions of R. S. O. 1897 c. 60, ss. 1, 2, would not apply.—*Per Garrow, J.A.*—The action would lie although trespass *vi et armis* might have been sustained, and it would be no defence that the offence was rape and not seduction. *E. v. F.* 11 O. L. R. 582; *S. C., sub nom. Gambell v. Heggie*, 7 O. W. R. 133.

See CRIMINAL LAW, I. 4, III. 34, 35.

### SEIGNEURIAL TENURE.

**Holder of part of property—Payment of the whole rent.**—The possessor of a part of the property inscribed on the register of a fief, made and deposited by virtue of the Seigneurial Act, 1854, s. 7 *et seq.*, is personally bound to pay the whole of the rent as it appears upon the register in order to take the place of the quit-rent and rents with which the property was charged under the previous seigneurial tenure. *Letellier de St. Just v. Desjardins*, Q. R. 28 S. C. 350.

### SELLING LIQUOR TO INDIAN.

See CRIMINAL LAW, III. 36, 37—INDIAN.

### SENTENCE.

See CANADA TEMPERANCE ACT.

**SEPARATE ESTATE.**

See HUSBAND AND WIFE.

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**SEPARATE SCHOOLS.**

See SCHOOLS, 5, 9, 10.

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**SEPARATION.**

See HUSBAND AND WIFE.

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**SEQUESTRATION.**

**Hypothecary creditor — Insolvency of debtor — Payment of taxes—Oppositions.]** — A hypothecary creditor cannot sequester an immovable upon the allegations that he has paid the taxes and the premiums of fire insurance due thereon; that oppositions by which rents falling due are claimed are pending; that the debtor is insolvent and the hypothecary creditor is in danger of losing his debt. *Caverhill v. Mackay*, 7 Q. P. R. 320.

See PATENT FOR INVENTION, 11.

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**SERVANT.**

See MASTER AND SERVANT.

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**SERVICE OF PAPERS.**

See CONTEMPT OF COURT, 2—COSTS, V. 10—DEFAMATION, 10 — EXECUTORS AND ADMINISTRATORS, 3—HUSBAND AND WIFE, III. 2, V. 1—INJUNCTION, 13—JUDGMENT, I.—JUDGMENT DEBTOR, 2—LIQUOR LICENSES, 10—LUNATIC, 4—OPPOSITION—PARTIES, III.—PARTNERSHIP, 2—PEREMPTION—PLEADING—PRACTICE, 2—SCHOOLS, 11—SCIRE FACIAS — SET-OFF, 3 — STAY OF PROCEEDINGS, 4—WRIT OF SUMMONS.

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**SERVICE OUT OF JURISDICTION.**

See WRIT OF SUMMONS.

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**SERVITUDE.**

See ARCHITECT, 1—EASEMENT—VENDOR AND PURCHASER, II. 2—WATER AND WATERCOURSES, 6, 25.

**SET-OFF.**

**1. Claim — Counterclaim—Debt due by partners—Debt due to one partner—Contract—Extras.** *Ross v. Redmond*, 1 E. L. R. 158.

**2. Claims of third persons—Personal debt—Alimentary allowance.]**—A defendant cannot set off against the plaintiff's debt rights belonging to third persons, especially when an alimentary allowance is in question, which is a debt exclusively personal. *Ross v. McIntosh*, 7 Q. P. R. 392.

**3. Debt purchased by defendant — Signification — Costs — Firm of advocates — Partnership — Debts of members.]** — A defendant in a suit may set up in compensation of the demand, a debt due by the plaintiff bought by him, though signification of the act of sale has not been made; but he bears the costs incurred up to the production of the sale in the case, which avails as a signification. — A firm of advocates in Quebec is a juridical person (*personne morale*), distinct from the several members who compose it. Hence, debts due to it cannot be set up in compensation of debts due by its members. *Sale v. Crépau*, Q. R. 28 S. C. 423.

**4. Liquidated demand—Stipulation for liquidated damages—Cross-demand—Pleading — Irregularity — Inscription in law.]**—A debt arising out of the stipulation in a contract for the performance of work that on default of completing it by a fixed date, the contractor shall pay \$50 as liquidated damages for every day of delay, is not a liquidated debt which may be set off according to the terms of art. 1188, C. C.—2. BLANCHET, J., dissenting, that the creditor may make such a debt available by recourse to the cross-demand mentioned in art. 217. C. R. C.—*Semble*, that when a debt, not the subject of set-off, is set up in a defence of set-off, and the opposite party joins issue without raising any objection to the regularity of the procedure, the Court may decree a set-off.—3. The party against whom an unliquidated debt is set up in a plea of set-off may attack such irregularity without being obliged to inscribe in law. *Ottawa Northern and Western R. W. Co. v. Dominion Bridge Co.*, Q. R. 14 K. B. 197.

**5. Solicitor's lien — Costs — Action and counterclaim—Set-off to prejudice of solicitor's lien—Con. Rules 252, 253, 1150, 1164, 1165.]**—Rule 1165 as to a set-off of damages and costs between



parties not being allowed to the prejudice of the solicitor's lien for costs, does not fetter the discretion of the trial Judge as to costs under Con. Rule 1130. —An action and counterclaim together constitute but one action for the purpose of ascertaining the ultimate balance for which execution is to issue; and, *per* STREET, J., Con. Rule 1164 is special authority for setting off the costs taxable to the defendant against those taxable against him without any saving of the solicitor's lien. *Levi Blumenstiel & Co. v. Edwards*, 11 O. L. R. 30, 5 O. W. R. 796, 6 O. W. R. 734.

See CONTRACT, VII. 1—COSTS, II. 2, IV. 7, VI.—COURTS, V. 5—JUDGMENT, IV. 3—PARTNERSHIP, 5—PLEADING, IX. 10—PRINCIPAL AND AGENT, 2—PRINCIPAL AND SURETY, 3—SALE OF GOODS, V. 1—SOLICITOR, 3.

## SETTLED ESTATES ACT.

See WASTE.

## SETTLEMENT.

See HUSBAND AND WIFE, VIII. 1 — PAUPER.

## SETTLEMENT OF ACTION.

See CONTRACT, X. 7—COSTS, VII. 9, VIII. 6—INTERVENTION — TRIAL, IV. 2.

## SEWERS.

See LICENSE—MUNICIPAL CORPORATIONS, XII.—WATER AND WATERCOURSES, 14.

## SHARES AND SHAREHOLDERS.

See BROKER—COMPANY, II.

## SHERIFF.

See ATTACHMENT OF INTEREST IN MINES, 1—COMPANY, II. 29—CONVERSION, 2—CREDITORS' RELIEF ACT —INJUNCTION, 11, 12 — JUDICIAL SALE OF LAND, 2—MONEY IN COURT —OPPOSITION.

## SHIP.

**1. Action for freight — Charterparty—Delay by master—Loss of cargo —Findings of trial Judge—Reversal by appellate Court—Commission evidence.]** —A vessel owned by the plaintiff was chartered at a fixed rate per month, the time to commence on 2nd December, 1902, to proceed to Bonne Bay, Newfoundland, there to load a cargo of herring, and thence with all possible dispatch to Halifax, etc. To an action to recover the freight agreed upon, the defence was set up that the master, although not prevented by dangers of the seas, wilfully and without reasonable cause or excuse, neglected and refused to leave the port of Bonne Bay, or to proceed with reasonable dispatch, although he knew the harbour was liable to freeze up, and, in consequence, the schooner was frozen in for the winter, and the cargo not delivered until the 27th April following, when it was worthless. The evidence shewed that the vessel arrived at Bonne Bay, and had completed loading and cleared on the 9th January, 1903, and could have got away on that day or any one of a number of days afterwards, when the condition of wind and weather were favourable, and other vessels, either at Bonne Bay or at places in the immediate neighbourhood where similar conditions prevailed, put to sea:—*Held*, reversing the judgment of the trial Judge on the question of fact, that, under the circumstances stated, the plaintiffs could not recover.—Where a large part of the evidence has been taken under commission, the Court on appeal is, to that extent, in as favourable a position to decide as to its effect as the Judge who tried the cause.—*Per* RUSSELL, J.—If the question were as to any one day on which it was contended the master might have sailed and did not, it might be difficult to say with certainty that his conduct was not consistent with the exercise of a *bona fide* judgment, but this difficulty is removed when it is found that there are at least seven different occasions as to which there is a strong body of testimony to the effect that the voyage might with safety have been undertaken. *Spindler v. Farquhar*, 38 N. S. R. 183.

**2. Affreightment — (Charterparty—Discharge of cargo—Obligations of owner—Custom of trade.)**—A ship that carries a cargo of fruit to the port of Montreal, under a charterparty with a clause "that the cargo is to be brought to and taken from alongside at the shipper's expense, and to be stowed and discharged according to the custom of the fruit trade of the ports," etc., is not bound, as a

part of its obligations when discharging, to provide (a) shed accommodation in which to store the fruit, (b) men to sort and check the same according to marks, numbers, and grades, no custom of the fruit trade to that effect being proved to exist at the port of Montreal. *Tracuzzi v. Glasgow Navigation Co.*, Q. R. 27 S. C. 371.

**3. Arrest — Co-owners — Account — Jurisdiction of Exchequer Court.]—**The Exchequer Court of Canada, on the Admiralty side, has as large a jurisdiction as the High Court of Admiralty, and therefore in an action by one co-owner against another for an account, the ship may be arrested. *Cope v. The "Raven" and Mayhew*, 11 B. C. R. 486.

**4. Charterparty — Covenant—Negligent stowage — Exemption of owner — Law of England—Application of.]—**A stipulation or covenant in a contract that it shall be governed by the laws of a foreign country is valid and binding.—Under the law of England, a stipulation in a charterparty that the owner or charterer of the vessel shall not be liable for damages to the goods carried, caused by improper and even negligent stowage, is valid and binding. *Canada Sugar Refining Co. v. Furness-Withy Co.*, *Tellier v. Furness-Withy Co.*, *Dobell v. Furness-Withy Co.*, Q. R. 27 S. C. 502.

**5. Collision — Admiralty Court — Practice—Place of trial—Action at Quebec—Cross-action at Montreal.** *Bouchard v. Elevator No. 7*, 2 E. L. R. 125.

**6. Collision — Admiralty law — Narrow channel—Risks — Rule of the road—Right of way — Blast signals.]—**The rule of the road on our rivers and lakes applicable to "narrow channels" is set out in art. 21, R. S. C. c. 79, which applies to foreign as well as to British and Canadian ships, and is as follows: "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship:—Held, that a channel 800 feet wide comes within the designation of "narrow channels" as mentioned above, and that a ship violated said rule when she steered towards the westward and crossed towards the channel on her port side, instead of keeping in the channel on her starboard side.—2. When two steamers are meeting on the Detroit river the descending steamer shall have the right of way; and it is no defence to an action for collision to prove that at the moment of collision it was too late to take a precaution which ought to have been taken earlier to avoid

the risk of a collision, the rule being that every steamship, when approaching another ship, so as to avoid the risk of collision, shall slacken her speed, or stop and reverse if necessary. The more imminent the risk of collision, the more obedience to the rule.—3. Where a steamer some distance from another has indicated by the course she is steering imperative is the necessity for implicit that she cannot be considered as a steamer "meeting another end on," the state of things does not arise which renders it incumbent on her to give blast whistles indicating which side she proposes to take on passing:—Held, on appeal, affirming the above, that when the master of a ship, in danger of collision with another ship, instead of porting his helm, puts it to starboard, and so makes the collision inevitable, the ab-collision from full liability, if the omission of a signal required by a local regulation to be given by the other ship in such circumstances, does not relieve the ship primarily responsible for the sion to give such signal did not contribute in any way to the accident. *Tucker v. The "Tecumseh"*, 6 O. W. R. 131, 10 Ex. C. R. 44, 149.

**7. Collision — Boom — Interference with navigation — Nuisance.]—**Nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance.—2. Where an interference with navigation is established, it is a public nuisance which any one specially injured or damaged by it has a right to remove.—3. While no person has the right to continuously appropriate to himself any portion of the water, or bank or shore of navigable waters, for the purpose of making up a boom of logs, the use thereof in a reasonable manner and for a reasonable period, having regard to local conditions, will not amount to an interference with navigation. *Kennedy v. The "Surry"*, 10 Ex. C. R. 29, 2 W. L. R. 550, 11 B. C. R. 499.

**8. Collision — Crossing ships — Admiralty Rules, 1897, Rule 19.]—**The S. S. "Parisian," making for Halifax harbour, came along the western shore, sailing almost due north to a pilot station, on reaching which she slowed down, finally stopping her engines. The "Albano," a German steamship for the same port, approached some miles to the eastward, sailing first, by error, to the northeast, and then changing her course to the south-west, apparently making for the eastern passage to the harbour. She again altered her course, however, and came almost due west towards the pilot station. When about a quarter of a

mile from the "Parisian" she slowed down, and on coming within 8 or 9 ship lengths gave 3 blasts of her whistle, indicating that she would go full speed astern. The "Parisian" then, seeing that a collision was inevitable, went ahead full speed for some 200 feet, when she was struck on the starboard quarter, and had to make for the dock to avoid sinking outside. The "Parisian's" engines were stopped about 6 minutes before the collision, and a boat from the pilot cutter was rowing up to her when she was struck. At the time of the collision, about 5 p.m., the wind was light, weather fine and clear, there was no sea running, and no perceptible tide:—*Held*, that the captain of the "Albano" had no right to regard the "Parisian" as a crossing ship, within the meaning of Rule 19 of the Admiralty Rules, 1897; and that the "Parisian" having properly stopped to take a pilot on board, and being practically in the act of doing so at the time, the "Albano" was bound to avoid her, and was alone to blame for the collision. *The "Albano" v. The "Parisian,"* 26 C. L. T. 314, 37 S. C. R. 284.

**9. Collision — Damages — Assessment by registrar—Items of damage—Use of pump—Services of tug—Surveyors' report—Salvage charges—Value of ship—Cost of repairs—Appeal — Costs.** *St. Clair Navigation Co. v. The "D. C. Whitney,"* 7 O. W. R. 690.

**10. Collision — Damages — Loss of fishing voyage.** *Langille v. Ernst,* 2 E. L. R. 56.

**11. Collision — Interlocutory application for consolidation of two actions—Appeal from order of local Judge—Costs.]—**An action for damages against the defendant ship for collision was brought in the Nova Scotia Admiralty District by the owner of the injured ship on the 15th September, 1905. The following day a similar action was begun by the charterer and owner of the cargo of such injured ship. On the 28th September an application was made by the defendant to the local Judge for an order to consolidate the two actions, or in the alternative for an order that the defendant ship be released upon tendering bail to the amount of her appraised value, and that a commission of appraisal be issued, to ascertain her value in her then condition. On the 3rd October the local Judge made an order that a commission of appraisal be issued, and that upon bail being given for the amount of such appraised value in each of the actions, the ship be discharged from arrest, and that the two actions be tried together. An appeal

from such order was taken to the Exchequer Court. Upon the appeal no objection was taken to the order, so far as it directed an appraisal, or to the direction that the two actions be tried together, except so far as that direction might be held to affect the question of the amount of bail to be given—it only being necessary to give bail to the amount of her appraised value to secure the release of the ship if the actions were consolidated. It was, however, urged that the local Judge should have ordered the consolidation of the two actions, and that the ship should be released in respect of both upon giving bail to the amount of her appraised value:—*Held*, that it was a matter within the discretion of the local Judge to grant or refuse an order for consolidation, and as such ought not to be interfered with on appeal—2. That the order should be varied to allow in the alternative the ship to be released in respect of both actions and claims made, upon payment into Court of her appraised value and the amount of her freight, if any.—3. This relief not having been asked before the local Judge, the Court on appeal declined to allow the costs of appeal to either party. *Actieselskabet Borgestad v. The "Thrift," Dominion Coal Co. v. The "Thrift,"* 26 C. L. T. 459, 10 Ex. C. R. 97.

**12. Collision — Negligence.] —**In a dangerous and crowded channel the captain of a vessel, especially going down stream, must slacken speed, and, if overtaking another vessel, is bound to pass at such a distance that no harm will result to the other vessel from suction or displacement waves. — The look-out man must devote himself solely to that duty, and if engaged at other work so that his attention is divided, it is not a proper compliance with the rule as to a proper look-out. *Cadwell v. The "C. F. Bielman,"* 10 Ex. C. R. 155, 7 O. W. R. 393.

**13. Collision—Rules of navigation — Negligence — Conflicting evidence—Damages — Costs.** *Canadian Lake and Ocean Navigation Co. v. The "Dorothy,"* 7 O. W. R. 621.

**14. Collision—Steamer and sailing vessel.** *Butt v. Dartmouth Ferry Commission,* 1 E. L. R. 139.

**15. Collision—Strict observance of rules of road—Look-out.]—**In a case of collision, one vessel cannot justify a departure from the rules of navigation by the fact that the other vessel was also disregarding the rules. On the contrary, a primary disregard of the rules by one

vessel imposes on the other vessel the duty of special care, prompt action, and maritime skill, as well as the duty of acting in strict conformity to the rules applicable to the latter in the circumstances.—Collision regulations have been framed for the protection of lives and property in navigation and are so strictly enforced that even where a vessel commits a comparatively venial error it cannot be absolved from the consequences.—The rules of the road must be strictly observed, and when they are violated by both vessels the Court will hold them equally liable. *Canadian Lake and Ocean Navigation Co. v. The "Dorothy,"* 10 Ex. C. R. 163, 7 O. W. R. 621.

**16. Collision between foreign vessels—Jurisdiction of Canadian Court—Foreign corporation—Discretion.]**—The Exchequer Court of Canada has jurisdiction in an action of collision brought by a foreign corporation against a foreign ship, although the collision occurred in foreign waters.—2. In such a case the Court ought to exercise its discretion to entertain the action. *St. Clair Navigation Co. v. The "D. C. Whitney,"* 6 O. W. R. 302, 10 Ex. C. R. 1.

**17. Counterclaim—Appeal from order striking out—Exchequer Court—Jurisdiction.]**—The jurisdiction which the Exchequer Court of Canada may exercise under the Colonial Courts of Admiralty Act, 1890, and the Admiralty Act, 1891, is the admiralty jurisdiction, and not the general or common law jurisdiction of the High Court in England.—*The Cheapside*, [1904] P. 339, referred to.—In an action *in rem* for a claim arising upon a mortgage of a ship, the Court has no jurisdiction to entertain a counterclaim for breach of contract to build the ship in accordance with certain specifications. *Union S. S. Co. of British Columbia v. Bow, McLachlan & Co., Limited, The "Camosun,"* 26 C. L. T. 780.

**18. Foreign vessel—Illegal fishing—Seizure of vessel—Evidence of vessel's position.]**—Judgment of Supreme Court of Canada in *Rex v. The "Kitty D.,"* 24 Occ. N. 261, 34 S. C. R. 673, reversed, and judgment of HODGINS, Loc. J. in Admiralty, 2 O. W. R. 1065, restored. *The "Kitty D." v. The King*, 26 C. L. T. 75.

**19. Foreign vessel—Illegal fishing—Three-mile limit—Capture outside limit—Continuous pursuit—Jurisdiction—Governments of Dominion and province.]**—The American schooner "North" was discovered by the Do-

minion government steamer "Kestrel" hove-to engaged in halibut fishing in Quatsino Sound, Vancouver Island, and within the three-mile limit. She had at the time all her fishing boats out, but on observing the approach of the "Kestrel" some four or five miles off, but also within the three-mile limit, the schooner picked up two of her dories and stood out to sea. The "Kestrel" made pursuit, deviating slightly from her course in such pursuit to pick up one of the schooner's fishing boats with its crew, and overhauled and seized the schooner about one and three-quarter miles outside the three-mile limit. At the time of seizure there were freshly caught halibut lying about on the schooner's decks:—*Held*, that the pursuit having been begun within the three-mile limit, and having been continuous, the seizure was lawful.—The stopping to pick up the fishing boat and its crew, as evidence of the offence committed by the schooner, was not a break in the continuity of the pursuit.—Observations as to the jurisdiction of Canada and the province, respectively, over fisheries. *Rex v. The "North,"* 11 B. C. R. 473, 2 W. L. R. 74.

**20. Maritime lien—Charterparty—Right to pledge credit of ship.]**—The orders of a foreman of the charterers, not being the captain of a vessel, cannot create a maritime lien against such vessel.—Where a ship is chartered and supplies are furnished to the charterer with a knowledge of his position with regard to the ship, no maritime lien attaches to the ship. *Upson-Walton Co. v. The "Brian Boru," The "Shaughraun," The "Monroe Doctrine," The "Reciprocity,"* 10 Ex. C. R. 176, 7 O. W. R. 310.

**21. Maritime lien—Goods supplied without knowledge of owners—Attachment of ship—Parties—Costs.]**—There is a privilege under art. 2383 (5), C. C., upon a steamer for coal supplied to her on her last voyage by the order of the master and of the charterers, through their agent, without the knowledge or participation of the owners, who incur no personal liability therefor.—Such a privilege may be enforced by attachment of the vessel before judgment, and the owners may be made parties to the suit, *pour voir dire*, but they will be liable for costs in case of contestation. *Inverness R. W. and Coal Co. v. Canadian Lines Limited*, Q. R. 29 S. C. 151.

**22. Mortgage—Security for "account current"—Construction—Advances.]**—The plaintiff, being indebted to B. on a current account, gave B. a mort-

gage of a vessel of which he was owner. The mortgage contained a recital that B. had advanced and was advancing certain sums of money to the plaintiff for purposes connected with shipping and trade, the amount of which was to be ascertained and the account current balanced on the 31st December, yearly. B., in addition to supplying the plaintiff with cash and goods, procured goods from other persons to a considerable amount, paying for them in cash and delivering them to the plaintiff:—*Held*, that the trial Judge was right in declining to restrict the terms of the mortgage to cash advanced for purposes connected with shipping and trade, and that, in interpreting the document, the nature and course of dealing between the parties must be taken into consideration, and that the words "account current" did not mean money advances only, but clearly included money used in advances and such articles as had been charged in accounts current from year to year. *Cleveland v. Boak*, 39 N. S. R. 39, 1 E. L. R. 64.

**23. Pilotage dues — Coal barge — "Propelled wholly or in part by steam" — Payment under protest — Crown — Board of Commissioners.]**—Barges used in transporting coal from Parrsboro to Saint John, registered as schooners, having a crew on board and masts rigged with sails so as to be capable under favourable circumstances of being navigated by sailing, but which are in fact navigated by being towed by tugs, are exempt from pilotage dues under s. 59 of the Pilotage Act, R. S. C. c. 80, as "ships propelled wholly or in part by steam." — The pilot commissioners are liable in their corporate capacity in an action for money had and received for pilotage dues illegally collected. Payment of such dues, under protest, is not a voluntary payment and may be sued for, though they have been paid over to the pilots, and the commissioners have no funds or resources to satisfy a judgment. *Cumberland R. W. and Coal Co. v. St. John Pilot Commissioners*, 37 N. B. R. 406, 1 E. L. R. 397.

**24. Seamen's Act—Fisherman—Refusal to join ship—Conviction—Right to look at depositions—Costs.** *Ree v. Wilneff*, 1 E. L. R. 168, 267.

**25. Salvage—Danger and imminent loss.]**—Salvage is an obligation of an exceptional nature, to indemnify those by whose assistance a ship, her cargo, or the lives of those on board are saved from imminent loss. The element of danger and imminent loss to the ship, etc., is essential, and, without it, no claim to

salvage can arise. *Montreal Lightcrage Co. v. Gordon*, Q. R. 28 S. C. 198.

**26. Transport—"Foreign-going ship"—Imperial Merchant Shipping Act—Sailors—Certificate of discharge—Penalty—Conviction—Right of appeal.]**—A ship engaged in maritime transport service between Quebec and Anticosti does not come under the designation "foreign-going ship" in the Imperial Merchant Shipping Act, 1894, s. 127.—The captain of such a ship is not obliged to deliver to his crew, at the end of their engagement, the certificate of discharge provided for by s. 128 of that Act, and is not, on that ground, liable to the penalty imposed upon persons for disobedience thereto.—An appeal lies to the Court of King's Bench, criminal side, from a decision of a police magistrate condemning a captain to pay the penalty provided by s. 128. *Bélanger v. Gagnon*, Q. R. 14 K. B. 340.

**27. Wages of sailor—Term of hiring—Expiry during voyage—Desertion of ship — Forfeiture—Accrual of debt for wages de die in diem—Jurisdiction of County Court—Amount less than \$200.** *Cairns v. British Columbia Salvage Co.* (B.C.), 4 W. L. R. 458.

See CARRIERS, 2, 4—CONSTITUTIONAL LAW, 11, 12—COSTS, III. 5—CROWN, 9—EXCHEQUER COURT OF CANADA—MASTER AND SERVANT, I. 2, II. 3, 12 — NEGLIGENCE, 2, 20, 22, 26 — POLICE MAGISTRATE, 2—PORTWARDENS

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## SIDEWALK.

See WAY.

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## SIMULATION.

See CONTRACT, IV. 4.

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## SLANDER.

See DEFAMATION.

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## SMALL DEBT PROCEDURE.

**1. Counterclaim—Discontinuance of action—Practice — Summary judgment—Default in reply.** *Cosgrave v. Duchek* (N.W.T.), 3 W. L. R. 194.

**2. Nature of claims — "Debt"—Claim for value of goods—Agreement to**



deliver—Damages for non-delivery—Two claims—One within small debt jurisdiction. *Cosgrave v. Duchek* (N.W.T.), 3 W. L. R. 320.

**3. Nature of claims — “Debt” —** Claim for value of goods—Rent payable in kind—Damages for non-delivery—Two claims—One within small debt jurisdiction. *Paradis v. Hotton* (N.W.T.), 3 W. L. R. 317.

See PARTNERSHIP, 5.

## SNOW AND ICE.

See WAY, III.

## SNOW FENCES.

See MUNICIPAL CORPORATIONS, XIV. 7.

## SOLICITOR.

**1. Action against, by client for an account —** Bill of costs—Reference for taxation—Summary order—Provision for payment according to event—Right of client to regular trial—Special agreement—Leave to deliver amended bill. *Myers v. Monroe* (Man.), 4 W. L. R. 221.

**2. Action by, for compensation for services —** Prosecution of claim against Dominion government—Quantum meruit—Nature of services—Commission. *Murphy v. Corry*, 7 O. W. R. 363.

**3. Agreement with client as to costs of litigation —** Bill of costs—Taxation—Claim against solicitors—Set-off—Statutory provisions affecting solicitors—English Solicitors Act—North-West Territories Ordinance—Jurisdiction of Court over solicitors—Delivery and taxation of bills of costs. *Bowcher v. Clark* (Y.T.), 4 W. L. R. 292.

**4. Authority — Nominal plaintiff—Parties.]—**An action begun in the name of the attorney of the real creditor will be dismissed upon exception to the form, the plaintiff, being without interest in the cause, not being permitted to plead in the name of another. *Meunier v. Drollet*, 7 Q. P. R. 426.

**5. Authority to bring action in name of municipality—**Resolution of council—Substantial compliance with.]—A municipal council having resolved to join in an action already launched by an

individual against the defendant; the reeve, after consultation with the solicitor, gave instructions to commence an independent action on behalf of the municipality:—*Held*, that, as the municipal council had shewn an intention to sue the defendant, the action of the reeve was a substantial if not a strict compliance with that intention. *Municipality of South Vancouver v. Rae*, 12 B. C. R. 64. 3 W. L. R. 346.

**6. Taxation of bill —** Motion for—Submission to arbitration—Construction. *Re Solicitor*, 7 O. W. R. 827.

See ACCOUNT, 1—ADVOCATE—AFFIDAVITS, 1—APPEAL, XIII. 2—ASSESSMENT AND TAXES, 17—ATTORNEY—COMPANY, IV. 8—COSTS—CRIMINAL LAW, III. 7—DISCOVERY, IV. 1—HUSBAND AND WIFE, I. 2—INTEREST, 2—MASTER AND SERVANT, II. 6—MORTGAGE, 2—RAILWAY, III. 2—REFERENCE—SCIRE FACIAS—SET-OFF, 3, 5—TRIAL, I. 7—TRUSTS AND TRUSTEES, 7, 13—VENDOR AND PURCHASER, I. 34—VENUE, 6, 7, 12—WRIT OF SUMMONS, 26.

## SPECIFIC PERFORMANCE.

**1. Contract for lease—**Rent to be fixed by percentage on cost of building to be erected—Amount of rent—Consent of lessees to extra cost of building—Architect—Burden of proof. *Joseph v. Anderson*, 7 O. W. R. 582.

**2. Contract for lease —** Statute of Frauds—No time fixed for commencement or duration of term—Alteration of contract after execution—Materiality. *Acme Oil Co. v. Campbell*, 8 O. W. R. 627.

**3. Contract for sale of land by trustees —** Evidence of concurrence by all—Statute of Frauds—Correspondence—Authority of trustees to bind co-trustee.]—A trustee in Toronto wrote to a co-trustee in St. Mary's stating that an offer had been made to purchase a portion of the trust estate for \$12,000, and giving reasons why it should be accepted. The co-trustee replied concurring in those reasons and consenting to the proposed sale. The Toronto trustee afterwards had negotiations with the solicitors of G., and at their suggestion offered to sell the same property to G. for \$13,000, but without further notice to his co-trustee. The offer was accepted by the solicitors, whereupon the person who had offered \$12,000 raised his offer to \$14,000, and the trustee notified the solicitors of G. that the sale to him was cancelled. In a suit by G. for specific performance:—

*Held*, affirming the judgment of the Court of Appeal, 9 O. L. R. 522, 5 O. W. R. 554, that the letter written by the co-trustee in St. Mary's contained a consent to the particular sale mentioned therein only, and could not be construed as a general consent to a sale to any person even for a higher price. Even if it could, there were circumstances which occurred between the time it was written and the signing of the contract with G. which should have been communicated to the co-trustee before he could be bound by the contract. *Gibb v. McMahon*, 26 C. L. T. 383, 37 S. C. R. 362.

**4. Contract to divide specified land to be acquired by defendants**  
—Acquisition by defendants of part only  
—Claim of plaintiffs to half of land actually acquired — Right to less than half with abatement in price. *Canadian Pacific R. W. Co. v. Grand Trunk R. W. Co.*, 8 O. W. R. 254.

See PARTIES, I. 9—PLEADING, VIII. 6  
—PRINCIPAL AND AGENT, 16 — STREET RAILWAYS, 1. 5, 6 — VENDOR AND PURCHASER.

## STAMPS.

See COSTS, V. 9—WRIT OF SUMMONS, 27.

## STATEMENT OF CLAIM.

See PLEADING, VIII.

## STATEMENT OF DEFENCE.

See PLEADING, IX.

## STATUTE OF FRAUDS.

See CONTRACT, X. 5, 6—COURTS, V. 6—GUARANTY, 1—PARENT AND CHILD, 1—SALE OF GOODS III. 3—SPECIFIC PERFORMANCE, 2, 3 — TRUSTS AND TRUSTEES, 1, 6—VENDOR AND PURCHASER, I. 13, 19, 25, 30, 31, 32, 33, 34, 37.

## STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

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## STATUTES.

**1. Inspection of Metalliferous Mines Act — Penal statute—Construction** — “Machinery hereinafter mentioned.”]—In construing a penal statute, the rule to be followed is that by which that sense of the words is to be adopted which best harmonizes with the context and promotes in the fullest manner the policy and object of the legislature.—The paramount object in construing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention.—*Semble*, the phrase “machinery hereinafter mentioned” in r. 21a of s. 25 of the Inspection of Metalliferous Mines Act, as enacted by c. 37 of 1901, means “any of the machinery hereinafter mentioned.” *McGregor v. Canadian Consolidated Mines Limited*, 12 B. C. R. 116.

**2. Inspection of Metalliferous Mines. Act—Penalty—Conviction—Employment of person in mine—Hours of labour.** *Re v. Canadian Consolidated Mines Limited (B.C.)*, 4 W. L. R. 101.

**3. Ontario Medical Act**—“Practising medicine” — Use of drugs or other substances — Application of statute to Christian Scientists and others—Statute for protection of public — Reference of question by Lieutenant-Governor in council under R. S. O. 1897 c. 84—Question of provincial concern — Scope of Act—Jurisdiction of Court—Application of existing law—Authority of decided cases. *Re Ontario Medical Act*, 8 O. W. R. 766.

**4. Private Act—Public Act—Conflict—Limitation of actions** — Time for bringing action under Families Compensation Act (B.C.)—Application of defendants’ Act of incorporation. *Green v. British Columbia Electric R. W. Co. (B.C.)*, 3 W. L. R. 347.

**5. Repeal of statute—Exception as to action or proceeding pending**—Municipal corporation—Notice of intention to take over street railway. *Re Town of Berlin and Waterloo Street R. W. Co.*, 8 O. W. R. 284.

**6. Retroactivity** — 6 Edw. VII. c. 19, s. 22 (O.)—Procedure — Division Courts — Contract—Provision for determination of forum for possible actions—Prohibition. *Re Sylvester Manufacturing Co. v. Brown*, 8 O. W. R. 984.

**7. Special Act—Repeal by implication—Repugnancy to subsequent general Act—Rule of construction—Assessment and taxes—Exemptions—Railway—By-law of municipality—Commutation—School rates.]**—A city council in 1897 passed a by-law providing that a certain annual sum should be accepted from a railway company for 15 years “by way of commutation and in lieu of all and every municipal rate or rates and assessment,” in respect of certain lands owned by the railway company. This by-law was passed under the authority of a special Act respecting the railway company, 48 V. c. 65 (O.), s. 3 of which provided that it should be lawful for the corporation of any municipality through which any line of the railway had been constructed to exempt the company and its property within such municipality, in whole or in part, from municipal assessment or taxation, or to agree to a certain sum per annum or otherwise in gross or by way of commutation or composition for payment of all municipal rates. By a subsequent general enactment, 55 V. c. 60, s. 4 (O.), it was declared that no municipal by-law thereafter passed for exempting any portion of the ratable property of a municipality from taxation, in whole or in part, should be held or construed to exempt such property from school rates. The general Act did not by express words repeal the special Act:—*Held*, that it did not effect a repeal by necessary implication—*generalia specialibus non derogant*.—*Held*, also, that there was nothing to shew that the sum which the railway company were to pay was not more than the school taxes which they would be liable to pay if they were not entitled to any exemption. *Way v. City of St. Thomas*, 12 O. L. R. 240, 7 O. W. R. 194, 731.

**8. Timber Manufacture Act, B.C., 1906—Timber cut on Crown lands—Prohibition as to export—Retroactivity—Powers of chief commissioner—Crown.]**—Section 2 of the Timber Manufacture Act, 1906, provides that all timber cut on ungranted lands of the Crown, or on lands thereafter granted, shall be used or manufactured in the province. Section 4 gives to the chief commissioner of lands and works, his officers, servants, and agents, power to do all things necessary to prevent a breach of s. 2, including seizure and detention of all timber so cut until security shall be given to His Majesty that such timber will be used and manufactured as provided by s. 2. The plaintiff had in his possession, and was about to export, a quantity of logs, cut before the passing of the Act, which were seized by the provincial timber inspector:—*Held*, that the

rule requiring the Courts not to construe Acts of the legislature to the prejudice of existing proprietary rights, if the language bears another sensible meaning, excludes from the operation of this statute all timber cut before the passing of it.—The authority to seize, under s. 4, is not conferred upon the Crown. The chief commissioner acts thereunder, not as the organ of the Crown, but as the grantee of legislative authority, and does not purport to act other than as a statutory officer. The timber in question, consequently, not being in the possession of the Crown, there was no seizure by the Crown.—The maxim “the King can do no wrong” considered. *Emerson v. Skinner*, 12 B. C. R. 154, 3 W. L. R. 558, 4 W. L. R. 255.

See ASSESSMENT AND TAXES, 2, 6, 9, 13, 19, 21—ATTACHMENT OF DEBTS, II. 11—BANKRUPTCY AND INSOLVENCY, 17—CANADA TEMPERANCE ACT—CERTIORARI, 1—CONSTITUTIONAL LAW—CONTRACT, VIII. 12—COPYRIGHT—COSTS, II. 1, III. 7, VIII. 1—COURTS, V. 3—CREDITORS' RELIEF ACT—FACTORIES ACT—INSURANCE, III. 3, 4—LIMITATION OF ACTIONS, II. 2, 4—LIQUOR LICENSES—MINES AND MINERALS—MUNICIPAL CORPORATIONS, III. 3—MUNICIPAL ELECTIONS, 9—PAUPER, 1—PENALTY, 1—RAILWAY, III. 1, 2, VIII. 1, IX. 5—SCHOOLS—SUBSTITUTION, 2—TRIAL, I. 15—WATER AND WATERCOURSES, 5, 9, 15, 23, WAY, V. 3—WILL, II. 4.

## STATUTORY DECLARATION.

See DEFAMATION, 7—FRAUD AND MISREPRESENTATION, 2—MUNICIPAL ELECTIONS.

## STAY OF PROCEEDINGS.

**1. Appeal from judgment at trial**—Security—Money in Court—Receiver—Interest—Jurisdiction. *Canadian Bank of Commerce v. McDonald* (Y.T.), 3 W. L. R. 396.

**2. Motion for**—Other actions arising out of same contract—Different causes of action. *Black v. Ellis*, 8 O. W. R. 303.

**3. Sale of land in action to enforce mechanic's lien**—Appeal pending in action for redemption—Identity of land—Identity of parties. *Black v. Weibe* (Man.), 4 W. L. R. 218.

**4. Succession**—Action against heirs—Statutory delays—Inventory—Deliber-



**ation—Liability—Service of writ of summons — Motion.]**— Defendants, sued as heirs may ask suspension of proceedings until the expiry of the delays to make an inventory and deliberate as to their acceptance or renunciation of the succession.—A defendant, sued as having himself personally contracted the debt, cannot stay proceedings even by alleging that he is jointly and severally liable with the other defendants.—Service of a writ of summons upon heirs of a deceased person collectively, and without mentioning their names or residence, does not deprive them of their right to the delays: art. 135, C. P. — Defendants are entitled to all delays granted to them by art. 8, C. P., amended by 4 Edw. VII. c. 45, respecting the service and presentation of motion. *Chevalier v. Trépanier*, 7 Q. P. R. 446.

See APPEAL, IV. 2, V. 20—BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 1—CONSTITUTIONAL LAW, 5—CONTRACT, VI. 3—COSTS, VIII. 7—COURTS, V. 7—DAMAGES, 6—DISCOVERY, I. 1—INTERPLEADER, 1—JUDGMENT, IV. 3—MUNICIPAL CORPORATIONS, XIV. 1—OPPOSITION, 6—VENDOR AND PURCHASER, I. 5—WRIT OF SUMMONS, 9.

### STEAM BOILERS ORDINANCE.

See CONTRACT, IV. 5.

### STEAMBOAT INSPECTION ACT.

See NEGLIGENCE, 26.

### STENOGRAPHERS' FEES.

See COSTS, VIII. 10.

### STIPENDIARY MAGISTRATE.

**Jurisdiction—Appointment — Proof — Towns Incorporation Act — Effect of appointment of police magistrate of town — Canada Temperance Act.]**— T. was convicted of an offence against the Canada Temperance Act by C., who, in making the conviction, professed to be acting as stipendiary magistrate for the county of W. No record of his appointment to this office could be found either in the minutes of the executive council or in the office of the provincial secretary; but there was a record of his appointment to the office of stipendiary magistrate for the parish of S.; C. swore (and herein

he was corroborated) that upon it being discovered that his commission as stipendiary magistrate for the parish of S. was illegal, a new commission appointing him stipendiary magistrate for the county of W. was issued to him, which commission had been lost, but under which he had been acting without objection for many years. Afterwards, when the town of S. was carved out of the parish of S. and incorporated under the Towns Incorporation Act, C. was appointed police magistrate for the town. Sub-section (2) of s. 131 of the Towns Incorporation Act provides, *inter alia*, that on an appointment of a police magistrate for a town incorporated thereunder, the appointment and commission of a police or stipendiary magistrate theretofore acting in such town shall thereupon *ipso facto* be cancelled, and he shall cease to hold office as such police or stipendiary magistrate.— *Held*, that there was sufficient proof of C. having been duly commissioned to act as stipendiary magistrate for the county of W., and that under the above sub-section he did not vacate such office upon being appointed police magistrate for the town of S. *Ree v. Cahill, Ex p. Tait*, 37 N. B. R. 18.

See CANADA TEMPERANCE ACT — CRIMINAL LAW, III. 40—JUSTICE OF THE PEACE, 14.

### STOCK.

See BROKER.

### STOCK EXCHANGE.

See BROKER.

### STOCK SPECULATIONS.

See BROKER—JUDGMENT, II. 1.

### STOLEN GOODS.

See REPLEVIN, 4.

### STOP ORDERS.

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### STREAMS.

See WATER AND WATERCOURSES.

**STREET.**

See WAY.

**STREET RAILWAYS.****I. CONTRACTS WITH MUNICIPALITIES AND OPERATION OF RAILWAY.****II. PASSENGERS, CARRIAGE OF, AND INJURIES TO.****III. PERSONS OTHER THAN PASSENGERS, INJURIES TO.**

See ASSESSMENT AND TAXES, 9, 11—  
CRIMINAL LAW, III. 24—DAMAGES, 2, 8  
—DISCOVERY, I. 11—LIEN, 3—MUNI-  
CIPAL CORPORATIONS, IV. 3—NEGLIGENCE  
13, 27, 28, 29, 30—STATUTES, 5.

**I. CONTRACTS WITH MUNICIPALITIES AND OPERATION OF RAILWAY.**

**1. Mileage payments—Construction of portion of railway—Ontario Judicature Act—Construction—Interest on payments in arrear.]**—The Ontario Judicature Act, R. S. O. 1897 c. 51, s. 113, enacts that "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it."—*Held*, that under the true construction of this section it is incumbent upon the Court to allow interest for such time and at such rate as it may think right in all cases where a just payment has been improperly withheld, and compensation therefor seems fair and equitable.—An order by the Court below, *City of Toronto v. Toronto R. W. Co.*, 5 O. W. R. 130, that the appellant company should pay arrears of track rentals within the limits of the respondent city, over and above their periodical payments already made, and should pay interest thereon, was affirmed. *Toronto R. W. Co., v. City of Toronto*, [1906] A. C. 117.

**2. Operation—Municipal franchise—Construction of contract—"Whole operation of its railway"—Suburban lines—Percentages upon earnings outside city limits.]**—By art. 1018 of the Civil Code of Lower Canada, "all the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire act." The appellants having contracted with the respondents to pay annually certain specific percentages on the total amount of their gross earnings arising from the whole operation of their railway, and it appearing from the rest of the contract that the respondents considered that territories of outside

municipalities were not included within the scope of the municipality, and that they could only deal with the streets within their jurisdiction, and that the appellants had to make separate arrangements with outside municipalities in respect of the operation of the railway within their limits:—*Held*, that by the true construction of the contract the respondents were only entitled to percentages on the gross earnings arising from the whole operation of the lines within their own limits.—Judgment in *City of Montreal v. Montreal Street R. W. Co.*, 34 S. C. R. 459, 24 Occ. N. 165, reversed. *Montreal Street R. W. Co. v. City of Montreal*, [1906] A. C. 100, Q. R. 15 K. B. 174.

**3. Operation of cars — Fender — "Front" of motor car—Penalty—1 Edw. VII. c. 25 (O.)]**—By 1 Edw. VII. c. 25, s. 1 (O.), it is provided that a street railway company, when operating any portion of their line by means of electricity, shall use "in the front of each motor car a fender."—*Held*, that what is meant by the "front" of the car is that end of it which when the car is in motion is the furthest forward, that is to say, furthest forward in the sense that it would first meet a person or an object moving in the opposite direction; and the defendants operating a car for a distance of 1,200 feet with the fender at the back instead of the front, as so defined, were liable to the penalty prescribed by the statute. Judgment of the County Court of York affirmed. *City of Toronto v. Toronto R. W. Co.*, 10 O. L. R. 730, 6 O. W. R. 574.

**4. Operation of railway—Breach of conditions—Liquidated damages—Penalty—Cumulative remedy—Construction and location of lines—Use of highways—Car service—Time-tables—Municipal control—Territory annexed after contract—Abandonment of monopoly.]**—Except where otherwise specially provided in the agreement between the Toronto Railway Company and the corporation of the city of Toronto, set forth in the schedules to 35 V. c. 99 (O.), the right of the city to determine, decide upon, and direct the establishment of new lines of tracks and tramway service, in the manner therein prescribed, applies only within the territorial limits of the city as constituted at the date of the contract. Judgment in *City of Toronto v. Toronto R. W. Co.*, 10 O. L. R. 657, 6 O. W. R. 677, reversed: GIBOUARD, J., dissenting.—The city, and not the company, is the proper authority to determine, decide upon, and direct the establishment of new lines, and the service, time-tables, and routes thereon. Judgment appealed from affirmed: SEDGE-

**WICK, J.**, dissenting.—As between the contracting parties, the company, and not the city, is the proper authority to determine, decide upon, and direct the time at which the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heating. Judgment appealed from reversed; **GIBOUARD, J.**, dissenting.—Upon the failure of the company to comply with requisitions for extensions as provided in the agreement, they cease to have any right of action against the city for subsequent grants of the privileges to others; the right of making such grants accrues, *ipso facto*, to the city, but is not the only remedy which the city is entitled to invoke. Judgment appealed from affirmed; **SEDGEWICK, J.**, dissenting.—The cars started out before midnight as day-cars may be required by the city to complete their routes so connected, although it may be necessary for them to run after midnight or transfer their passengers to a car which would carry them to their destinations without payment of extra fares, but at midnight, *eo instanti*, their character would be changed to night-cars, and all passengers entering them after that hour could be obliged to pay night fares; **SEDGEWICK, J.**, dissenting. *Toronto R. W. Co. v. City of Toronto*, 26 C. L. T. 454, 37 S. C. R. 430.

**5. Streets in newly annexed territory**—*By-law—Passing of, before date of Act—Recommendation of engineer—Adoption by resolution—2 Edw. VII. c. 27, s. 16 (O.)—Necessity for by-law—Specific performance—Option to others to lay down rails—Effect of—Engineer—Authority of—Stopping places—Right to fix—Determination of engineer.*]—By s. 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 V. c. 99 (O.), the defendants are required to establish and lay down new lines and to extend the tracks and street car service on such streets as may be from time to time recommended by the city engineer and approved by the city council within such period as may be fixed by by-law to be passed by a vote of two-thirds of all the members of the council; and all such extensions and new lines shall be regulated by the same terms and conditions as relate to the existing system, etc. A recommendation was made by the city engineer to the city council that a double line of tracks should be laid down and the car service extended on the continuation of one of the streets in the city, and a by-law was passed duly approving thereof and fixing the date for such service, of which the defendants were duly notified. The continuation of

said street was in territory brought into the city subsequently to the entering into of this agreement:—*Held*, that the agreement applied as well to streets brought within the city subsequently to the entering into of the said agreement as to those then within its limits. *City of Toronto v. Toronto R. W. Co.*, 5 O. W. R. 130, affirmed by Privy Council, March number of C. L. J. 1906, and *City of Toronto v. Toronto R. W. Co.*, 9 O. L. R. 333, 10 O. L. R. 657, followed.—*Held*, also, that it was not essential that the city should pass a by-law as required by s. 16 of 2 Edw. VII. c. 27 (O.), which provides that prior to the passing a by-law authorizing any electric railway company to lay out or construct its railway on, upon, or along any public highway, road, street, or lane, notice must be given similar to that required by s. 632 of the Municipal Act; for that section only applies to those electric railways which come within R. S. O. 1897 c. 209, and has no application to the defendants.—The by-law for the laying out and construction of the extension was passed on the 10th April, 1905, while the statute for the annexation of the territory in question was not passed until the 25th May, 1905; but the Lieutenant-Governor's proclamation annexing the territory was issued on the 3rd March to take effect on the 10th March, 1905, to which no objection was ever taken:—*Held*, that the by-law was valid.—By s. 5 of 63 V. c. 102 (O.) it is provided that if the railway company neglect or fail to perform any of their obligations under the Act and the agreement, and an action is brought to compel performance, the Court before which the action is tried shall, notwithstanding any rule of law or practice to the contrary, inquire into the alleged breach, and in case a breach is found to have been committed, shall make an order specifying what things shall be done by the defendants as a substantial compliance with the Act and agreement; which shall be enforceable in the same manner, etc., as a mandamus:—*Held*, that an order could be made specifying what was necessary to be done to constitute a substantial compliance with the agreement. *City of Kingston v. Kingston, etc., Electric R. W. Co.*, 25 A. R. 462, specially referred to.—*Held*, also, that the corporation could enforce the laying out of such extension notwithstanding the option given by s. 17 of the agreement to grant to another person or company the right of laying down lines on streets, after failure of the defendants, though duly notified to do so.—*Held*, also, that the engineer for the time being, and not the engineer who held office when the agreement was entered into, is the one referred

to therein, and that he does not act in a judicial capacity but as the executive officer of the corporation, to whom he must make his recommendations, which the council may approve or reject as they see fit.—By s. 26 of the agreement it is provided that the speed and service necessary on any main line, part of same or branch, is to be determined by the city engineer and approved of by the council; and by s. 39 it is provided that the cars shall only be stopped clear of cross streets, and midway between streets where the distance exceeds 600 feet:—*Held*, that the regulation of the places at which cars are to stop to take on and let off passengers is part of the service within s. 26; and, therefore, subject to the limitations of s. 39, the defendants might be required to stop wherever the city engineer and city council might agree in requiring them to do so.—The engineer reported to the council recommending that the cars should be required to stop at certain specified points, and his report was adopted by resolution of the council:—*Held*, that this was a determination and not merely a recommendation of the engineer, for it must be assumed that before making his recommendation he had determined the matter as far as he could; and that it was not essential that the adoption of such recommendation should be by by-law. *City of Toronto v. Toronto R. W. Co.*, 11 O. L. R. 103, 6 O. W. R. 871. (See the next case.)

**6. Streets in newly annexed territory**—*Extension of road into*—*Stopping places*—*Right to fix*—*Determination of engineer*—*Injunction*.]—Section 14 of the agreement entered into between the plaintiffs and defendants, set out in 55 V. c. 99 (O.), whereby the defendants were required to establish and lay down new lines and to extend the tracks and street car service on such streets as might be, from time to time, recommended by the city engineer and approved by the city council, does not apply to territory which was not within the limits of the city at the date of the agreement, but has subsequently been annexed to and become part thereof. *Toronto R. W. Co. v. City of Toronto*, 37 S. C. R. 430 (reversing the judgment of the Court of Appeal, 10 O. L. R. 657), followed.—By s. 26 of the agreement the "speed and service" necessary on each main line, part of same, or branch, is to be determined by the city engineer and approved by the city council; and by s. 39 the cars shall only be stopped clear of cross streets and midway between streets, where the distance exceeds 600 feet:—*Held*, subject to the limitations of clause 39, that the regulating of the places at which cars shall be stopped came within condition

26, relating to the speed and service, and was therefore to be determined by the city engineer and approved of by the council.—The engineer made a report to the council recommending that cars should be required to stop at certain specified points, which was adopted by resolution of the council:—*Held*, that the engineer did not occupy a judicial or quasi-judicial position between the parties to the agreement, and was not bound to consult with the defendants before determining what service should be supplied, and that such report, though somewhat informally expressed, was a sufficient determination on the part of the engineer, and that the adoption by resolution was sufficient, it not being essential that such adoption should be by by-law.—*Held*, also, that the plaintiffs were entitled to an order restraining the defendants from running the cars upon their railway, except in accordance with the determination of the engineer as to the stopping places.—*Judgment in 11 O. L. R. 103, 6 O. W. R. 871, varied. City of Toronto v. Toronto R. W. Co.*, 12 O. L. R. 534, 8 O. W. R. 179.

See RAILWAY, II. 3.

## II. PASSENGERS, CARRIAGE OF, AND INJURIES TO.

**1. Contract** — *Continuous passage*—*Damages*.]—The defendants had placed a number of special or extra cars on a portion of their line for the purpose of carrying a large number of persons who had assembled for the purpose of viewing a regatta. It was arranged that the cars in question should run from a point in the suburbs, near which the regatta was held, to a point in the centre of the city, and discharge their passengers there and return for others, those passengers who desired it being given transfers which entitled them to be carried on other cars to their destinations in other parts of the city. The point at which the special cars were stationed was passed at stated intervals by other cars carrying on a regular service to and from Quinpool road. The plaintiff, who had been attending the regatta, entered a car known as a "trailer," attached to another car which bore a sign at each end with the words "Quinpool road," expecting to be carried to a point on the line near his residence, but was informed on reaching the central point that the car in which he was went no further, and that he would have to transfer. There was evidence that an agent of the company stationed at the point of departure announced, as passengers entered, that the car in question was for the city, but this was not heard



by the plaintiff:—*Held*, that, outside of the cars performing the regular service, there was no obligation on the part of the defendants to carry the plaintiff through to his destination in any one particular car; that the only contract was to carry passengers in accordance with the usual modes and methods of running the defendants' cars: and that, under the circumstances existing at the time, it was the plaintiff's duty to have protected himself by making inquiry as to the destination of the car he entered. *O'Connor v. Halifax Electric Tramway Co.*, 38 N. S. R. 212. Affirmed by the Supreme Court of Canada, 37 S. C. R. 523.

**2. Negligence — Crossing cars—Undue speed—Sounding gong—Findings of jury.]**—Judgment of the Court of King's Bench, Quebec, Q. R. 14 K. B. 355, affirmed. *Montreal Street R. W. Co. v. Deslongchamps*, 37 S. C. R. 685.

**3. Negligence — Operation of car—Contributory negligence—Conflicting evidence—Findings of jury — Refusal of Court to interfere.** *Rossi v. Ottawa Electric R. W. Co.*, 8 O. W. R. 98.

**4. Negligence — Operation of tramway—Precautions for safety of passengers—Crossing cars — Sounding gong—Slackening speed at dangerous places—Neglect of rules — Passenger alighting from front of car — Contributory negligence.]**—Judgment of the Court of King's Bench for Manitoba, 15 Man. L. R. 338, affirmed. *Winnipeg Electric Street R. W. Co. v. Bell*, 37 S. C. R. 515.

**5. Passenger thrown from car—Negligence — Contributory negligence—Evidence for jury—Operation of car—Duty to passenger standing on platform.** *Shea v. Toronto R. W. Co.*, 7 O. W. R. 724, 8 O. W. R. 404.

### III. PERSONS OTHER THAN PASSENGERS. INJURIES TO.

**1. Bicycling on highway—Crossing behind car—Approach of car from opposite direction—Failure to sound gong—Negligence — Contributory negligence—Nonsuit—New trial.** *Preston v. Toronto R. W. Co.*, 8 O. W. R. 504.

**2. Crossing track — Collision with motor-car — Negligence—Recklessness of deceased—Findings of jury—Evidence to support—New trial.** *King v. Toronto R. W. Co.*, 8 O. W. R. 507.

**3. Crossing track—Negligence—Contributory negligence—Findings of jury.]**

—In an action brought against an electric railway company for damages, by a person struck by one of their cars, the evidence shewing that the accident was mainly the result of the plaintiff's imprudence, but being contradictory as to whether the gong was sounded at the time, as required by the company's by-laws, a verdict that the accident was caused by the negligence of the defendants is not clearly against the weight of evidence, and will not be set aside on that ground. Judgment will therefore be rendered upon it in favour of the plaintiff. *Montreal Street R. W. Co. v. Deslongchamps*, Q. R. 14 K. B. 355.

**4. Crossing track—Negligence—Contributory negligence—Findings of jury—Action under Fatal Accidents Act—Right of both father and mother to recover for death of child—Damages.** *Mulvaney v. Toronto R. W. Co.*, 7 O. W. R. 644.

**5. Crossing track—Negligence—Excessive speed—Contributory negligence—Findings of jury—Evidence to support.** *Taylor v. Ottawa Electric Co.*, 8 O. W. R. 612.

**6. Snow and ice piled on highway — Negligence—Nuisance—Powers of city engineer—Directions.]**—The defendants, operating a tramway line in H., were empowered by their Act of incorporation and the rules made thereunder to remove snow and ice from their tracks, to enable them to operate their cars, "provided" that, in case of such removal, it should be the duty of the company to level the snow and ice so removed to a uniform depth, to be determined by the city engineer, and to such distance on either side of the track as the engineer should direct, or to remove from the street all snow and ice disturbed, ploughed, or thrown out, etc., within 48 hours of the fall or disturbance, etc., if the city engineer should so direct. In exercise of the power conferred upon them, the defendants swept snow from their track and piled it up on either side of the road in such a way as to form a ridge or bank, which caused a sleigh driven by the plaintiff to slew, throwing him out and severely injuring him:—*Held*, that the removal by the defendants, under the powers conferred upon them, of snow and ice, and placing it upon other portions of the street, was not to be treated as a nuisance for which the company would be responsible in damages.—*Seemle*, that, irrespective of any directions given by the engineer, it was the duty of the defendants in removing snow and ice from their track and throwing it upon adjacent parts of the street, to do so in a reasonably careful manner, and with a just re-

gard to the rights and interests of the public, and that, if the question had been left to the jury in this way, a verdict for the plaintiff based upon sufficient evidence could not have been disturbed.—*Semble*, also, that the defendants would be responsible for the consequences of failure on their part to carry out the directions and determination of the city engineer, but, in the absence of such directions and determination, they were only bound to act in a reasonably careful manner, and the adequacy of their performance of the duty cast upon them was to be determined by the circumstances of the case. *Mader v. Halifax Electric Tramway Co.*, 37 N. S. R. 546. See S. C., 26 C. L. T. 188, 37 S. C. R. 94.

### STRIKE.

See TRADE UNION.

### STRIKING OUT PLEADINGS.

See PLEADING.

### SUBPOENA.

See CONTEMPT OF COURT, 2—COSTS, VII.  
3—PRACTICE, 2.

### SUBROGATION.

See INTEREST, 1 — MORTGAGE, 7—PARTNERSHIP, 12—PLEADING, VIII. 7—SALE OF GOODS, II. 2.

### SUBSCRIPTION.

See COMPANY, II., III.

### SUBSIDY.

See CROWN, 2.

### SUBSTITUTED SERVICE.

See WRIT OF SUMMONS, 7.

### SUBSTITUTION.

1. Action by curator against life tenant—Security for estate—Contracts

—Setting aside—Superior Court—Territorial jurisdiction—Joinder of causes of action — Election—Interim injunction—Dissipation of estate.]—An action by the curator to a substitution against the life tenant who is dissipating the property of the substitution, to compel him to give security, or in default to give up possession to the remaindermen, and to set aside contracts made by him with the object of dissipating such property, his co-contractors being made defendants with him, is an action in a mixed matter within the jurisdiction of the Court for the district in which any one of the defendants resides.—The two claims are not incompatible, and the plaintiff may combine them in one action. The defendants, therefore, cannot by dilatory exception compel him to elect between them.—It is within the discretionary power of the Court or a Judge, at the time of the institution of such an action, to grant an interlocutory injunction against acts of such a nature as to damage the property of the substitution, but not against those which affect only the income or revenue derivable from the property; and when such income or revenue has been transferred, by acts alleged to be void, to solvent transferees, they will be left in possession *pendente lite*. *Hébert v. Resther*, Q. R. 14 K. B. 375.

2. Universal legacy — Partition — Statute—Effect of.]—A universal legacy to children, subject to a substitution in favour of grandchildren of the testator, having been followed, after the decease of the latter, by partition among the beneficiaries, a statute which declares such partition final and definite, and which decrees that the beneficiaries are and have always been sole proprietors of the share which the partition gives to each of them, subject to the charge of rendering it up to their children at their decease, has the effect of restricting the right of the grandchildren to the share of their father or mother, and leaves them without interest or status by virtue of the will as regards the share of each one of the other beneficiaries who may die without leaving children. *Prérost v. Prérost*, Q. R. 28 S. C. 257.

3. Will — Devise of immovables — Partition among devisees—Alienation — Restraint upon—Right of interrention.]—A devise, in terms universal, of immovables to the children of the testator born and to be born of his marriage, with restraint upon alienation, so that they may pass in the course of nature to the grandchildren, creates a substitution to which the provisions of 61 V. c. 44 (Q.) are applicable, and the alienation of

the immovables may be permitted when it is of advantage to both classes.—When the heirs have made a partition among them of the immovables as if each lot had been devised to each co-parcener, by virtue of the substitution, and this partition has been ratified by the legislature, the interest of each one is restricted to his own portion, and one has no status nor interest to intervene in respect of the alienation of the property falling by the partition to the others. *Prévost v. Prévost*, Q. R. 14 K. B. 309.

See FIXTURES—WILL, II. 4.

### **SUBWAY.**

See RAILWAY, II. 3.

### **SUCCESSION.**

**Irregular succession** — *Demand of possession* — *Hereditary rights*—*Publication of notice to heirs.*—Possession of an irregular succession cannot be demanded if it is not alleged that the plaintiff has the hereditary rights which he assumes to exercise, and if the formalities prescribed by art. 1424, C. P., that is to say, the publication of a notice to the possible heirs of the deceased, have not been complied with. *Gouin v. Bédard*, 7 Q. P. R. 366.

See HUSBAND AND WIFE, IV.—STAY OF PROCEEDINGS, 4.

### **SUCCESSION DUTY.**

See REVENUE, 2—WILL, I. 32.

### **SUMMARY CONVICTION.**

See CANADA TEMPERANCE ACT—CERTIORARI—CRIMINAL LAW, V.—HAWKERS AND PEDLARS—JUSTICE OF THE PEACE—LIQUOR LICENSES—POLICE MAGISTRATE—PROHIBITION—PUBLIC HEALTH—SHIP, 24, 26—STIPENDIARY MAGISTRATE.

### **SUMMARY JUDGMENT.**

See JUDGMENT, IV.

### **SUMMARY TRIAL.**

See CRIMINAL LAW, II. 6, III. 40.

### **SUMMONS.**

See PRACTICE, 3—WRIT OF SUMMONS.

### **SUPERANNUATED CIVIL SERVANT.**

See ASSESSMENT AND TAXES, 12.

### **SUPERIOR COURT, QUEBEC.**

See APPEAL, XI.—COURTS, IX.

### **SUPREME COURT OF BRITISH COLUMBIA.**

See APPEAL, I.

### **SUPREME COURT OF CANADA.**

See APPEAL, XII.

### **SUPREME COURT OF NEW BRUNSWICK.**

See APPEAL, II.

### **SUPREME COURT OF NORTH-WEST TERRITORIES.**

See APPEAL, III.

### **SUPREME COURT OF NOVA SCOTIA.**

See APPEAL, IV.

### **SUPREME COURT OF PRINCE EDWARD ISLAND.**

See APPEAL, VIII.

### **SUPREME COURT OF YUKON TERRITORY.**

See APPEAL, XIII.

### **SURETY.**

See GUARANTY — PRINCIPAL AND SURETY.

**SURGEONS.**

See MEDICAL PRACTITIONER.

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**SURPRISE.**

See NEW TRIAL, 3.

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**SURROGATE COURT JUDGE.**

See COURTS, VI.

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**SURROGATE COURTS.**

See COURTS, I., VI.

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**SURVEY.**

See MINES AND MINERALS, 3.

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**SURVEYOR.**

See CONTRACT, VIII. 1.

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**SURVIVORSHIP.**

See INSURANCE, III. 8—WILL, I. 5, 10,  
12, 31.

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**TAVERN LICENSES.**

See MUNICIPAL CORPORATIONS, VII. 4.

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**TAX SALE.**

See ASSESSMENT AND TAXES.

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**TAXATION.**

See MUNICIPAL CORPORATIONS, XIII.

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**TAXATION OF COSTS.**

See COSTS, VII.—SOLICITOR, 1, 3, 6.

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**TAXES.**

See ASSESSMENT AND TAXES.

**TEACHER.**

See SCHOOLS, 2, 3, 10, 11.

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**TELEGRAPH.**

See CONTRACT, V. 2.

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**TELEPHONE COMPANY.**

See COMPANY, IV. 9.

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**TEMPERANCE ACT, 1864.**

See LIQUOR LICENSES, 12.

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**TENANT AT WILL.**

See LIMITATION OF ACTIONS, I.

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**TENANT BY SUFFERANCE.**

See VENDOR AND PURCHASER, II. 8.

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**TENANT FOR LIFE.**

See TRUSTS AND TRUSTEES, 15—WASTE  
—WILL.

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**TENANTS IN COMMON.**

See PARTNERSHIP, 6—WILL, I. 5.

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**TENDER.**

See CHOSE IN ACTION, ASSIGNMENT OF,  
5—RAILWAY, III. 1 — TRUSTS AND  
TRUSTEES, 9 — VENDOR AND PUR-  
CHASER, I. 9.

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**TERMINATING SHARES.**

See COMPANY, IV. 5—MORTGAGE, 20.

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**TERRITORIAL JURISDICTION.**

See COURTS.



**TESTAMENTARY CAPACITY.**

See WILL, III.

**THEFT.**

See BAILMENT—CRIMINAL LAW, III. 38—42—DEFAMATION, 14.

**THIRD PARTIES.**

See PARTIES.

**TIMBER.**

**1. Agreement for sale of standing timber**—Construction—Quantity of timber — Measurements — Estimates—Conflicting evidence. *McAlister v. Brigham*, 7 O. W. R. 347.

**2. Crown lands**—Issue of patent—Consent of timber licensees—Agreement as to timber — Ownership of land—Estoppel. *McWilliams v. Dickson Co.*, 7 O. W. R. 747.

**3. Dispute as to ownership**—Crown lands—Location—Cancellation—Timber licenses—Settlement — Purchase—Cheque—Acceptance on account—Accord and satisfaction—Injunction—Consent order in action afterwards dismissed for want of prosecution—Binding agreement—Title — Possession—Jus tertii—Assignment of location—Regulations of department—Settlement duties—Forfeiture—Ruling of department—Reference. *McWilliams v. Dickson Co. of Peterborough*, 8 O. W. R. 211.

**4. Rights of licensee**—*Trespass on limits.*]—The holder of a license to cut timber on Crown lands, under s. 1309 *et seq.*, R. S. Q., has no possessory action against a trespasser on his limits. His proper remedy is in damages as for a tort. *Price v. Girard*, Q. R. 28 S. C. 244.

See CHOSE IN ACTION, ASSIGNMENT OF, 2—CONTRACT, VIII.—CROWN LANDS, 6 — INSURANCE, II. 11 — MECHANICS' LIENS, 7—STATUTES, 8 — TRESPASS TO LAND, 3—VENDOR AND PURCHASER, II. 7—WATER AND WATERCOURSES, 8, 11, 24.

**TIMBER MANUFACTURE ACT.**

See STATUTES, 8.

**TIME.**

See APPEAL, II. 3, V. 1, 2, 10, VII. 1, X. 2, XII. 1, XIII.—ARBITRATION AND AWARD, 1, 38—ATTACHMENT OF DEBTS, II. 5—BANKRUPTCY AND INSOLVENCY, 6—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 15, 25—CERTIORARI, 1—COLLECTION ACT, 1 — COMPANY, IV. 10—CONTRACT, II. 2, III. 15, VI. 6, VII. 3, VIII. 5, 9, IX. 4, 7—COSTS, V. 3, 4, 5, VII. 2—CRIMINAL LAW, III. 5, IV. 4, 17—CROWN, 3 — DAMAGES, 6—DISCOVERY, I. 13—DISTRESS — ESTOPPEL, 2—EVIDENCE, III. 1—HUSBAND AND WIFE, VII. 1, 7 — INJUNCTION, 13 — JUDGMENT, I. 6—LIEN, 2, 3 — LIMITATION OF ACTIONS—LIQUOR LICENSES, 5, 8, 10—MASTER AND SERVANT, I. 7 — MECHANICS' LIENS, 2, 10, 11, 12, 13, 14 — MINES AND MINERALS, 9 — MORTGAGE, 7—MUNICIPAL CORPORATIONS, XIV. 3, 5—MUNICIPAL ELECTIONS, 12—OPPOSITION, 5—PARLIAMENTARY ELECTIONS, I. 1, II. 1, 10, 12-16 — PARTICULARS, 1—PARTIES, III. — PARTITION — PEREMPTION—PLEADING—PRINCIPAL AND AGENT, 3—RAILWAY, IV., VIII. 1, IX. 8—REGISTRY LAWS, 7—SCHOOLS, 11—SPECIFIC PERFORMANCE, 2 — STATUTES, 4—STAY OF PROCEEDINGS—TRIAL, I. 13, 14—VENDOR AND PURCHASER, I. 9, 23, 27, II. 4—VENUE, 18 — WAY, V. 2 — WRIT OF SUMMONS, 25.

**TITLE TO LAND.**

See CHURCH — CONTRACT, III. 6—COURTS, V. 4—EJECTMENT — LIMITATION OF ACTIONS — TRESPASS TO LAND—WATER AND WATERCOURSES, 1, 17.

**TOLL ROADS.**

See MUNICIPAL CORPORATIONS, V. 7 — WAY, IV. 2.

**TOLLS.**

See WATER AND WATERCOURSES, 11, 24.

**TORT.**

See DAMAGES, 1, 9—MUNICIPAL CORPORATIONS, XIV. 9 — WARRANTY — WRIT OF SUMMONS, 24.

**TOWNS INCORPORATION ACT.**

See STIPENDIARY MAGISTRATE.

**TRADE.**

See RESTRAINT OF TRADE.

**TRADE COMBINATION.**

See CONSPIRACY, 1—CRIMINAL LAW, III. 6, 7.

**TRADE MARK.**

**1. Infringement — Coined word—Similarity — Colourable imitation — Costs.]** — The coined word "Sta-Zon," adopted by the defendants as a trade mark or name for their eye glasses, is not so similar to the coined word "Shur-On," adopted by the plaintiffs and registered as a trade mark to distinguish their eye glasses of very similar appearance, as to mislead ordinary persons, exercising ordinary caution, into purchasing the defendants' goods by mistake for those of the plaintiffs.—There can be no infringement unless the similarity is so close as to give rise to a reasonable probability of deception.—Where there is no reliable evidence of persons having been actually misled, it is for the Court to determine the question by consideration of the words themselves.—The plaintiffs in advertising their goods used in connection with the word "Shur-On" such words as "On to stay on," "An eye glass that stays on," etc.—*Held*, that, although the defendants had adopted the trade mark "Sta-Zon" because of the plaintiffs having so described their goods, and with the object of acquiring the benefit of the market which the plaintiffs had developed, the plaintiffs had acquired no exclusive right in the words used in their advertisements other than "Shur-On;" but, on account of the defendants' conduct, the dismissal of the plaintiffs' action for infringement should be without costs. *Kerstein v. Cohen*, 11 O. L. R. 450, 7 O. W. R. 247, 8 O. W. R. 934.

**2. Infringement — Visual resemblance—Idem sonans.]**—In deciding whether a trade mark so resembles another as to be calculated to deceive, visual resemblance is not necessarily the only thing to be considered; the possibility of confusion to the ear may also be an element.—The letter "B" stamped on buttons of braces manufactured by the de-

fendants in the same manner as the plaintiffs' trade mark—the letter "D"—was stamped on the buttons of braces manufactured by them, was held to be an infringement. *Doran v. Hogadore*, 11 O. L. R. 321, 7 O. W. R. 349.

See CONTRACT, I. 5.

**TRADE NAME.**

See COVENANT, 2.

**TRADE UNION.**

**1. Conspiracy — Injuring plaintiffs' trade—Strike—Combined action—Intention to inflict damage—Actionable wrong —Indorsement and aid of other association—Injunction—Picketting.]** — The members of a labour union, in order to compel the plaintiffs, employers of both union and non-union men, to enter into an agreement with the union, whereby the employers would agree, amongst other things, to employ none but union men so long as the union was able to supply workmen, called the plaintiffs' workmen out on strike in the middle of a day's work, and thereafter sent letters to the plaintiffs' customers and others, most of whom employed union members, informing them that their men would refuse to handle any product of the plaintiffs, as they were an unfair firm to organized labour, and published of the plaintiffs' goods that they were unfair, and by other means endeavoured to prevent the plaintiffs from carrying on their business:—*Held*, that this combined action on the part of the members of the union with the intention of inflicting damage on the plaintiffs was not justified by any countervailing prospect of pecuniary advantage to the union or the men, and was therefore actionable, and the members of an international association, of which the local union was a part, having indorsed the action of the local members and rendered them financial assistance to carry on the strike, were, along with such local members, liable in damages.—*Held*, also, that an injunction should be granted restraining acts in furtherance of the conspiracy to injure, except as to picketting, there not being sufficient evidence that it had been resorted to.—Judgment of MACMAHON, J., after trial with a special jury, affirmed. *Metall. Roofing Co. of Canada v. Jose*, 12 O. L. R. 200, 7 O. W. R. 709.

**2. Employers' association—Conspiracy to injure workmen—Black list—**

Findings of jury. *Mitchell v. Woods* (B.C.), 4 W. L. R. 371.

See PLEADING, IX. 1 — WRIT OF SUMMONS, 13.

### TRADING COMPANY.

See COMPANY, IV. 10.

### TRADING STAMPS.

See CONSTITUTIONAL LAW, 14.

### TRAFFIC ACCOMMODATION.

See RAILWAY, II. 4.

### TRAFFIC AGREEMENT.

See RAILWAY, X. 1.

### TRAMWAYS.

See STREET RAILWAYS.

### TRANSCRIPT.

See COURTS, V. 2.

### TRANSPORT.

See SHIP, 26.

### TRAVELLING EXPENSES.

See JUSTICE OF THE PEACE, 12.

### TREASURER OF MUNICIPALITY.

See ESTOPPEL, 1.

### TREATING.

See MUNICIPAL CORPORATIONS, IX. 7—MUNICIPAL ELECTIONS, 7—TRIAL, I. 7.

### TREES.

**Fall of branch—Injury to passer-by on highway—Negligence—Liability.]**—The owner of property on which trees grow close to a public thoroughfare is liable for damages caused by the fall through decay of a branch on a passer-by. Owners of such trees, who fail to have them properly inspected and pruned, are at fault and liable for accidents that happen in consequence. *Lamarche v. Les Révérends Pères Oblats*, Q. R. 29 S. C. 138.

See CRIMINAL LAW, III. 38—RAILWAY, X. 8.

### TRESPASS TO GOODS.

See CONVERSION, 3—DISTRESS—ILLEGAL DISTRESS—TRIAL, II. 1.

### TRESPASS TO LAND.

**1. Boundaries** — Water lot — Road allowance — Encroachment — Right of user — Navigable water — Injunction — Damages — Reference — Costs — Parties—Indemnity—Guarantee. *Herri-man v. Pulling & Co.*, 8 O. W. R. 149.

**2. Cattle straying from highway** —Defective fence. *Smith v. Boutilier*, 2 E. L. R. 212.

**3. Cutting timber**—Joint tort-feasors—Independent contractor — Damages —Gross negligence. *Phillips v. Parry Sound Lumber Co.*, 8 O. W. R. 282.

**4. Damages for exclusion and profits**—Form of action — *Mesne profits.*]—A verdict in an action for trespass to land recovered against a defendant in possession, for the expulsion and exclusion of the plaintiff and for profits, will not be disturbed on the ground that the count on which it was obtained was in the form of an action for *mesne profits*. *Smith v. Smith*, 37 N. B. R. 7.

**5. Disturbance of possession** — *Encroachment — Remedy — Damages.*]—The disturbance of possession which affords ground for an action of trespass is such as is adverse or in defiance of the right of a person who is in possession *animo domini*. A simple encroachment is only ground for an action for damages. *Bertrand v. Levesque*, Q. R. 28 S. C. 460.

**6. Disturbance of possession—[Intention — Damages.]**—An action for trespass is based upon the disturbance caused to possession, without reference to the intention of the supposed trespasser. It is not necessary that the act complained of should be of an aggressive character, not that there should be proof of actual damage, in order to sustain the action. *Latourelle v. Darby*, Q. R. 14 K. H. 553.

**7. Disturbance of possession — Right of action—Entry—Damages—Right of possession.]**—A disturbance of possession which affords ground for an action of trespass must be a material fact or a juridical act which, directly by itself or indirectly by its consequences, constitutes or implies a claim adverse to the possession of another person. The simple fact of entering upon lands for a temporary purpose (in this case for the purpose of projecting into a river over a steep bank timber for a drive), when that is done without any idea or claim of having a right as against the owner, may give rise to an action for damages, but cannot be the occasion of a judicial pronouncement upon a right of possession which is not attacked. *Latourelle v. Darby*, Q. R. 28 S. C. 97.

**8. Line fence—Occupation not in accord with paper title.** *Martin v. Martin*, 2 E. L. R. 70.

**9. Occupancy—Payment into Court—Costs.** *Forbes v. Dixon*, 1 E. L. R. 498.

**10. Possession of plaintiff—Writ of possession against previous occupant.** *Whitford v. Armstrong*, 2 E. L. R. 54.

**11. Removal of coal—Measure of damages.** *Bartlett v. Nova Scotia Steel Co.*, 1 E. L. R. 226.

**12. Title—Joint occupancy — Deed by one occupant with other's concurrence.** *Jennings v. Chandler*, 2 E. L. R. 57.

**13. Title by possession—Vague and indefinite evidence.** *Young v. Greenough*, 1 E. L. R. 174.

See CONTRACT, III. 6—DEED, 4, 9—MINES AND MINERALS—RAILWAY, IX. 1, 6, 10, X. 5, 8—TIMBER—WATER AND WATERCOURSES, 1, 4, 10, 13, 15, 19.

## TRESPASS TO PERSON.

See ASSAULT—JUSTICE OF THE PEACE—PLEADING, VIII. 15.

## TRIAL.

### I. JURY.

### II. JURY NOTICE.

### III. POSTPONEMENT.

### IV. MISCELLANEOUS.

See ARREST, 13—COSTS, III. 5, VI. 4, VII. 6—CRIMINAL LAW—EVIDENCE, II. 1, III. 1, IV. 2—MEDICAL PRACTITIONER, 3—MINES AND MINERALS, 8—NEW TRIAL—PARLIAMENTARY ELECTIONS—PARTIES, III.—PRACTICE, 4—RECEIVER, 1—SHIP, 5—SOLICITOR, 1—VENUE.

### I. JURY.

**1. Depositions under commission —[Use of by jury—New trial.]**—On the trial of an action on a promissory note, the evidence of a witness taken under a commission was, subject to the objection of counsel, given to the jury, and by them taken to the jury room when they retired to consider as to their verdict:—*Held*, that the practice was not usual, and was not to be commended, but, as the incident could not have had a prejudicial effect, it was not a ground for a new trial. *Royal Bank of Canada v. Hale*, 37 N. B. R. 47.

**2. Facts assigned — [Inscription on ordinary roll.]**—After the facts to be submitted to the jury have been assigned, a party cannot, even if thirty days elapse after such assignment, inscribe the case on the ordinary roll. *Kermode v. University of Queen's College*, 7 Q. P. R. 368.

**3. Facts assigned—Motion to settle — Peremption.]**—Where a party has caused to be served, within the time allowed therefor, notice of a motion to settle the facts to be submitted to the jury, he cannot be deprived of his right to a trial by jury except by the ordinary peremption. *Furness, Withy, & Co., Limited, v. Great Northern R. W. Co. of Canada*, 7 Q. P. R. 361.

**4. Failure to answer material question—Power of Court to supply—New trial.]**—Where the jury, in answering questions submitted to them, fail to answer a material question, upon which their answers to other questions depend, their findings will be set aside and a new trial ordered.—Assuming that the Court has power to supply a finding, on a point not answered by the jury, it will not do so in a case where the evidence is not clear or where it is conflicting. *Blois v. Midland R. W. Co.*, 39 N. S. R. 242.

**5. Grounds for demanding—Damages — Injunction.]** — It is not necessary, to authorize a trial by jury, that all the claims made by the plaintiff in a commercial action should be for payment of money. Neither a claim for an injunction accompanying a demand for damages, nor the fact that an interlocutory injunction has been granted, can take away the right to a jury. *Brunet v. United Shoe Machinery Co. of Canada*, 8 Q. P. R. 9.

**6. Issue — Finding — New trial.]**—Where the issue submitted to and found by the jury involves, and as a necessary consequence determines, the issue raised by the pleading, a new trial will not be granted, though the precise point was not submitted. *Porter v. Tibbits*, 37 N. B. R. 25.

**7. Juror treated by defendant's attorney.** *Nadeau v. Theriault*, 2 E. L. R. 135.

**8. Motion for directions—Preservation of right to trial by jury.]**—A demand by way of motion to settle the facts to be placed before the jury, as provided in art. 424, C. P. C., even when it is not followed by an adjudication thereon, is a proceeding within the meaning of art. 442, which has the effect of relieving the party who makes it within the time prescribed from the forfeiture of the right of trial by jury provided by that article. *Furness, Withy, & Co., Limited, v. Great Northern R. W. Co.*, Q. R. 29 S. C. 11.

**9. Non-direction — Onus — Substantial miscarriage — New trial.]**—Where a verdict is attacked for non-direction, the onus is upon the attacking party to shew that the proper instructions were asked for and refused. And where the charge of the trial Judge has placed the case as a whole correctly before the jury, and no injustice has been done by the verdict, and no substantial miscarriage of justice has resulted, a new trial will not be allowed for non-direction which has not materially affected the result. *Burrill v. Sanford*, 37 N. S. R. 535.

**10. Postponement of trial—Same jury.]**—Where there is a postponement of a trial by jury after the jury has been selected, the Court will order that the jury already chosen shall serve upon the postponed date, unless there are serious reasons to the contrary. *Milonas v. Grand Trunk R. W. Co.*, 7 Q. P. R. 427.

**11. Questions submitted—Answers by jury—Determination of issue—Verdict**

**— New trial — Questions by counsel — Duty of jury to answer.]**—T. & Co., under an arrangement made with B. in 1900, agreed to supply S. with materials to be used in building and repairing houses owned or managed by B. The materials were charged direct to B., and supplied upon his credit. This arrangement continued down to the 8th November, 1902, without any dispute between the parties. T. & Co. alleged that about that time B. requested them for his convenience to change the account and charge all materials got under the arrangement between them to S., to prevent the amount from getting mixed up with his private account with T. & Co., with which S. had nothing to do, and the account was changed in the books accordingly, but without any intention on the part of T. & Co. to alter the liability of B. This arrangement and request was denied by B., and he said, on the other hand, that about the 8th November, 1902, he gave T. & Co. a written notice that he would be no longer liable for goods supplied to S., and that the arrangement between them to that effect was terminated. On the trial of an action by T. & Co. against B. for goods sold and delivered after the 8th November, 1902, the jury were asked: "After the 8th November, 1902, to whom was credit given by T. & Co., to B. or S.?" and they found, to B. They were also asked whether the goods were sold upon the credit of B. or S., and they found, upon the credit of B. They also found, in answer to a question, that B. agreed to become liable for the goods supplied subsequent to the 8th November, 1902, and charged in T. & Co.'s books to S. On these findings a verdict was entered for the plaintiff for the amount claimed:—*Held, per TUOK, C.J., HANINGTON and LANDRY, JJ.*, that these findings were in effect findings that the change in the account was made in the circumstances alleged by T. & Co. at the request of B., and that the notice alleged to have been given by B. terminating his liability was not given; and it was no ground for a new trial, that no distinct questions were left or findings asked on these issues.—*Held, per BARKER, McLEOD, and GREGORY, JJ.*, that, as the questions submitted did not necessarily involve findings upon the issues between the parties, and upon which the defendant's liability must depend, there should be a new trial; that under s. 163 of c. 111 of C. S. N. B. 1903, counsel have the right to require the Judge to submit questions to the jury, and if they are pertinent to the issue it is the duty of the Judge to instruct the jury that they must answer them if they can.—The Court being equally divided, the rule

dropped, and the verdict for the plaintiffs stood. *W. H. Thorne and Co. Limited v. Bustin*, 37 N. B. R. 163. See 37 S. C. R. 533.

**12. Right to elect for jury — Damages for personal injuries—Incidental damages.**—The damages claimed in an action were principally for personal injuries suffered by the plaintiff by reason of a fall upon a sidewalk attributed to the negligence of servants of the defendants, whereby the plaintiff's leg was broken, but incidental damages were also claimed:—*Held*, that the plaintiff had the right to elect a trial by jury. *Armstrong v. Town of Westmount*, 8 Q. P. R. 20.

**13. Time for applying—Notice of motion.**—A simple notice of motion is not a valid proceeding to bring on a trial by jury, the only valid proceeding being the motion itself, and if that is not made within the time allowed, the party applying loses the right to a jury. *Bray v. Montreal Street R. W. Co.*, 8 Q. P. R. 122.

**14. Time for demanding — Lapse — Revival.**—The filing, with or without consent, of a reply by the defendants after default, has not the effect of reviving in favour of the plaintiff a lapsed right to demand a jury. *Leclair v. Montreal Street R. W. Co.*, 7 Q. P. R. 453.

**15. Venue — Change — Right to special jury—Statutes.**—The plaintiffs named Nelson as the place of trial, the action having been commenced in the Vancouver registry. The defendants applied to have the venue changed to Vancouver and for an order that the action be tried by a special jury if the plaintiffs desired a jury. No affidavit was filed alleging any ground for supposing that a fair trial could not be had at Nelson, but it was urged that there was no provision by which a special jury could be had:—*Held*, by the full Court, that the defendants could obtain a special jury at Nelson, and that in any event the application was rightly dismissed, as no ground had been shewn for supposing that a fair trial could not be had. *Fernie Lumber Co. v. Crow's Nest Southern R. W. Co.*, 12 B. C. R. 148, 3 W. L. R. 472.

**16. Verdict — Motion to set aside — Negligence — Duty of Court — Reasonable verdict.**—In an action for damages for personal injuries caused by the alleged negligence of the defendants, in which the question of their liability is tried by a jury, the appreciation of what constitutes the fault or neglect is for the

jury. The Court, upon motion to set aside the verdict, is not called upon to decide whether the verdict rests upon an erroneous appreciation of the evidence, but whether it is or is not unreasonable. *Quebec and Levis Ferry Co. v. Jess*, Q. R. 14 K. B. 473.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 17, 18—CARRIERS, 5—CONSOLIDATION OF ACTIONS, 1—CONTRACT, VII. 4, VIII. 2—COSTS, III. 3—COURTS, V. 7—DAMAGES, 9—DEFAMATION, 15—FALSE ARREST AND IMPRISONMENT, 3—INSURANCE, I.—MALICIOUS PROSECUTION AND ARREST—MASTER AND SERVANT, II.—NEGLIGENCE—NUISANCE, 1, 2—PLEADING, VIII. 15—RAILWAY, I. 7, IV. 3, 4, VI. 2, VII. 2, 3, 4, 5, 7, VIII. 6, X. 4—STREET RAILWAYS, II., III.—TRADE UNION, 2—VENUE, 9—WAY, III.

## II. JURY NOTICE.

**1. Action for damages for wrongful and illegal seizure of goods—Trespass—King's Bench Act, s. 59.** *Bertlett v. House Furnishing Co. (Man.)*, 4 W. L. R. 567.

**2. Irregularity — Striking out—Action against municipal corporation—Non-repair of highway.** *Burns v. City of Toronto*, 8 O. W. R. 867.

**3. Striking out—Separate sittings for jury and non-jury cases—Practice.** *Montgomery v. Ryan*, 8 O. W. R. 855.

## III. POSTPONEMENT.

**1. Grounds for—Mistake of plaintiff—Proposed amendment—Award.** *Paradis v. National Trust Co.*, 7 O. W. R. 323.

**2. Grounds for—View of locus in quo necessary for defence—Impossibility of view at date of proposed trial.** *Williamson v. Parry Sound Lumber Co.*, 7 O. W. R. 532, 562.

**3. Necessary witnesses—Members of Parliament—Refusal to attend during session.** *Lefurgey v. Great West Land Co.*, 7 O. W. R. 868.

**4. Proposed absence of witness—Servant of Crown.** *Pinkerton v. Township of Greenock*, 7 O. W. R. 737.

See COSTS, III. 9—CRIMINAL LAW, III. 27—DISCOVERY, IV. 5—PARTIES, III. 4; see also *ante* F. 10.



## IV. MISCELLANEOUS.

**1. Judgment directing new trial**—*No substantial difference in evidence—Nonsuit.*]—The judgment of the Supreme Court of Nova Scotia (34 S. C. R. 366) in an action by the executrix of M. to recover an amount alleged to be due under a contract of hiring with the defendants, was reversed on appeal to the Supreme Court of Canada, on the ground that the illness of deceased, by which he was permanently incapacitated, would of itself terminate the contract, and a finding of the jury that the deceased did not continue in his employment after notice of a rule that an employee was only to be paid for time that he was actually on duty, was held to be against evidence and was set aside.—A new trial having been ordered and had, the presiding Judge, on the conclusion of the plaintiff's case, stated that, in his opinion, the additional evidence made no material change in the case from what it was before, and withdrew the case from the jury:—*Held*, that the facts being substantially the same as before, no useful purpose could be served in submitting the case to a jury, and that the Judge was right in withdrawing the case from the jury and in dismissing the action. *Marks v. Dartmouth Ferry Commission*, 38 N. S. R. 386.

**2. Separate trial of preliminary issue**—Settlement of action—Rule 531—Consent. *Thomas v. Imperial Export Co.*, 7 O. W. R. 745, 807.

## TROVER.

See COSTS, VIII. 7.

## TRUSTEE ACT.

See EXECUTORS AND ADMINISTRATORS, 6  
—TRUSTS AND TRUSTEES, 4.

## TRUSTEE LIMITATION ACT.

See TRUSTS AND TRUSTEES, 15.

## TRUSTEE RELIEF ACT.

See PAYMENT INTO COURT.

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## TRUSTS AND TRUSTEES.

**1. Absolute conveyance**—Action to establish trust—Evidence—Character of trust—Statute of Frauds. *Hill v. Bible* (N.W.T.), 4 W. L. R. 276.

**2. Absolute conveyance**—Evidence—Possession—Limitation of actions. *Morrison v. McLeod*, 1 E. L. R. 112.

**3. Assignments by beneficiary**—Priorities—Notice—Agent's knowledge of prior assignment—Costs. *Forrest v. Sutherland*, 2 E. L. R. 77.

**4. Breach of trust**—Accounts—Evidence—*Nova Scotia Trustee Act*—Liability of trustee—Judicial discretion—Statute of Limitations.]—By his last will N. bequeathed shares of his estate to his daughters A. and C., and appointed A. executrix and trustee. C. was weak-minded and infirm, and her share was directed to be invested for her benefit and the revenue paid to her half-yearly. A. proved the will, assumed the management of both shares and also the support and care of C. at their common domicile, and applied their joint incomes to meet the general expenses. No detailed accounts were kept sufficient to comply with the terms of the trust, nor to shew the amounts necessarily expended for the support, care, and attendance of C., but A. kept books which shewed the general household expenses, and consisted, principally, of admissions against her own interests. After the decease of both A. and C., the plaintiffs obtained a reference to a Master to ascertain the amount of the residue of the estate coming to C. (who survived A.), and the receipts and expenditures by A. on account of C. On receiving the report the Judge referred it back to be varied, with further instructions and a direction that the books kept by A. should be admitted as *prima facie* evidence of the matters therein contained. (See 37 N. S. R. pp. 452-464). This order was affirmed by the Supreme Court of Nova Scotia *in banco*:—*Held*, affirming the judgment appealed from (37 N. S. R. 451), that the allowances for such expenditures need not be restricted to amounts actually shewn to have been so expended; that, under the Nova Scotia statute 2 Edw. VII. c. 13, and Order XXXII., Rule 3, a Judge may exercise judicial discretion towards relieving a trustee from liability for technical breaches of trust, and, for that purpose, may direct the admission of any evidence which he may deem proper for the taking of accounts.—*Cairns v. Murray*, 37 S. C. R. 163.

**5. Breach of trust**—Threat of litigation—Promise to make amends by will — Compromise — Consideration — Enforcement — Revocation of will — Claim on estate. *Lee v. Totten*, 8 O. W. R. 823.

**6. Conveyance of land to trustee**—Action to establish trust—Evidence—Onus — Fraud — Finding of trial Judge — Reversal on appeal—Construction of documents—Inferences from facts—Statute of frauds—Parol evidence of express trust — Corroboration — Fiduciary relationship — Judgment declaring trust and directing account—Form of. *Gordon v. Handford* (Man.), 4 W. L. R. 241.

**7. Conveyance of land to trustee for infant**—Fraud of trustee—Conveyance to creditor as security—Breach of trust—Constructive notice—Solicitor acting for both parties—Purchase for value — Occupation of land by tenant—Negligence — Redemption — Costs.]—The defendant H., being solicitor for the plaintiff, at his request accepted the trusteeship of the land in question for the plaintiff's infant son, but afterwards, as found by the trial Judge, fraudulently conveyed the land to the defendant S., who had been his client, in satisfaction of the sum of \$460, part of his then indebtedness to her. S. had no notice of the plaintiff's claim, and supposed that the land was vacant, although it had a house on it, which, in fact, had been all the time occupied by tenants paying rent to the plaintiff:—*Held*, that notice of the plaintiff's claim should not be attributed to S. on account of her solicitor's knowledge of the facts; because, in carrying out the transaction, the solicitor would naturally suppress that knowledge.—*Rolland v. Hart*, L. R. 6 Ch. 678, followed.—2. The occupation of the land by a tenant affected S. with constructive notice only of that tenant's rights, and not with notice of the lessor's title or rights.—*Hunt v. Luck*, [1902] 1 Ch. 428, followed.—3. S. was entitled to be treated as a purchaser for value without notice; and, having the legal estate, her claim should prevail over the prior equity of the plaintiff, but only to the extent of the amount by which she had reduced her claim against H., as no new or further consideration passed from her to H. when she acquired the title.—4. The action of the plaintiff in conveying the land to H., and not afterwards inquiring what the trustee was doing with the property, could not be considered as negligence disentitling the plaintiff to relief, in view of the fact that he continued to receive the rents.—*Shropshire, etc., Co. v. The Queen*, L. R. 7 H. L. 507, followed.—5. The infant

was entitled to redeem the land upon payment to S. of the \$460 with interest, her subsequent outlays, and costs of suit.—6. The defendant H. should pay the infant the amount so found due to S. and the plaintiff's costs. *MacArthur v. Hastings*, 15 Man. L. R. 500, 1 W. L. R. 285.

**8. Enforcement of trust**—Cheque delivered on condition — Non-fulfilment — Recovery of amount of cheque—Evidence. *Pool v. Huron and Erie Loan and Savings Co.*, 7 O. W. R. 680.

**9. Funds held in trust by Dominion for Ontario**—Rate of interest—Right to pay over funds and extinguish liability — Tender — Sufficiency of.]—*Held*, that the Dominion of Canada, prior to the 31st December, 1904, was under an obligation to pay to the province of Ontario interest at the rate of 6 per cent. per annum on the capital of certain trust funds held by the Dominion and belonging to the province, viz., the Upper Canada Grammar School Fund, the Upper Canada Building Fund, and the Upper Canada Improvement Fund.—2. That the Dominion at the date mentioned had no right, without the assent of the province, to reduce the rate of interest from 5 per cent. to 4 per cent. per annum.—3. That the Dominion has the right at any time to pay or hand over to the province the amount of such trust funds, with interest accrued thereon, in discharge of its obligations in respect thereof both as to the principal and the interest.—4. On the 29th December, 1903, the Minister of Finance for the Dominion of Canada wrote to the Premier of Ontario respecting the payment of interest on the above funds as follows:—"It has been decided to pay on the 1st of January, 1904, the interest on these funds at the rate heretofore paid, namely, 5 per cent. After that date, interest at the rate of 4 per cent. will be paid until further notice, or until the principal of the funds is paid to Ontario in full. If this arrangement is not satisfactory to your government, I shall be pleased to receive notice to that effect, whereupon arrangements will be made to pay off the principal sum at an early date." On the 6th January, 1904, the Premier of Ontario replied that such proposal was not satisfactory to his government; and intimated that the rate of interest, 5 per cent., was not susceptible of modification without the consent of the province:—*Held*, that the terms of the letter of the Finance Minister did not constitute a good tender of the amount of the said funds. To make it effective for said purpose, the letter should have been fol-



lowed or supplemented by an unconditional offer and tender of the money by the Dominion to the province. *Province of Ontario v. Dominion of Canada*, 10 Ex. C. R. 292.

**10. Interest in partnership** — Trustees under will—Sale of partnership interest to surviving partners—Discretion of trustee — Adequacy of price — Goodwill—Beneficiaries under will—Attack on sale—Account—Costs. *Smith v. Smith*, 7 O. W. R. 586.

**11. Land conveyed to son of tenant**—Agreement to purchase—Declaration of trusteeship—Conflicting evidence — Improvements by son—Equitable decree. *Bishop v. Bishop*, 8 O. W. R. 877.

**12. Purchase of land.** *Corbett v. McNeil*, 1 E. L. R. 368.

**13. Purchase of land for company in name of trustee**—Fraud of trustee—Conveyance to stranger—Action to set aside—Constructive notice—Solicitor — Priorities — Land Titles Act—Caveat — Costs. *North-West Construction Co. v. Valle* (Man.), 4 W. L. R. 37.

**14. Taking accounts** — Commission — Costs. *Morton v. Miller*, 1 E. L. R. 91.

**15. Trustee Limitation Act**—Life tenant — Income. *Cairns v. Murray*, 1 E. L. R. 87.

See ACCOUNT, 3, 4—ASSESSMENT AND TAXES, 17—BILLS OF EXCHANGE AND PROMISSORY NOTES, I. 2—COMPANY, II. 5, 10, III. 8, 16—CONTRACT, X. 5—COSTS, V. 11, VI. 3—COURTS, VI. 2—GIFT, 5—INSURANCE, III. 3—INTEREST, 1 — PARTIES, II. 1 — PAYMENT INTO COURT—PRINCIPAL AND AGENT, 1—RAILWAY, IX. 4—REGISTRY LAWS, 1—SCHOOLS, 1, 2, 4, 5—SPECIFIC PERFORMANCE, 3—VENDOR AND PURCHASER, I. 8—WILL.

## TUTOR.

**Appointment or removal**—*Power of Court—Family council.*]—The power of appointment or removal of tutors is vested by the Civil Code in the Court or Judge, the function of the family council being merely advisory. The Court will therefore remove a tutor from office against the advice of the majority of the family council, whenever it finds it proper to do so. *Beiser v. O'Brien*, Q. R. 27 S. C. 444.

See INFANT, 1. 15.

## UNDUE INFLUENCE.

See CONTRACT, VI. 5—GIFT, 5—HUSBAND AND WIFE, VIII. 1—MUNICIPAL CORPORATIONS, IX. 1—WILL, III.

## UNIVERSAL GIFT.

See GIFT, 6.

## UNIVERSAL LEGACY.

See SUBSTITUTION, 2.

## USE AND OCCUPATION.

See VENDOR AND PURCHASER, I. 16, II. 8.

## USUFRUCT.

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See MORTGAGE, 4, 10.

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See APPEAL, X. 2—PEREMPTION, 4.

## VAGRANCY.

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## VALUING SECURITIES.

See BANKRUPTCY AND INSOLVENCY, 5, 6.

## VANCOUVER ISLAND SETTLERS' RIGHTS ACT.

See CONSTITUTIONAL LAW, 15.

## VEHICLES.

See NEGLIGENCE — PARLIAMENTARY ELECTIONS, III. 5—RAILWAY, VII.

## VENDOR AND PURCHASER.

### I. CONTRACT FOR SALE OF LAND. II. MISCELLANEOUS.

See ASSESSMENT AND TAXES, 3—CONTRACT, X. 9 — COSTS, V. 15 — EQUITABLE EXECUTION, 2 — EVIDENCE, I. 1 — MINES AND MINERALS, 12 — MISTAKE — MORTGAGE, 1, 16—MUNICIPAL CORPORATIONS, I. 1—PRINCIPAL AND AGENT—SPECIFIC PERFORMANCE—WILL, I. 6, 10, 15, II. 2—WRIT OF SUMMONS, 20.

#### I. CONTRACT FOR SALE OF LAND.

**1. Action by purchaser to compel specific performance** — Dispute as to payment—Absence of receipt—Burden of proof. *Boyd v. Chessum*, 7 O. W. R. 843.

**2. Authority of agent to contract for vendor**—Misapprehension as to instructions — Specific performance — Refusal to enforce. *Walker-Parker Co. v. Thompson*, 7 O. W. R. 125, 8 O. W. R. 197.

**3. Collateral undertaking** — Non-fulfilment—Right to recover price — Rescission of contract—Abatement in price.] —A stipulation in a deed of sale by which the vendor collaterally undertakes to procure for the purchaser, by way of expropriation, an immovable belonging to a third person, is not a condition upon the fulfilling of which the right of the vendor to recover the purchase price depends. At the most it is only a ground for an action on the part of the purchaser to rescind the sale or for an abatement in the price. *Price v. Ordway*, Q. R. 15 K. B. 67.

**4. Completion** — Delivery of Registrable conveyance — Repudiation before completion — Immoral purpose of purchaser—Rescission of sale—Judgment—Terms.]—The plaintiff, through an agent, negotiated a sale of land, and had executed a conveyance, but received no part of the purchase money, when he heard that the purchaser's intention was to allow the land to be used for immoral purposes, and refused to complete unless some assurance to the contrary should be given. Meanwhile the conveyance had been sent to the registry office and returned unregistered because the description was so uncertain that it could not be registered. The plaintiff inserted words to identify the land properly, and also a provision by which the land should be forfeited and returned to the owner in case a house of ill-fame should be erected and maintained thereon. The deed thus altered was registered

by the purchaser, and the transaction completed by payment to the plaintiff, the forfeiture clause not being noticed:—Held, that under the land system of Ontario it is one of the terms of a contract of sale, when nothing is said to the contrary, that the sale should be completed by a proper conveyance susceptible of registration, and thus, when the vendor raised his objection as to the use intended, the transaction was not complete, and he had an option to repudiate it, which he did in effect; but the purchaser could not be held to the conveyance with the prohibitory clause in it, and, he repudiating that, it was competent for the plaintiff to recede from the whole contract, without liability for damages. — Judgment was pronounced directing the cancellation of the conveyance, the vacating of its registration, and delivery of possession to the plaintiff, upon terms that the purchase money be repaid and permanent improvements paid for, deducting occupation rent. *Owen v. Mercier*, 12 O. L. R. 529, 8 O. W. R. 151.

**5. Construction** — Payment of purchase money by instalments—Default—Action by vendor for cancellation—Acceleration of further payments—Payment into Court—Stay of proceedings on payment of instalments due and costs. *Read v. Richardson* (N.W.T.), 4 W. L. R. 123.

**6. Covenant against incumbrances** — Breach — Action for damages — Real Property Limitation Act—Charge on land—Construction of contract — Condition precedent—Payment of mortgage—Conveyance of land—Measure of damages. *Wilson v. Graham* (Man.), 3 W. L. R. 517.

**7. Exchange of lands** — Action to set aside — Misrepresentations — Failure to prove. *Myronis v. Wainstock* (Man.), 4 W. L. R. 522.

**8. Failure to make payments**—Cancellation — Construction of contract — Person entitled to give notice of cancellation—Garnishing proceedings — Notices — Title to land — Trustee — Assignment — Beneficiaries — Foreign law as to attachment of debts—Forfeiture—Return of deposit — Laches — Evidence — Admissibility — Documents — Copies. *Gudgel v. Case* (N.W.T.), 4 W. L. R. 462.

**9. Mineral claim**—Specific performance — Unilateral contract or option — Fluctuating value—Time of the essence — Place of payment—Tender—Intoxication.]—Where the contract is for the sale of property of a fluctuating value,

such as mineral claims, although there is no stipulation that time shall be of the essence of the contract, yet, by the very nature of the property dealt with, it is clear that time shall be of the essence.—Where the transaction is an option, or unilateral contract, for that reason time is to be taken as intended to be of the essence.—Where there is a stipulation to pay money on a particular day, and no place is agreed upon, it is the duty of the payor to seek out and find the payee if he is within the jurisdiction.—On the evidence the defendant was not, when he signed the contract, so intoxicated that he did not understand the nature of the instrument he was signing. *Morton and Symonds v. Nichols*, 12 B. C. R. 9, 3 W. L. R. 161.

**10. Mistake of vendor as to quantity**—Specific performance as to part only of land contracted to be sold. *De Rosiers v. De Calles*, 8 O. W. R. 91.

**11. "Offer" — Pleading.**—An offer of sale means the existence of a mutual agreement, and not simply an unaccepted offer, and therefore an action based upon such an offer will not be dismissed on inscription in law. *Racette v. Vanier*, 7 Q. P. R. 449.

**12. Option to purchase land** — Registration—Failure to exercise option—Refusal to execute release—Action—Costs. *Dingman v. Jarvis*, 7 O. W. R. 244.

**13. Oral contract** — Conflict of evidence as to its terms—Part performance—Statute of Frauds. *Thibideau v. Cyr*, 2 E. L. R. 246.

**14. Oral contract — Execution of deed and mortgage—Misdescription—Defective title—Innocent misrepresentation — Rescission — Compensation.**—The plaintiff at an interview with the defendant agreed to purchase "the F. property" belonging to her, for \$2,300—\$500 cash and the balance in six years with interest, and advised her to get the papers made out, and she instructed her solicitor to prepare the deed and mortgage. When they were ready, she advised the plaintiff, who had, however, changed his mind and refused to go on, but offered to pay the expenses. Under pressure from two solicitors and the issue of a writ, he accepted the deed, executed the mortgage to secure the purchase money, and made the cash payment, without searching the title, relying on the representation of one of the solicitors that the defendant had a good title. Subsequently he discovered that the description in the deed to him covered more

property than the vendor owned, and that what he did get was subject to an outstanding lease for life. In an action for a rescission of the contract, the trial Judge having found that the defendant was not guilty of any fraudulent misrepresentation or concealment; that there was no mutual mistake and no express agreement as to title; and that the misrepresentation as to title was innocently made:—*Held*, that fraud having been negatived and the deed having been executed, the plaintiff was not entitled to a rescission of the contract.—*Held*, also, that as an adverse claim to title by possession could not be decided in this action owing to the claimant not being a party, it could not be said there was an entire failure of consideration, and the plaintiff was therefore not entitled to relief on the latter ground, and the action was dismissed, but under the circumstances without costs. *Shurie v. White*, 12 O. L. R. 54, 7 O. W. R. 773.

**15. Payment by instalments—Default of purchaser—Rescission at option of vendor.**—A stipulation in a contract for the sale of land, the price whereof is payable by instalments, that upon default by the purchaser in making any one of the payments within sixty days after it falls due, the contract of sale shall become void and the vendor shall have the right to retain all that he has already received as liquidated damages, is a binding contract for the benefit of the vendor, which the latter only can invoke upon default. The purchaser cannot take advantage of his own default in the fulfilment of a part of his engagement in order to free himself from the rest. *Péloquin v. Cohen*, Q. R. 28 S. C. 193.

**16. Payment by instalments** — Purchaser taking possession—Failure to make payments—Vendor resuming possession—Action by vendor for damages—Breach of contract—Use and occupation—Conversion of crop—Cancellation of contract. *Harvey v. Wiens* (Man.), 4 W. L. R. 410.

**17. Possession — Interest — Equitable relation of parties.**—The defendant purchased a lot of land from A. for \$1,140, under an agreement in writing, by the terms of which A. was to give a deed of the land to the defendant, or to any other person named by him, on receipt of the purchase price, and to accept a mortgage of the property for \$1,000, part of the purchase price, on receiving from the defendant all moneys due over and above that amount. After the making of the agreement, the defendant paid A. \$140, and entered into pos-

session of the premises, and for a period of two years paid A. interest on the sum of \$1,000, as if the deed and mortgage had been executed, although, as a matter of fact, he had not received the deed or given the mortgage as agreed. No further interest was paid, on the ground that A., and the plaintiffs claiming under him after his death, wrongfully and in breach of the agreement, refused and neglected to convey the land to the defendant, and that the agreement itself contained no provision calling for the payment of interest:—*Held*, that the defendant, being in possession of the property and enjoying the fruits of it, was bound to pay interest pending the carrying out of the terms of the agreement, and that the question whether the delay was due to the action of the deceased or not was immaterial.—*Per* RUSSELL, J.—The position of the parties in equity was that of mortgagor and mortgagee, and interest was due by the defendant on that footing, notwithstanding the absence of any stipulation in the agreement, the defendant having gone into possession and enjoyed the fruits. *Anderson v. Phinney*, 38 N. S. R. 393.

**18. Rescission** — Fraudulent misrepresentation of vendor's agent—Replevin of documents—Damages for detention. *Dillabough v. Scott* (Man.), 3 W. L. R. 449.

**19. Specific performance**—*Authority of agent—Statute of Frauds—Memorandum in writing—Absence of vendor's name—Inadequacy of price.*—In an action to enforce specific performance of an alleged contract for the sale of land the only written memorandum of the contract was a receipt for \$100 "in part payment of lot 16," etc., describing it, mentioning also the balance of the price and the purchaser's name, but not disclosing the name of the vendor, and signed "P. W. Black, agent:—"*Held*, that this was not sufficient to satisfy the Statute of Frauds, parol evidence to supply the name of the vendor not being admissible.—*Semble*, also, on the evidence, that the agent had no authority to bind the vendor by executing a contract, and that, on account of the inadequacy of the price, the Court would be slow to enforce specific performance.—Judgment of FALCONBRIDGE, C.J., reversed. *Bradley v. Elliott*, 11 O. L. R. 398, 7 O. W. R. 137.

**20. Specific performance** — Contract by vendor to sell to others—Conduct of plaintiff — Cancellation — Notice to second vendees — Defence — Registry laws. *McConnell v. Lye*, 7 O. W. R. 851.

**21. Specific performance** — Correspondence — Agent — Completion of contract—Subsequent formal offer to purchase and refusal—Effect of. *Boken v. Galbraith*, 8 O. W. R. 559.

**22. Specific performance** — Correspondence — Uncompleted negotiations—Authority of wife as agent—Death of husband—Pleading. *Trick v. Conniff* (Man.), 4 W. L. R. 515.

**23. Specific performance** — Damages for breach—Substituted agreement—Binding of fact—Default in payment of purchase money—Stipulation as to time—Rescission of contract — Estoppel — Laches — Waiver — King's Bench Act, R. S. M. 1902 c. 40, s. 32 (m)—Court of equity—Discretion. *Barlow v. Williams* (Man.), 4 W. L. R. 233.

**24. Specific performance** — Inequitable contract — Discretion — Appeal — Mistake or fraud. *Drummond Mines Co. v. Fernholm*, 8 O. W. R. 864.

**25. Specific performance** — Negotiations — Concluded agreement — Correspondence — Authority of agent — Non-disclosure of purchaser's name—*Statute of Frauds.*—A., who temporarily resided in England, had had certain dealings with a firm of real estate agents, C. & Co., in Vancouver, who cabled to him inquiring the lowest price, cash, he would accept for a certain lot in Vancouver. He replied "\$13,000 net." C. & Co. cabled back that the best offer they could get was \$12,000, net to him, and asking if they could accept. A. made no reply. Subsequently C. & Co. cabled that they had sold the lot for \$13,000 net, had accepted, without stating purchaser's name, a deposit of \$500, and asking confirmation by cable. A. cabled "writing acceptance." The letter following upon this stated that his reason for cabling in those terms was that he "wanted it distinctly understood that I could not complete the deal until I returned. . . . It would be impossible to close before, as the title deeds belonging to the property were left in Toronto. I will accept the offer on the following terms, that is, the adjustments to be calculated to 1st April. After that time the purchaser can collect the rents. The premises are leased for a year from last fall. Kindly make it known to the purchaser so that there will not be any misunderstanding; be sure and tell the purchaser that I cannot give him possession of the premises; he will simply have to accept the present tenant. Of course I accept the \$13,000, net cash offer, with the understanding that I am not to be called upon to produce any

title papers other than these in my possession; no doubt you have explained all this to your client. . . . Kindly write and let me know if your client accepts these terms." C. & Co. handed this letter to the plaintiff's solicitors, who accepted "unreservedly the stipulations made by Mr. Andrews," but added, "We are ready at any minute to pay this money over to Mr. Andrews as soon as proper title is evidenced to our satisfaction." C. & Co. communicated this to A. The latter in reply repeated, in effect, the terms of his former letter. There was some evidence at the trial about a proposed change in the terms of payment from a cash basis to instalments:—*Held*, IRVING, J., *dissentiente*, that A.'s letter following his cable "writing acceptance," read with C. & Co.'s cable announcing sale at \$13,000, and the letter of the plaintiff's solicitors to C. & Co., constituted a memorandum of a contract between the plaintiff and defendant sufficient to satisfy the Statute of Frauds; that the letter of the plaintiff's solicitors to C. & Co. contained an unqualified acceptance of the terms proposed in A.'s letter to C. & Co., and did not import the proposal of a fresh term. *Calori v. Andrews*, 12 B. C. R. 236, 4 W. L. R. 259.

**26. Specific performance** — Offer to sell land—Absence of consideration—Right to withdraw before acceptance—Company — Service of notice of withdrawal on secretary—Notice addressed to secretary personally. *Carton v. Wilson*, 8 O. W. R. 781.

**27. Specific performance**—Option — Acceptance in name of another person — Time. *Vanderlip v. Peterson* (Man.), 4 W. L. R. 403.

**28. Specific performance**—Relief from contract — Hardship — Equitable terms—Payment of damages and costs—Evidence of contract. *Dundas v. Dinwick*, 7 O. W. R. 124.

**29. Specific performance**—Sale by vendor to another—Purchaser for value without notice — Damages — Fraud — Amendment — Costs — Cancellation of contract — Notice.]—The plaintiff made an agreement in writing for the purchase of the land in question from the defendant H., paid \$200 on account, went into possession, and erected a good house on the lot. The title to it was under the Real Property Act. The plaintiff did not register his agreement. Some time afterwards the defendant R. procured an assignment from H. to himself of the agreement, and also a transfer of the title to the lot. The trial

Judge found that these transfers were obtained by fraudulent promises on the part of R. or his solicitor to protect the plaintiff's interests. R. afterwards transferred the lot for value to the defendant P., who was not proved to have had any notice or knowledge of the plaintiff's rights or that he was in possession of the property:—*Held*, that the plaintiff could not have specific performance of the agreement as against P., but should be allowed to remove the house from the lot if he desired.—In his statement of claim the plaintiff had asked only for specific performance of the agreement, but, under the power conferred on the Court by s. 38 (k), of the King's Bench Act, and Rules 344 and 346, as to amendment of the pleadings, if found necessary, the Court, having found the defendant R. guilty of fraud, granted the plaintiff further relief against him by ordering him to pay the plaintiff, by way of damages, what he had paid to H. on the lot with interest.—Action dismissed as against the defendants H. and P.:—*Held*, as to costs, that the defendant R. should be ordered to pay not only the plaintiff's costs, but also those of his co-defendants directly to them: *Daniel's Ch. Pr.*, 7th ed., p. 980. — *Rudow v. Great Britain Mutual Life Assurance Society*, 17 Ch. D. 600, followed.—There were two clauses in the agreement providing for cancellation in case of default, the first saying that, after such default, the vendor might cancel with or without notice, the second providing for the manner of giving the notice of default:—*Held*, that the vendor might elect to adopt one or other of such modes of cancellation; that, if he elected to cancel without giving notice, he could not do so by a mere operation of his mind, but must do something by which he gives the purchaser clearly to understand that he decides to avoid the contract, and that the relation of vendor and purchaser no longer exists between them, or do some act directly affecting the vendee in his position or interest, as, for example, a sale to another: *McCord v. Harper*, 26 C. P. 104; and, on the other hand, if he adopts the mode of cancellation by notice, he must conform strictly to the mode prescribed. *Czuack v. Parker*, 15 Man. L. R. 456.

**30. Specific performance**—Statute of Frauds—Description of land—Sufficiency—Parol evidence. *Lewis v. Hughes* (B.C.), 4 W. L. R. 269.

**31. Specific performance**—Statute of Frauds—Memorandum in writing—Receipt — Correspondence — Insufficiency — Part performance. *Berry v. Scott* (N.W.T.), 4 W. L. R. 282.



**32. Specific performance**—Statute of Frauds—Memorandum in writing—Cheque for part of purchase money—Receipt — Authority of agent — Part performance — Possession. *Stevenson v. McRae* (N.W.T.), 3 W. L. R. 259.

**33. Specific performance**—Statute of Frauds—Memorandum in writing—Insufficiency — Part performance — Possession — Improvements. *Berry v. Scott* (N.W.T.), 3 W. L. R. 84.

**34. Specific performance**—Statute of Frauds—Memorandum in writing—Transfer in blank—Cheque—Supplying name of purchaser—Terms of payment — Variation — Authority of solicitor—Collateral contract—Amendment. *Taylor v. Grant* (N.W.T.), 3 W. L. R. 254.

**35. Specific performance**—Title—Recital in deed more than twenty years old—Evidence—Onus. *Gunn v. Turner*, 8 O. W. R. 796.

**36. Vendor unable to make title**—Bona fides—Damages—Return of deposit — Pleading — Amendment—Costs. *Moody v. McDonald* (Man.), 4 W. L. R. 303.

**37. Written offer of option to purchase land**—Oral acceptance—Refusal of vendor to carry out—Offer not under seal — Consideration — Finding of jury—Taking unfair advantage—Mistake as to title—Statute of Frauds—Registry laws — Commission — Breach of contract — Damages — Loss of profits on re-sale. *Carrick v. McCutcheon*, 8 O. W. R. 749.

## II. MISCELLANEOUS.

**1. Building — Party wall — Deed—Reservation — Indemnity.]**—The vendor of land with a building thereon of which a wall is in a position necessary to become a party wall, may make a reservation in his deed of this wall as a party wall. By this reservation the right of the vendor and his assigns to one or two alternatives is established; either to make the wall a party wall without paying the indemnity provided by art. 518, C. C., if he acquires the adjoining lands; or to recover such indemnity from a third person who acquires such adjacent lands, if he makes the wall a party wall. *Duperrault v. Roy*, Q. R. 28 S. C. 519.

**2. Deed — Building restrictions — Covenants — Creation of servitudes.]**—A stipulation in a conveyance of land di-

vided into building lots whereby the purchaser covenants not to do certain things, for example, not to build in a space reserved at the line of the street, does not create a servitude upon each lot at the expense of the other. In the absence of a dominant tenement, it creates only an obligation not to so build, of which the vendor and his legal representatives are the obligees, and the purchaser and his representatives the obligors. *Pelletier v. Trudeau*, Q. R. 27 S. C. 196.

**3. Deed — Covenant — Breach — Building restrictions—House — Stable.]**—The owners of two adjoining parcels of land sold and conveyed one, the deed containing a covenant by the purchaser for himself, his heirs, executors, administrators, and assigns not to "erect or build more than one house upon the property hereby conveyed;" with special provisions as to the cost and materials of "any house so erected," and as to the distance of its walls from the boundaries of the parcels conveyed. The vendor subsequently conveyed his parcel to the testator of the plaintiffs, having first erected a stable upon it. The parcel first sold became vested by various mesne conveyances in the defendants, who built a stable upon part of it, sufficient space being left within the prescribed boundaries for the erection of a house in the terms of the covenant, which the defendants asserted they intended to build. The defendants also contended that the covenant was inoperative by reason of a change in the residential character of the neighbourhood by the erection of factories, etc.:—*Held*, assuming the plaintiffs were entitled to the benefit of the covenant, and that there had been no change in the residential character of the neighbourhood, that no breach was proved, for the defendant had the right to build the stable as appurtenant to the house to be afterwards erected.—*Bowes v. Law*, 18 W. R. 102, approved.—Judgment of STREET, J., 9 O. L. R. 607, 5 O. W. R. 706, affirmed. *Hime v. Lovegrove*, 11 O. L. R. 252, 7 O. W. R. 4.

**4. Mining rights—Re-sale to company—Commission paid by purchaser—Right to charge against vendors—Appeal from report — Time — Waiver.]**—The defendant, acting on behalf of a syndicate of which he was a member, obtained from the owners of a number of coal mining areas transfers of the areas for the purpose of putting them into a company in which he was interested, the purchase price being payable in some cases in cash and in others in bonds and stock of the company. The plaintiffs were part owners of areas which were to be paid for in bonds and stocks. For

the purpose of carrying the transaction through, and paying those proprietors who required payment for their properties in cash, it became necessary to borrow a considerable sum of money. This was obtained from bankers, who charged a commission for the accommodation. The defendant sought to deduct from the amount payable to the plaintiffs a proportion of the commission so paid, alleging assent on their part. It was shewn that the plaintiffs had no knowledge of the expenditure, and that there was no authorization from them to incur it:—*Held*, that, under these circumstances, the plaintiffs were not liable; also, that the defendant's agency for his associates in the purchase excluded the idea of agency for the plaintiffs; also, that the benefit which accrued to the plaintiffs from the loan was too remote to create any liability on their part.—On appeal from the order varying the referee's report the objection was taken that the application for the order was made out of time.—*Held*, that the objection was one which should have been taken before the Judge who made the order, who could have extended the time, and not being so taken was waived; also, that the Court could not, in any case, give effect to the objection in the absence of evidence shewing the date at which the report was made. *Fultz v. McNeil*, 55 N. S. R. 506; *Fultz v. Corbett*, 1 E. L. R. 54.

**5. Sale of interest of judgment debtor in lands**—*Indemnity*—*Warranty*—*Eviction*—*Sheriff's title*.]—The purchaser at a forced sale of the rights of the judgment debtor in an immovable, who sells them as they are conveyed to him in the sheriff's title, is bound to indemnify the buyer for loss from eviction of the immovable by reason of its never having belonged to the judgment debtor.—The prosecuting creditor is only bound to warrant the purchaser at a forced sale against eviction by reason of informalities in the proceedings or of the property seized not ostensibly belonging to the debtor. *Mahoney v. Diotte*, Q. R. 28 S. C. 314.

**6. Sale of land**—*Vendor remaining in possession*—*Power of redemption*—*Grant of hypothec*—*Cancellation*.]—A sale being perfected by the consent of the parties, though no delivery of the thing sold takes place, the seller of an immovable who remains in possession of it, with a power of redemption at will, ceases nevertheless to be the owner, and has no power to grant a hypothec upon it. Such a hypothec will be declared void at the suit of a subsequent acquirer of the property, and the judgment will

order the registration thereof to be cancelled, or will stand in lieu of such cancellation. *Chapleau v. Merchants Bank of Canada*, Q. R. 28 S. C. 38.

**7. Sale of timber**—Prior unregistered deed—Notice. *White v. Allen*, 2 E. L. R. 91.

**8. Tenant by sufferance**—*Use and occupation of lands*—*Art. 1608, C. C.*—*Promise of sale*—*Reddition de compte*—*Action ex vendito*—*Practice*.]—The action for the value of the use and occupation of lands does not lie in a case where the occupation by sufferance was begun and continued under a promise of sale; in such a case the appropriate remedy would be by action *ex vendito* or for *reddition de compte*. *Cantin v. Bérubé*, 26 C. L. T. 850, 37 S. C. R. 627.

**9. Warranty of title**—Title outstanding in Crown—Purchaser obtaining Crown grant—Damages. *Nelson v. Wallace*, 1 E. L. R. 500.

## VENUE.

**1. Companies**—Place of residence—Place where cause of action arose—Preponderance of convenience—Witnesses. *Royal Electric Co. v. Hamilton Cataract Co.*, 7 O. W. R. 73.

**2. Contract**—*Sale of goods*—*Agreement as to place of trial*—*Action to set aside contract*.]—An action for the cancellation of a contract of sale on the ground of failure of consideration is an action "arising out of the transaction" within the meaning of a provision in the contract that any such action shall be tried in the county where the head office of the vendors is situated, and, apart from any question of convenience, the venue if laid elsewhere will be changed to that county. *Wright v. Ross*, 11 O. L. R. 113, 7 O. W. R. 69.

**3. Contract**—6 *Edw. VII. c. 19. s. 22 (O.)*—*Retroactivity*.]—An action was brought in the High Court by the purchasers of a machine against the sellers, for a return of money paid on the agreement of sale, damages for breach thereof, the return of the plaintiffs' promissory notes given thereunder, and cancellation of the agreement. The plaintiffs based their action upon a new agreement which they alleged superseded the original one as to some of the terms, but, except as specified, the engine was to fulfil the terms and conditions of the original agreement. The original agreement contained a clause providing that if

any action or actions arise in respect to the machine or notes or any renewals thereof, the same should be entered, tried, and finally disposed of in the Court which has its sittings where the head office of the defendants is located, i.e., at Sarnia, and another clause providing that any action brought with respect to this contract or in any way connected therewith, between the parties, shall be tried at the town of Sarnia, and the purchasers consent to have the venue in any such action changed to Sarnia:—*Held*, that the action did not come within either clause; but, if it did, that s. 22 of 6 Edw. VII. c. 19(O.) applied, although the contract was made before it was enacted.—Order of the Master in Chambers refusing to change the venue to Sarnia affirmed. *Bell v. Goodison Thresher Co.*, 12 O. L. R. 611, 8 O. W. R. 567, 618.

**4. Convenience**—Action to set aside tax sale. *Hamilton v. Hodge*, 8 O. W. R. 351, 421.

**5. Convenience** — Delay — Counterclaim. *McDougall v. Meir*, 8 O. W. R. 471.

**6. Convenience** — Expense—Speedy trial — Residence of parties and solicitors—Costs. *Miller v. Bayes*, 8 O. W. R. 671.

**7. Convenience** — Witnesses—Affidavit — Solicitor. *Jordan v. Macdonell*, 8 O. W. R. 947.

**8. Convenience** — Witnesses—Cause of action. *Gardiner v. Beattie*, 7 O. W. R. 136.

**9. Convenience** — Witnesses — Expense — Fair trial — Jury — Undertaking—Costs. *Gillard v. McKinnon*, 7 O. W. R. 161, 208.

**10. County Court action**—Convenience — Witnesses — Counterclaims. *Serros v. Lynde*, 8 O. W. R. 119.

**11. Fair trial** — Convenience — Expense—Witnesses. *Sturgeon v. Port Burwell Fish Co.*, 7 O. W. R. 359, 390.

**12. Motion by plaintiff to change** — Mistake in laying venue—Solicitor's slip — Costs — Speedy trial. *Garland v. York Mutual Fire Ins. Co.*, 7 O. W. R. 322.

**13. Preponderance of convenience**—Counterclaim. *Farmer v. Kuntz*, 7 O.W. R. 829, 8 O. W. R. 4.

**14. Preponderance of convenience**—County Court action. *James v. Shemilt*, 7 O. W. R. 828.

**15. Preponderance of convenience**—County Courts Act—Action by relative of registrar.] — The plaintiff's right to select the place of trial is not lightly to be interfered with, and the onus is on the defendant moving to change the venue under s. 68 of the County Courts Act, to shew that the preponderance of convenience is against the place selected.—Under s. 70 of the Act, the venue will not be changed because the plaintiff is a near relative of the registrar of the Court in which the action is begun, unless indeed it is shewn that the registrar himself is the true plaintiff. *Phair v. Sutherland*, 12 B. C. R. 293.

**16. Preponderance of convenience** — Expense — Cause of action. *Sharpin v. Nicholson*, 7 O. W. R. 57.

**17. Preponderance of convenience** — Witnesses — Expense — Other considerations. *Mitchell v. Hagersville Contracting Co.*, 8 O. W. R. 410, 446.

**18. Statement of claim**—Naming place of trial other than the proper one under Rule 529 (b) — Irregularity—Waiver by pleading—Motion to change venue under Rule 529. (d)—Time for making—Necessity for defined issues—Practice—Costs. *Cummings v. Town of Berlin*, 8 O. W. R. 552.

**19. Venue improperly laid**—Rule 529 (b)—Onus—Reasons for retaining venue where laid. *Pigott v. Bank of Hamilton*, 7 O. W. R. 802.

See DISMISSAL OF ACTION, 4—MINES AND MINERALS. 8—PLEADING, VIII. 1—SHIP, 5—TRIAL, I. 15—WRIT OF SUMMONS, 4.

## VERDICT.

See TRIAL.

## VIEW.

See EASEMENT—TRIAL, III. 2.

## VOTERS' LISTS.

See CRIMINAL LAW, III. 1—MUNICIPAL CORPORATIONS, IX. — PARLIAMENTARY ELECTIONS.



## VOTING AND VOTERS.

See MINES AND MINERALS, 5—MUNICIPAL CORPORATIONS, IX., XIV. 4—MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS—PENALTY, 4—SCHOOLS, 6.

## WAGES.

See ATTACHMENT OF DEBTS—COMPANY, IV. 4—CONTRACT, IV. 5—LIEN, 2, 3, 4, 6 — MASTER AND SERVANT—SALE OF GOODS. V. 2—SHIP, 27.

## WAIVER.

See APPEAL, III. 1 — ARREST, 6—ATTACHMENT OF DEBTS, II. 1—BILLS OF EXCHANGE AND PROMISSORY NOTES, III. 23 — CANADA TEMPERANCE ACT, 17—COMPANY, IV. 1—CONTRACT, I. 2, II. 1, III. 11 — CRIMINAL LAW, I. 1, II. 1, 2, III. 40 — CROWN, 10—FIRE, 2—INFANT, 1 — INSURANCE, II. 9—JUDGMENT, I. 7—LANDLORD AND TENANT, 12, 15—MECHANICS' LIENS, 3, 6—PARLIAMENTARY ELECTIONS, II. 14—PRE-EMPTION, 1—PRINCIPAL AND SURETY, 5—SALE OF GOODS, I. 4, 8—VENDOR AND PURCHASER, I. 23, II. 4 — VENUE, 18.

## WARDS.

See MUNICIPAL CORPORATIONS, IX. 9.

## WAREHOUSE RECEIPTS.

**Partnership—Banks and banking—Bank Act—Liability of partners—Promissory notes—Negotiation—Extinguishment of debt — Securities — Release of partner—Covenant not to sue—Reservation of rights.]**—The defendant, M. was a partner with the defendant G. in a commission and produce business carried on in the same building as a storage business in which G. was also engaged. It was alleged by the plaintiffs that the defendant F. was a partner in both businesses. The account of the commission and produce business was kept at the plaintiffs' bank. For the purpose of enabling the partnership to purchase the produce in which they dealt, the plaintiffs gave the partnership a line of credit in the form of an overdraft on their account. From time to time the plaintiffs discounted their promissory notes, the

proceeds of which were placed to the credit of the account. The goods purchased by them were warehoused with the storage branch, and receipts signed in the name of "The Ottawa Cold Storage and Freezing Company" by G. were given to M. on behalf of the commission and produce business, and were from time to time indorsed over to and hypothecated with the plaintiffs as promissory notes were discounted. The transactions involved in this action were represented by ten warehouse receipts indorsed to the plaintiffs by M., with a memorandum of hypothecation signed by G. and a certificate of valuation by him, and ten promissory notes made on behalf of the commission and produce business to the order of M. and indorsed by him and G. While these notes were current, the businesses ceased, and the plaintiffs took possession, and found that there was a large discrepancy between the goods in store and the amounts specified in the warehouse receipts. Before this action, and while interpleader proceedings in relation to the goods were pending, in which the plaintiffs desired to obtain the evidence of the defendant F., their solicitors, by their instructions, wrote to F.'s solicitor a letter stating that the plaintiffs had no evidence that F. was a member of the partnership known as "The Ottawa Cold Storage and Freezing Company," which was liable to the plaintiffs upon certain promissory notes, and that the plaintiffs had authorized the writers to undertake that the plaintiffs would not attempt to hold F. liable for the notes, or any of them, as a partner in the company:—*Held*, upon the evidence, that there was no ground for differing from the conclusion of the trial Judge that the defendant F. was a partner in both branches of the business.—2. That in the solicitors' letter there was a sufficient reservation of the plaintiffs' rights against the partnership and those who were undoubtedly members of it to prevent the letter from being treated as having any greater effect than a covenant not to sue; the language afforded a strong presumption that the parties were dealing with the liability of F., and not with the liability of the other two; and the surrounding circumstances, with reference to which it must be construed, led to the same conclusion; and therefore the debt as security for which the warehouse receipts were given to the plaintiffs was not extinguished, and the plaintiffs were entitled to the benefit of the securities, if otherwise valid.—3. That there was a negotiation of a note and an actual advance at the time of the acquisition of each warehouse receipt; although on most occasions when a discount was effected the account was

overdrawn, that was in the course of dealing, and the circumstance did not deprive the transaction of its character of a negotiation of the note, for the proceeds were placed freely at the disposal of the customers, and the drawings on the account continued as before. *Halstead v. Bank of Hamilton*, 27 O. R. 435, 24 A. R. 152, 28 S. C. R. 235, distinguished.—4. That the firm by which the warehouse receipts were given was not the firm to which they were given, M. being a member of the latter and not of the former; and G., in signing the warehouse receipts on behalf of the storage business, was not giving receipts "as of his own property," within the meaning of s. 2 (d) of the Bank Act. Since the Judicature Act, there exists no reason why if two different firms have a common partner an action should not be maintained by one against the other.—5. That, on the evidence, the plaintiffs had shewn that the goods were not in the warehouse when possession was taken. Judgment of MEREDITH, J., reversed. *Ontario Bank v. O'Reilly*, 12 O. L. R. 420, 8 O. W. R. 187.

See SALE OF GOODS, III, 1.

## WARRANT OF COMMITMENT.

See CRIMINAL LAW, II, 4.

## WARRANTY.

**Action in warranty**—*Right of action* — *Tort.*] — An action in warranty does not lie unless the person called upon to warrant is bound to the same extent and in the same manner as the plaintiff in warranty.—No action in warranty lies in cases of delict or quasi-delict. *City of Hull v. Gatineau Road Co.*, 7 Q. P. R. 397.

See CONTRACT, VII. 4—JUDGMENT, II. 3—SALE OF GOODS.

## WARRANTY OF AUTHORITY.

See ARCHITECT, 5.

## WARRANTY OF TITLE.

See VENDOR AND PURCHASER, II. 5, 9.

## WASTE.

**Lease for years by tenant for life**—Settled Estates Act—Rights of reversioners on death of life tenant—"Without impeachment of waste"—Repair of buildings—Short Forms Act—Permissive waste—Wear and tear. *Morris v. Cairncross*, 7 O. W. R. 834.

See LANDLORD AND TENANT, 31—WILL, I. 9.

## WATER AND WATERCOURSES.

**1. Artificial watercourse** — *Canal bank* — *Trespass*—*Possessory action*—*Bornage*—*Title to land.*] — The possessory action lies only in favour of persons in exclusive possession *à titre de propriétaire*.—The ownership of a canal serving as a tail-race for a water-mill naturally involves the ownership of the banks of the canal and the right to make use thereof for the purpose of maintaining the tail-race in efficient condition.—In the present case, the bank of the canal had fallen in at a place adjoining lands belonging to D., and the projection thus formed had been, for some years, occupied by him. A. made an entry for the purpose of removing this obstruction, and re-building a retaining wall to support the bank. In a possessory action by D.:—*Held*, that, as the original boundary had become obliterated, the decision of the question of possession should be postponed until the limits of the canal bank had been re-established. *Parent v. Quebec North Shore Turnpike Road Trustees*, 31 S. C. R. 556, followed. *Delisle v. Arcand*, 37 S. C. R. 668.

**2. Construction of aqueduct** — *Powers of municipal corporation*—*Interference with private aqueduct*—*Rights acquired by possession* — *Damages*—*Injunction.*]—A municipal corporation who pass a by-law and contract for the construction of an aqueduct must take into consideration the rights acquired by one who has already constructed a similar aqueduct within the limits of the corporation, and has exploited it publicly for 15 years, without objection, although not authorized by by-law to do so. The corporation cannot, for the purposes of the new aqueduct, order the owner of the old one, by resolution, to remove his pipes within 40 hours, nor permit their contractor to destroy them. The owner of the old aqueduct, in the above conditions, has a right of action for damages against the corporation and contractor who cut and removed his pipes, as well as a remedy by injunction to restrain them

from interfering with his possession. *Village of Warwick v. Baril*, Q. R. 14 K. B. 467.

**3. Dam**—Flooding lands of riparian owner—Cause of injury—Damages—Release—Statutory powers. *Miller v. Beaty*, 7 O. W. R. 605, 8 O. W. R. 326.

**4. Dam**—Injury by—Statutory right—Action for trespass—Injunction—Arbitration clauses—Remedy by action—Failure of company to proceed under their Act.]—In an action for trespass on the appellant's land and interference with his water rights, the respondents pleaded that they were authorized thereunto by their incorporating Act, 36 V. c. 102 (O.), and that the appellant's remedy (if any) was to proceed by arbitration under the Act:—*Held*, that, according to the true construction of s. 5, the arbitration clauses only come into operation on disagreement as to the amount of purchase money, value, or damages arising after definite notice of expropriation and treaty or tender relative thereto; and that, as the respondents had not proceeded in accordance with the directions of their Act, the appellant had not lost his remedy by action.—An injunction was rightly granted in this case, but its effect will cease on the respondents proceeding to expropriate in the manner directed by their Act.—Judgment in *London Water Commissioners v. Saunby*, 24 Occ. N. 201, 34 S. C. R. 650, reversed, and judgment of Court of Appeal in *Saunby v. London Water Commissioners*, 2 O. W. R. 763, restored, with a variation. *Saunby v. London Water Commissioners*, [1906] A. C. 110.

**5. Diversion of waters of river**—Authorization by water records or grants—Prior rights in waters—Water Clauses Consolidation Act, 1897—Water Privileges Act, 1892—Private Acts affecting water company—Riparian owners—Appropriation of waters—Lands acquired by contract—Construction of statutes—Expropriating statutes—Retroactivity—Effect of general Acts on earlier special Acts—Municipal corporations.]—The plaintiffs were incorporated in 1885 by an Act of the British Columbia legislature which authorized them to divert and appropriate the waters of Thetis lake and Deadman's river, and to appropriate lands, privileges, and waters which should be vested in them. By an amending Act of 1892 they were authorized to appropriate and divert the waters of Goldstream river and its tributaries, subject to the rights arising under the Victoria Waterworks Act, 1873. The plaintiffs in 1892 commenced operations on Goldstream river by clearing the banks and building dams for the purpose of making

reservoirs, and making other improvements. In 1897 the Water Clauses Consolidation Act was passed, by which all unrecorded and unappropriated water and water-power, declared by the Water Privileges Act, 1892, to be vested in the Crown, were brought under one comprehensive code for administrative purposes. Between 1892 and 1898 the plaintiffs had purchased from various owners the lands along the Goldstream river, and contended in the action that they had thus become entitled to the riparian rights of such owners:—*Held*, that the Water Privileges Act, 1892, vested in the Crown the right to the use of all the water in Goldstream river. The plaintiffs' Act of 1892 merely gave them a right to take what was necessary for their purposes, and by taking possession of the source of the river they could not claim the exclusive use of the water from the source of the river to its mouth.—The Water Clauses Consolidation Act, 1897, was intended to control the acquisition and use of waters not appropriated on or before the 1st June, 1897, and prescribed a method by which the right to use such waters, as well recorded as unrecorded, could be obtained. The Act intended that existing companies should be limited strictly to their corporate powers.—The purchase of lands by the plaintiffs gave them no greater right than the owners possessed, viz., a right to the uninterrupted, undiminished, and unpolluted flow of the water past their lands for the purposes incidental to their ownership. The plaintiffs purchased those lands solely by virtue of the limited authority given them by their Act of incorporation, and for the purposes only of that Act.—Under the provisions of the Water Clauses Consolidation Act, 1897, the city corporation had a right to the waste or unrecorded waters of Goldstream river, and under the Victoria Waterworks Act, 1873, they had a right to the compulsory acquisition of the whole of the interests of the plaintiffs on that river.—*Per HUNTER, C.J.*:—Having regard to the nature of the undertaking and the conditions imposed, the legislature, when it conferred the right "from time to time and at all times thereafter" to divert and appropriate the waters of Goldstream, granted an exclusive license, subject only to the rights conferred on the city by the Act of 1873 and amending Acts. That right, having sprung into existence, should not, in the absence of clear and unmistakable language, be prejudiced by any subsequent legislation. The option as to how or where the water is to be taken, is left entirely with the plaintiffs, who are given the exclusive use and control of the stream. Judgment of DUFF, J., 4 W. L. R. 59, reversed (*HUNTER, C.J., dissenting*).

ente). *Esquimalt Waterworks Co. v. City of Victoria*, 12 B. C. R. 302, 5 W. L. R. 173.

**6. Ditch — Servitude — Expropriation — Indemnity — Damages.** — The owner of lower land is obliged, under art. 501, C. C., to receive waters brought upon his land by a line ditch constructed by the owner of higher land for the benefit of his land, such necessary work not falling under the exception in the article created by the words "without the hand of man having contributed thereto."—2. Indemnity paid to an owner of land expropriated for the construction of a railway is not to be regarded as including damages caused by the obstruction to the flow of water: *Grand Trunk R. W. Co. v. Langlois*, Q. R. 14 K. B. 173.

**7. Expropriation of lands of riparian owners** — Development of water power by municipality — Lease from Crown of bed of watercourse — Compensation to owners — Basis of — Value of lands — Interest of riparian owners in bed of stream and water power — Parties — Attorney-General — Non-navigable stream lying between and connecting navigable waters — Impediments to navigation by falls — Title to lands — Crown patent — Construction — Ownership *ad medium filum* — English Rules as to non-tidal waters — Application to Ontario — Injury to dam — Compensation for — Costs. *Keewatin Power Co. v. Town of Kenora*, *Hudson's Bay Co. v. Town of Kenora*, 8 O. W. R. 369.

**8. Floatable river — Boom — Logs from up river — Retention — Freshet salvage — Vis major — Quantum meruit — Riparian rights.** — P. owned a saw-mill on the bank of a floatable river, and placed a boom across the stream to hold logs floated down to the mill. T. had a boom further up-stream, in which he had stored pulp-wood. An unusual freshet broke T.'s boom, and brought a quantity of his pulp-wood down with the current into P.'s boom, where it was caught and held until removed some time afterwards by T.'s men, without causing any damage or expense to P. In an action by P. to recover salvage or the value of the use of his boom for the time during which T.'s logs had been held therein:—*Held*, reversing the judgment in Q. R. 14 K. B. 513, that, as P. had no right of property in the river where he had placed the boom in which T.'s wood had been caught, those waters remained *publici juris*, notwithstanding the construction of the barrier; that T.'s wood came to the boom and remained there in a lawful manner; that the ser-

vice rendered in stopping the pulp-wood was involuntary and accidental; and that P. could recover nothing therefor.—*Per* FITZPATRICK, C.J., that there is no difference between the laws of the province of Quebec and those of England in respect to the rights of riparian owners to the water of floatable streams flowing past their lands. *Miner v. Gilmour*, 12 Moo. P. C. 131, referred to. *Tanguay v. Price*, 26 C. L. T. 851, 37 S. C. R. 657.

**9. Floatable river—Obstruction by dam—Removal by force—Justification—Absence of convenient opening — Statutes.**—The plaintiff's dam across the river Soutamattée was, up to the time of the spring freshet of 1904, provided with a slide constructed in conformity with the requirements of R. S. O. 1897 c. 140, and was in good repair, but part of the slide was carried away and part was damaged and broken by that freshet, which was an unusual one:—*Held*, upon the evidence, that the injury to the slide could not have been guarded against by the plaintiff, and was the result of *vis major*; that it was not reasonably practical for the plaintiff to have repaired the slide before the defendants' drive of logs and timber coming down the river arrived at the dam; and that the sluice way did not constitute a convenient opening for the passage of the drive:—*Held*, therefore, that the defendants were in law justified in blowing up the slide and part of the dam in order to remove the obstruction which they offered to the passage of the drive.—*Farquharson v. Imperial Oil Co.*, 30 S. C. R. 188, followed.—*Caldwell v. McLaren*, 9 App. Cas. 392, referred to.—*Ward v. Township of Grenville*, 32 S. C. R. 510, distinguished.—History of the Ontario legislation respecting mills and mill dams and rivers and streams. *James v. Rathbun Co.*, 11 O. L. R. 271, 6 O. W. R. 1005.

**10. Floatable river—Ownership of bed of non-floatable river — Riparian owners—Trespass.**—A river is floatable within the meaning of art. 400, C. C., when rafts of timber can be carried over it; a river which can only carry timber in logs is not floatable.—The bed of a non-floatable river belongs up to the middle to the riparian owners, and those who are on the two sides opposite have the property in the whole bed between their lands. They have consequently a right to bring an action for trespass against those who disturb their possession of the bed. *Canadian Electric Lighting Co. v. Tanguay*, Q. R. 28 S. C. 157.

**11. Floatable river — Tolls—Improvements — Mixing of logs — Proof**



*of ownership — Onus.*]—A floatable river is a public highway which all persons have a right to use for floating logs without liability to indemnify riparian proprietors or others who have constructed works of improvement thereon. The right of the latter to collect tolls from those who use the river is one conferred by statute, and arises only in the cases provided for therein.—When logs belonging to two owners are floated together down a stream and become mixed, either one who admits to have appropriated a part of those of the other will be held to a strict account for any missing beyond the quantity admitted, and the onus of proving their loss in some other manner will rest on him. *Tourville Lumber Co. v. Dansereau*, Q. R. 29 S. C. 126.

**12. Impeding flow of water—Interference with bed of stream—Right of action—Riparian proprietor—Onus.**] — Having regard to Lord Blackburn's examination of *Bickett v. Morris* in *Orr Ewing v. Colquhoun*, 2 App. Cas. 839, at p. 852 *et seq.*, and the remarks of FITZGIBBON and BARRY, L.JJ., in *Belfast Ropeworks Co. v. Boyd*, 21 L. R. Ir. 560, the law is not that any sensible interference with the bed of a stream is *per se* actionable, but that there must be either actual damage, or a reasonable possibility of damage, to give a good cause of action; and that in determining whether the defendant has discharged the onus, regard must be had to the circumstances of the case.—*Held*, further, that in this particular case the defendants had discharged the onus, having regard to the evidence taken since the trial by leave of the full Court. *West Kootenay Power and Light Co. v. City of Nelson*, 12 B. C. R. 34, 3 W. L. R. 239.

**13. Lands bordering on navigable lake—Rights of riparian owner—Access over shoal water to deeper water—Removal of sand or gravel from bed of lake at edge of water—Trespass—Diminution of soil—Recession of shore line—Special injury — Injunction — Damages.** *Stover v. Lavoie*, 8 O. W. R. 398.

**14. Municipal corporation—Sewage works—Construction of dam and ditch—Overflow of private lands—Injury to crops—Liability—Cause of injury—Finding of referee—Natural or artificial watercourse — Leave and license — Acquiescence—Evidence.** *Passmore v. City of Hamilton*, 8 O. W. R. 82.

**15. Municipal corporation—Water supply—Erection of dams—Overflowing private property — Trespass — Damages — Authorization by statute — Compensation**

*— Remedy — Action — Pleading.*]

—The plaintiff, in the first count of his declaration, alleged that he was in possession of a lot adjoining Ludgate lake in the parish of Lancaster, and that the defendants penned back the waters of the lake, thereby overflowing and flooding his land, destroying the trees and herbage on it, and otherwise injuring it, and depriving him of its use. By 59 V. c. 64 (N.B.), the defendants were authorized to utilize the water of the lake for the benefit not only of the residents of Carleton, but for the use of the residents of Lancaster, and by 61 V. c. 52 (N. B.), the defendants were given additional powers in reference to this water supply to meet certain public requirements. The pleas alleged that by certain Acts of the legislature (without naming them), the defendants were authorized to take, hold, and convey the water of Ludgate lake and the water that might flow into the same to, into, and through that part of the city of St. John called Carleton, and also to erect and maintain dams to raise and maintain the waters therein, and also to lay pipes necessary for the furnishing and supplying of water for that part of the city. The pleas then went on to recite the provisions of 61 V. c. 52, and aver that the defendants published the notice required by s. 6, and that they used the water and took the land as authorized by that Act, and these were the trespasses complained of; that the plaintiff was entitled to compensation, but only to such compensation as might be given him by the tribunal created for the purpose by the Act itself.—*Held*, on demurrer, that the second, third, and fourth pleas to the first count were bad, and no answer to that count, because it did not appear that the trespasses complained of were committed by virtue of legislative authority for which compensation must be had by recourse to the special remedy provided.—The second and third counts of the declaration alleged, as causes of action, damages resulting from acts alleged to have been done under and by virtue of certain Acts of the legislature which entitled the plaintiff to compensation from the defendant:—*Held*, on demurrer, that these counts were bad, as the damage for which compensation was claimed arose from lawful acts done by the defendants by virtue of legislative authority, for the recovery of which recourse must be had to the special remedy provided. *Rose v. City of St. John*, 37 N. B. R. 58.

**16. Navigable waters — Hamilton Bay — Deed — Grant of wharf on one side of slip — Derogation from grant — Use of slip so as to prevent access to**

wharf—Evidence of mode of user at time of grant — Admissibility — Injunction. *Hamilton Steamboat Co. v. MacKay*, 7 O. W. R. 465.

**17. Navigable and floatable waters—Obstructions to navigation—Crown lands—Letters patent of grant—Evidence — Collateral circumstances leading to grant — Title to land — Riparian rights — Fisheries — Arts, 400, 414, 503. C. C.]—**A river is navigable when, with the assistance of the tide, it can be navigated in a practicable and profitable manner, notwithstanding that at low tide it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth.—*Bell v. Corporation of Quebec*, 5 App. Cas. 84, followed.—Evidence of the circumstances and correspondence leading to grant by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of shewing an intention to enlarge the terms of letters patent of grant of the lands, subsequently issued, so as to include the bed of the river and the right of fishing therein.—The judgment appealed from, Q. R. 14 K. B. 115, was reversed, and the judgment of the Superior Court, Q. R. 25 S. C. 104, was restored. *Steadman v. Robertson*, 18 N. B. R. 580, and *The Queen v. Robertson*, 6 S. C. R. 52, referred to.—*In re Provincial Fisheries*, 26 S. C. R. 444, [1898] A. C. 700, discussed. *Attorney-General for Quebec v. Fraser*, *Attorney-General for Quebec v. Adams*, 26 C. L. T. 849, 37 S. C. R. 577.

**18. Overflow of river—Injury to adjacent lands — Bridge constructed by township corporation—Effect of, in damming water back—Extraordinary freshets—Employment of competent engineers —Non-liability of corporation—***Pinkerton v. Township of Greenock*, 8 O. W. R. 967.

**19. Riparian owners — Expropriation — Trespass — Torts — Diversion of natural flow — Injurious affection—Damages—Execution of statutory powers — Arbitration — Injunction — Mandamus—59 V. c. 44 (N.S.)—Construction.]—**A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor, and may also obtain relief by injunction restraining the continuation of the tortious acts so committed.—The powers conferred upon the town council of the town of North Sydney, N.S., by the Nova Scotia statute 59 V. c. 44, for the purpose of obtaining a water supply, give them no rights in respect to the diversion of watercourses, except subject to

the provision of s. 4 of the Act, and after arbitration proceedings taken to settle compensation for injurious affection to property resulting from the construction or operation of the waterworks.—*Saunby v. Water Commissioners of London*, [1906] A. C. 110, followed. *Leahy v. Town of North Sydney*, 26 C. L. T. 526, 37 S. C. R. 464.

**20. Riparian owners—Use of water by—Dams—Retention of water—Liability to owners lower down.]—**Running water is a thing common to those whose lands it borders or crosses, and, according to the provisions of art. 503, C. C., they may use it for their own purposes in its passage, but in such a manner as not to hinder the exercise of the same right by other riparian proprietors. Therefore, the owner of works up-stream who retains the water for certain periods, by means of dams, so as to render its flow intermittent, exceeds the limits of his right, and is liable to the riparian proprietors down-stream for the damage which he causes them, as provided in ss. 5535 and 5536, R. S. Q. *Brome Lake Electric Power Co. v. Sherwood*, Q. R. 14 K. B. 507.

**21. Riparian owner—Use of water by—Injury to others—Ascertainment of damages—Condition precedent — Pleading.]—**Article 5536, R. S. Q., in prescribing the mode of ascertaining the damages for injuries caused by those who exploit watercourses opposite their lands makes the remedy of those who suffer injury subject to a condition precedent which they are bound to fulfil. Neglect to comply therewith affords a defence to an action, which the defendant must expressly plead, and which the Court will not supply of its own motion. *Leclair v. Dufault*, Q. R. 28 S. C. 14.

**22. Riparian owners—Water lots Interference with navigation—Injunction —Balance of convenience.** *Huntley v. Jeffers*, 1 E. L. R. 385, 434.

**23. Riparian owners—Water rights —Pollution of water—Proof of damage —Special use authorized by statute.]—**The pollution of a river by a riparian owner will be enjoined at the instance of a riparian owner lower down without proof of actual damage.—Generally speaking, one not a riparian owner is not entitled to complain of the pollution of the river, and a grant or license from a riparian owner to use the water does not entitle the grantee or licensee to complain of its pollution by another riparian owner.—Where the plaintiffs were authorized by Act to take a specified quantity of water per day from a

lake for, among other purposes, the domestic use of their citizens, it was held that they were entitled to enjoin the pollution of the lake by a riparian owner. *City of St. John v. Barker*, 3 N. B. Eq. 358.

**24. Rivers and Streams Act—Tolls — Order fixing — Condition precedent to right of action—Remedy.]—**Section 13 of the Rivers and Streams Act, R. S. O. 1897 c. 142, confers exclusive jurisdiction to fix tolls payable for floating saw-logs over constructions and improvements made by others in rivers, streams, and creeks, upon the different tribunals mentioned in it; and it is incumbent upon any persons seeking to levy such tolls to produce as a condition precedent to recovery an order or judgment by one of such tribunals fixing them.—*Per OSLER and GARROW, J.J.A.*—It is not necessary that the tolls should be fixed before the logs are floated.—*Aliter, per MEREDITH, J.A.*—*Per GARROW, J.A.*—An action will lie for such tolls, after the same have been duly fixed, and parties are not confined to the remedy by distress given by s. 19. *Beck Manufacturing Co. v. Ontario Lumber Co.*, 12 O. L. R. 163, 8 O. W. R. 35.

**25. Supply of water — Deed — Covenant — Easement — Servitude — Personal obligation.]—**A covenant in a deed by which P. acquired the right to erect a wind-mill pump on his neighbour's land to supply water to his premises by a pipe, "that he agrees to permit F., another neighbour, to take water for the use of his premises from the pump, and for that purpose to connect a pipe with the one to be laid by P.," does not establish a servitude in favour of F.'s premises. The latter are not described so as to be made a dominant tenement, and there is no servient tenement on which the charge is imposed. The covenant only gives rise to a personal obligation by P. to F.; and the subsequent owners, *à titre particulier*, of F.'s premises have no rights of servitude that can be enforced against P. *Christin v. Péloquin*, Q. R. 28 S. C. 299.

See CONTRACT, III. 7, VII. 1, VIII. 3—CROWN, 6, 9, 10—CROWN LANDS, 1—DITCHES AND WATERCOURSES ACT—EASEMENT, 4—FISHERIES—GOLD COMMISSIONER—MINES AND MINERALS—MUNICIPAL CORPORATIONS, II., XII.—NEGLIGENCE, 20—PARTIES, II. 5—PENALTY, 5—TRESPASS TO LAND, 1—WAY, III. 1.

## WATER CLAUSES CONSOLIDATION ACT.

See MINES AND MINERALS—WATER AND WATERCOURSES, 5.

## WATER PRIVILEGES ACT.

See WATER AND WATERCOURSES, 5.

## WATER RATES.

See MUNICIPAL CORPORATIONS, XIV. 10.

## WATERWORKS.

See MUNICIPAL CORPORATIONS, IV. 4.

## WAY.

- I. BOUNDARY LINE ROAD.
- II. DEDICATION OF HIGHWAY.
- III. NON-REPAIR OF HIGHWAY—INJURY FROM.
- IV. OBSTRUCTION OF HIGHWAY.
- V. OPENING AND MAINTENANCE OF HIGHWAY.
- VI. PRIVATE WAY.

See MUNICIPAL CORPORATIONS, V. — NEGLIGENCE—NUISANCE, 1, 2, 4—RAILWAY—STREET RAILWAYS—TREES—TRESPASS TO LAND, 1.

## I. BOUNDARY LINE ROAD.

**County boundary line road—**Deviation — Adoption of road already constructed — Municipal Act, s. 654—Construction—Award — Jurisdiction of arbitrators—Absence of necessary preliminaries—Counsel attending before arbitrators under protest. *Re Township of Normanby and Township of Carrick*, 8 O. W. R. 908.

## II. DEDICATION OF HIGHWAY.

**1. Acceptance by public—User.]—**An action was brought by the corporation of the city of Toronto against the Grand Trunk Railway Company to determine whether or not a street crossed by the

railway was a public highway prior to 1857, when the company obtained their right of way. It appeared on the hearing that in 1850 the trustees of the general hospital conveyed land adjoining the street, describing it in the deed as the western boundary of allowance for road, and in another conveyance made in 1853 they mentioned in the description a street running south along said lot, being the street in question. Subsequent conveyances of the same land prior to 1857 also recognized the allowance for a road:—*Held*, IDINGTON, J., dissenting, that the said conveyances were acts of dedication of the street as a public highway.—The first deed executed by the hospital trustees and a plan produced at the hearing shewed that the street extended across the railway track and down to the river Don, but at the time the portion between the track and the river was a marsh. Evidence was given of use by the public of the street down to the edge of the marsh:—*Held*, IDINGTON, J., dissenting, that the use of such portion was applicable to the whole dedicated road down to the river, and the evidence of user was sufficient to shew an acceptance by the public of the highway.—Judgment of the Court of Appeal in *City of Toronto v. Grand Trunk R. W. Co.*, 4 O. W. R. 491, reversing judgment of MACMAHON, J., 2 O. W. R. 3, affirmed. *Grand Trunk R. W. Co. v. City of Toronto*, 26 C. L. T. 248, 37 S. C. R. 210.

**2. Plan—Registration before incorporation.]**—A plan shewing the *locus in quo* as a street was made and filed before, but practically contemporaneously with, the locality being set apart as an incorporated village, the former being on the 3rd June, 1873, the latter on the 25th June, 1873. Lots were first sold under the plan in 1876. Subsequent legislation, which was retroactive, declared that allowances for roads laid out in cities, towns, and villages, fronting upon which lots had been sold, should be public highways:—*Held*, that the road in question was a public highway and subject to the jurisdiction of the municipality. *McGregor v. Village of Watford*, 13 O. L. R. 10, 8 O. W. R. 479.

**3. User by public—Action—Parties—Attorney-General—Municipal corporation—Ownership in fee.]**—In an action for a declaration that a portion of the River road lying between Bargar and Dorothy streets, in the town of Welland, was not a highway, but the private property of the plaintiffs, it appeared that the road had been continuously travelled by the public since the district was first settled, and that in 1855 B., the plaintiffs' predecessor in title, as owner of the lands adjoining this portion of the road,

agreed with the municipal corporation of the township in which these properties were then situate, to dedicate to the public as highways and to open up for traffic Bargar and Dorothy streets, and, in consideration of his doing so, the corporation agreed to close up and convey to him the portion of the River road in question. For this purpose a by-law was passed, admitted by the defendants to be legal and sufficient, and a conveyance to B. was duly executed, which, as admitted, vested the fee in him:—*Held*, that if a highway now existed, it must be by virtue of an express or implied dedication by the owner since 1855; and, as such private dedication would vest in the municipality not merely the surface, but the soil and freehold of the highway, it was unnecessary for the purposes of the present action that the Attorney-General should be added as a party.—The by-law enacted that B. should have the right to close up the road as soon as Bargar and Dorothy streets should be opened for public use and travel. Until 1873 or 1874 Bargar street was unfit for use as a public highway, and the public continued to use the River road, and even after Bargar street was opened and used the user of the portion of the River road in question continued, and no attempt was made at any time to close it; the public continuously used it without objection, and public money was spent upon it from time to time:—*Held*, following *Mytton v. Duck*, 26 U. C. R. 61, that, even if the user for the first 18 years should not be taken into account, because of the special clause in the by-law of 1855, there had been, since the right to close became absolute, 32 or 33 years of uninterrupted user before the bringing of this action, sufficient to establish conclusively a dedication. *Maccomb v. Town of Welland*, 12 O. L. R. 362, 7 O. W. R. 876.

See RAILWAY, X. 2.

### III. NON-REPAIR OF HIGHWAY—INJURY FROM.

**1 Bridge carried away by flood—Neglect of municipality to replace—Special damage to land-owner—Continuing cause of action—Damages—Mandamus—Remedy by indictment—Costs.]**—1. A private individual who suffers special damage caused by the neglect of a municipal council to replace a bridge on a public highway that had been carried away by a flood, is entitled to recover for such damages in an action against the municipality under s. 667 of the Municipal Act, R. S. M. 1902 c. 116. *Jesson v. Moore*, 1 Ld. Raym. 495, followed.—2. A



mandamus to replace the bridge should not be granted in such a case, as there is another adequate remedy, viz., to proceed by indictment, but the refusal of the mandamus should be without prejudice to the plaintiff's right so to proceed.—3. Under s.-s. (b) of above section the plaintiff's claim for damages should be limited to such as he had suffered since one month prior to the service of his notice of action on the municipality.—4. The cause of action being a continuing one, the damages should, under Rule 566 of the King's Bench Act, be assessed up to the date of the delivery of the judgment.—5. It is proper to bring such an action in the Court of King's Bench, even if the damages allowed should be within the jurisdiction of a County Court, and the plaintiff should have full costs. *Noble v. Municipality of Turtle Mountain*, 15 Man. L. R. 514, 2 W. L. R. 144.

**2. Chemins de tolerance—Non-repair—Liability of municipality.]—**Rural municipal corporations are responsible for accidents caused to persons by the bad condition of roads of sufferance, become municipal roads by the terms of art. 749 of the Municipal Code. *Lalongé dit Gascon v. Parish of St. Vincent de Paul*, Q. R. 27 S. C. 218.

**3. Injury to person driving—Municipal corporation—Real cause of injury—Reasonable state of repair of country road.** *Turner v. Eustis*, 7 O. W. R. 238.

**4. Injury to persons driving—Logs piled on highway—Municipal corporation—Negligence—Notice.]—**On the side of a road allowance in front of a saw mill large quantities of logs, bark, and rubbish were allowed to be piled and to be left there. The plaintiffs were driving with their horse and buggy along the allowance; while passing the place in question, the horse became frightened and swerved from the beaten track in the direction of the pile, and, in attempting to turn back again to the road, the front wheel of the buggy came in contact with a log lying about two or three feet from the travelled way, whereby the buggy was overturned, and the plaintiffs thrown out and injured:—*Held*, that the defendants were liable therefor. *Kelly v. Township of Whitechurch*, *Baker v. Township of Whitechurch*, 11 O. L. R. 155, 6 O. W. R. 839, 12 O. L. R. 83, 7 O. W. R. 279.

**5. Loose iron lid of catch-basin in sidewalk—Absence of defect in construction—Negligence—Notice—Inference—Municipal corporation.** *Hobin v. City of Ottawa*, 8 O. W. R. 101, 589.

**6. Loss of horse—Negligence of municipal corporation—Contributory negli-**

**gence—Proximate cause of damage—Findings of Judge—Appeal.** *Armstrong v. Township of Euphemia*, 7 O. W. R. 152.

**7. Necessity for guard-rail—Negligence—Liability of municipal corporations—Damages.** *Campbell v. Townships of Brooke and Metcalfe*, 8 O. W. R. 292.

**8. Negligence of municipal corporation—Liability for loss of horse—Contractors for corporation work—Relief over against—Costs.** *Taylor v. Town of Portage la Prairie (Man.)*, 4 W. L. R. 404.

**9. Negligence of municipal corporation—Injury to pedestrian—Notice of accident—Omission to give—Reasonable excuse—Absence of prejudice.]—**On one of the streets of the city there was a hole in the sidewalk about 20 feet long, caused by the stone flags having fallen in, the bottom being covered with broken stones, iron, and other debris; while along the side of the curb, bricks to the height of 8 feet had been piled, at one end of which a lamp had been placed; but the place where the cavity was, was in total darkness. The plaintiff, who was not very familiar with the city, was walking after dark along the street, when he fell into the hole, and was so seriously injured that he had to be taken to the hospital, where he remained over three weeks, during two of which he was obliged to remain in bed, his condition being such that he was mentally incapable of giving to the city the notice of the accident within the seven days prescribed by s. 606 (3) of the Municipal Act, 3 Edw. VII. c. 19 (O.) It appeared that the city was not prejudiced by the want of notice:—*Held*, that the street was out of repair, so as to render the city liable to the plaintiff; and that, under the circumstances, the plaintiff had shewn sufficient excuse for not giving the notice. *O'Connor v. City of Hamilton*, 10 O. L. R. 536, distinguished. *Morrison v. City of Toronto*, 12 O. L. R. 333, 7 O. W. R. 547, 607.

**10. Sidewalk—Injury to pedestrian—Liability of municipality—Negligence—Contributory negligence—Damages.** *McKay v. Village of Port Dover*, 7 O. W. R. 292, 758.

**11. Sidewalk—Injury to pedestrian—Liability of municipality—Negligence—Notice of action—Sufficiency—Damages—Quantum.** *Iverson v. City of Winnipeg (Man.)*, 4 W. L. R. 53.

**12. Sidewalk—Injury to pedestrian—Negligence of municipal corporations—Notice.]—**Sources of recurring and re-

peated danger on a street are to be watched and guarded against by a municipality.—Where a contractor for taking down a building had laid planks on a sidewalk, which were fastened at both ends with iron straps to keep them together, which straps were raised from time to time by teams and waggons passing over the planks, leaving a space between the straps and the planks, into which a passer-by put her foot and was thrown to the ground and injured:—*Held*, that when the normal condition of a sidewalk is disturbed, it is the primary duty of a municipality to see that in its altered state it is kept in proper repair, and in a busy and much frequented place in excellent repair; and that when the source of danger has existed in a crowded street of a city for two weeks or even somewhat less, notice of the want of repair and of dangerous condition will be attributed to the authorities.—In this case the corporation was held liable notwithstanding there was evidence of repair by nailing down the straps when discovered to be loose. Judgment of BRITTON, J., affirmed. *Gigneo v. City of Toronto*, 11 O. L. R. 611, 7 O. W. R. 696.

**13. Snow and ice**—Notice to municipal corporation — Gross negligence—Damages. *Ludgate v. City of Ottawa*, 8 O. W. R. 257, 865.

**14. Unguarded excavation**—*Negligence—Contributory negligence—Findings of jury.*—The plaintiffs sought to recover damages from the defendant town corporation for injuries sustained in falling into a ditch or trench which had been dug across one of the streets of the town by a contractor under the town authorities in connection with the construction of a system of drainage. The evidence shewed that the plaintiffs drove out of town in the morning before the trench was dug, and were returning after dark, when they were thrown into the trench, which, in the meantime, had been dug across the greater part of the street, and had been left unguarded and insufficiently lighted. The jury found, in answer to questions submitted to them, that the town corporation were guilty of negligence in not properly guarding the excavation, but that the driver of the carriage could have avoided the accident by the exercise of reasonable care:—*Held*, on an equal division of the Court, that the judgment entered on the findings, in the defendants' favour, must be affirmed. *Weir v. Town of Amherst*, 38 N. S. R. 477.

See APPEAL, V. 5 — PARTIES, I. 1—TRIAL, II. 2.

#### IV. OBSTRUCTION OF HIGHWAY.

**1. Obstruction by committee of council of township**—Stakes in highway to mark course of ditch—Misfeasance—Liability of corporation for acts of committee—Injury to pedestrian on highway—Damages. *Biggar v. Township of Crowland*, 8 O. W. R. 819.

**2. Toll road** — *Action négatoire—Conclusions injonctives.* — An action *négatoire* with *conclusions injonctives* which are the essential accompaniment of it, is an action at common law, and may properly be brought by commissioners of toll roads against any person who causes obstructions upon the roads of which they have the control. *Montreal Toll Roads Commissioners v. Montreal Water and Power Co.*, 8 Q. P. R. 38.

See CRIMINAL LAW, III. 25.

#### V. OPENING AND MAINTENANCE OF HIGHWAY.

**1. County road**—*Liability of county corporation — Procès-verbal and sentence of homologation.*—Where a *procès-verbal* provides that the maintenance of a road shall be at the charge of a group of ratepayers of a local municipality, and the sentence of homologation at the same time declares it a county road, under the direction of the county corporation, the latter will be obliged to carry out the provisions of the *procès-verbal*, and levy the cost of such maintenance directly from the ratepayers in the manner provided by art. 941, C. M., without having recourse to the intervention of the local municipality in which the road is situated. *County of St. John v. Corporation of St. Jacques-Le-Mineur*, Q. R. 14 K. B. 343.

**2. Procès-verbal — Homologation—Time.**—Where by a definitive judgment of the Circuit Court, a *procès-verbal* for the opening of a road has been declared regular, and its homologation granted, this homologation does not lapse by efflux of time, especially where most of the bridges have been completed, a part of the road built, and the material for the construction of the whole road purchased. *Bigras v. County of Laval*, 7 Q. P. R. 419.

**3. Procès-verbal—Municipal corporation—Powers of—Prescription — Pleading—Statute — Retroactivity—Part performance—Irregularities of procedure.**—A *procès-verbal* for the opening of a municipal road, made and homologated be-

fore the statute 69 V. c. 27 (Q.), remains in force until it is abrogated by a subsequent *procès-verbal* or by-law. A municipal council has therefore the power by resolution to order the performance of work specified in such a *procès-verbal* which has been allowed to remain in abeyance for a period of over forty years.—2. A *procès-verbal* cannot remain in force for a part and become inoperative for another part under 60 V. c. 27, s. 7 (Q.) When therefore it is made and homologated for the opening of two roads, one a front road and the other a by-road, and its provisions are carried out in respect of the latter, it is in force as a whole and does not become prescribed in respect of the front road.—3. Prescription of a *procès-verbal* under the statute must be expressly pleaded by the party who seeks to avail himself of it.—4. The above statute has no retrospective operation and applies only to *procès-verbaux* made after it came into force.—5. The rule of art. 825, M. C., that no one is bound to maintain more than one front road on the same lot of thirty arpents' depth, affords no ground of annulment of a *procès-verbal*, but only of application to the municipal authorities to shift the burden in conformity with it.—6. Irregularities of procedure are not sufficient grounds for an action to set aside municipal proceedings but of appeal or petition to quash provided in the Municipal Code for the purpose.—*Theriault v. Corporation of St. Alexandre*, 8 Rev. de Jur. 527, approved. *Corporation of Ste. Justine de Newton v. Leroux*, Q. R. 15 K. B. 159.

## VI. PRIVATE WAY.

**1. Deed of grant** — Construction—“A good and sufficient roadway not less than 10 feet in width”—Termini and location—Loss of right by abandonment—Extinguishment by merger—Obstruction—Action for removal—Damages—Mandatory order—Costs. *Brocklebank v. Colvill*, 8 O. W. R. 231.

**2. Easement** — Prescription — Presumption of lost grant—Evidence—Interruption—Inconsistent user by others—*Jus publicum*. *Adams v. Fairweather*, 7 O. W. R. 785, 8 O. W. R. 886.

**3. Prescription**—User for 40 years—Interruption—Evidence—Fresh evidence on appeal—Costs. *Avery v. Fortune*, 8 O. W. R. 952.

**4. User** — Prescription — Abandonment.]—L. and H., who owned and occupied a farm in common, agreed upon a

division of the property between them, and called in a surveyor for that purpose, who ran a line, upon which a fence was erected and by which the parties continued to hold. At the time of the division there was a road upon the property, which had been used as a means of obtaining access to the public road, and which both parties continued to use. After a time H. constructed a road on his part of the property, which gave him a more convenient mode of access to the public road when going in certain directions, but he continued from time to time, as necessary, to use the former road. After the death of H., L. erected a fence for the purpose of preventing the defendants, who claimed under H., from making use of the portion of the old road which passed through his land, and upon the defendants taking down the fence brought an action for damages for the removal of the fence and an injunction to prevent the defendants from passing over his land. The evidence shewed a continuous user of the way for a period of about 30 years, and the plaintiff failed to shew any abandonment or interruption of the user:—*Held*, that the plaintiff could not succeed in his action; also, that the construction by H. of the new road over his own land and its use as mentioned was not an abandonment of his right to use the former way. *Horne v. Horne*, 38 N. S. R. 404.

See CEMETERY—EASEMENT, 1, 2.

## WEIGHTS AND MEASURES.

See MUNICIPAL CORPORATIONS, VII. 6—SALE OF GOODS, VI. 4—TIMBER.

## WHARF.

See PARTIES, III. 1—WATER AND WATER-COURSES, 16.

## WILL.

I. CONSTRUCTION.

II. DEVISE SUBJECT TO RESTRAINT UPON ALIENATION.

III. EXECUTION. TESTAMENTARY CAPACITY, AND UNDUE INFLUENCE.

See ADMINISTRATION ORDER, 2—CONTRACT, X. 14—COURTS, IV.—DISTRIBUTION OF ESTATES—EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE, VI. 3—INSURANCE, III. 4, 5—INTERPLEADER,

3—LIMITATION OF ACTIONS, I. 8—MORTGAGE, 7—PARENT AND CHILD, 2—PARTICULARS, 4 — PARTIES, I. 11, 14—RECEIVER, 1—SUBSTITUTION, 2, 3—TRUSTS AND TRUSTEES, 5, 10—WRIT OF SUMMONS, 9.

## I. CONSTRUCTION.

**1. Annuities** — Deficiency—Arrears — Death of annuitants — Application of accumulated income—Residuary bequest to charities. *Re Foley*, 8 O. W. R. 141, 597.

**2. Bequest of money—Life Interest** —Gift—Deposit in bank—Distribution of estate—Probate Court—Appeal—Decree of Court below.]—The mere fact that money has been deposited in a bank by a testator in the joint names of himself and his daughter, with power to either to withdraw, raises no presumption that a gift of the fund to the daughter was intended.—Testator bequeathed to his daughter any money which he might die possessed of "to hold and be enjoyed by her while she remains unmarried, and in case of her decease or marriage," then over:—*Held*, that the daughter took only a life interest.—*Quære*, whether the Court will hear an appeal from a Probate Court when the decree of the Judge below is not before it. *In re Daly*, 37 N. B. R. 483, 1 E. L. R. 487.

**3. Bequest to "my family"** — Exclusion of children of deceased child. *Re Wilkie*, 7 O.W.R. 473.

**4. Bequest to widow—"Dower of one-third of my estate"**—Non-technical use of word "dower"—Absolute gift of one-third.]—A testator, after directing payment of his debts and funeral and testamentary expenses, directed the executors to sell the whole of his real and personal estate (excepting certain household goods reserved for his wife), turning the same into money, and after the payment of his debts, etc., and "my wife receives her dower of one-third of my estate," he gave to his wife the whole of the interest of his estate as long as she lived, "that is, the interest on the balance of my estate after she receives her dower;" and upon his wife's decease he gave two-thirds of the balance of his estate to his son, and the remaining one-third of the balance to his two brothers and a sister, to be equally divided among them:—*Held*, that the word "dower" was not used in its technical sense of a life interest in one-third of the testator's realty; but meant one-third

absolutely of his whole estate; so that the wife took such one-third absolutely, and a life interest in the remainder. *Re Manuel*, 12 O. L. R. 286, 8 O. W. R. 70.

**5. Death of devisee before testator**—Subject of devise falling into residue — Death of one of two residuary legatees and devisees—Tenants in common—Lapse as to lands devised—Survivor entitled to personalty. *Re Gamble*, 8 O. W. R. 797.

**6. Devise**—Charge on unspecified portion of lands devised—Conveyance of—Portion of lands free from charge — Vendor and purchaser. *Re Zimmerman and Senner*, 7 O. W. R. 275.

**7. Devise**—Charges on land devised—Payment of expenses of administration—Legacies — Annuity — Land Titles Act — Incumbrances. *Re McVicar* (N.W.T.), 3 W. L. R. 492.

**8. Devise**—Estate—Fee simple or life estate with executory devise over—"Die without lawful issue"—Death in lifetime of testator—Lapsed devise. *Re Kelcher*, 8 O. W. R. 225.

**9. Devise**—Life estate—Charge on—Payment of mortgage and legacies — Acceptance — Refusal — Acceleration of estate of remainderman — Executors — Legal estate — Power of sale—Crop-payments — Deductions — Labour — Waste —Repairs—Fire insurance—Lease. *Re Bell*, 7 O. W. R. 199.

**10. Devise**—Life estates—Remainder in fee—Estate tail—Period of distribution — Surviving wife — Title — Vendor and purchaser.]—A testator devised to one of his sons, G., fifty acres of land, "to have and to hold to him, etc., as aforesaid and not otherwise." In an earlier part of the will he had devised lands to his other sons, "to have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their and each of their wives to have and to hold to their children respectively and their heirs forever." G. was unmarried at the date of the will and of the testator's death:—*Held*, that G. took an estate for life, and his widow (if he left one) an estate for life after his death, and his children the remainder in fee after her death, or if no widow, after G.'s death.—G. was not entitled to an estate tail under the rule in *Wild's Case*, for that rule applies only where

the gift to both parent and children is immediate, nor under the rule in *Shelley's Case*.—*Grant v. Fuller*, 33 S. C. R. 34, and *Chandler v. Gibson*, 2 O. L. R. 442, followed.—*Held*, also, that the devise to the children of G. was a gift to a class, which would comprise all children coming into existence before the period of distribution.—G. had married and had children living, and his wife had died at the time of an application under the Vendors and Purchasers Act, he having contracted to sell the land:—*Held*, that if he married again his second or any future wife who survived him would be entitled to a life estate.—Title could not be made without the order of the Court. *Re Sharon and Stuart*, 12 O. L. R. 605, 8 O. W. R. 625.

**11. Devise**—Misdescription of land—*Falsa demonstratio*—Evidence of extrinsic facts—Correction of mistake. *Re Harkin*, 7 O. W. R. 840.

**12. Distribution of estate**—Shares—Income—Corpus—Survivorship—Period of distribution. *Re Totten*, 7 O. W. R. 886, 8 O. W. R. 543.

**13. Dower**—Election—Specific devise of portion of lot—Use of driving house, etc.—Rooms in dwelling house.—A testator by his will devised to his widow for life 17 acres on the west side of a lot, together with the use of a drive house on his lands for the storage of crops, taken from the 17 acres, and of two rooms, certain furniture and bedding, and all the fruit she wanted for her own use from that now grown thereon; and, subject to such life estate and a payment of \$100 to his daughter, he devised the same to one of his sons. To another son he devised the remainder of the lot, containing 33 acres, together with all buildings and erections thereon, reserving such privileges as were theretofore given to his widow during her lifetime, and subject to a bequest of \$150 to the said daughter, and the payment of the funeral and testamentary expenses:—*Held*, that the widow was not entitled to dower in the dwelling house, but was so entitled as to the 33 acres, not being put to her election by reason of the disposition made in her favour. Judgment of ANGLIN, J., affirmed. *Re Hurst*, 11 O. L. R. 6, 6 O. W. R. 417, 721.

**14. "Dying without issue"**—Vested estate on birth of child—Absolute estate in fee.—A testatrix by her will gave certain real estate to an adopted daughter; but in the event of her "dying without issue" the devise was to lapse. There was no devise over:—*Held*, that

"dying without issue" meant without a child being born; and therefore, on the birth of a child, the devise became absolute. *Re Johnston and Smith*, 12 O. L. R. 262, 7 O. W. R. 845.

**15. Estate of devisee**—Limitations—Fee simple—Vendor and purchaser. *Re Reid and Randall*, 7 O. W. R. 559.

**16. Gift**—Restrictions—Investment—Estate—Responsibility of executors—Defeasance—Executory devise over. *Re Kennell*, 7 O. W. R. 566.

**17. Incomplete bequest**—Legatee not named—Vagueness as to subject—Extrinsic evidence, inadmissibility of—Void bequest—Bequest to church—Income—Perpetuity—Charitable bequest—Validity. *Re Cameron*, 7 O. W. R. 416.

**18. Joint life estate**—Remainder in fee in common—Rule in *Shelley's Case*—Gift to class. *Re Rutherford*, 7 O. W. R. 796.

**19. Lapsed devise**—Land Titles Act—Rules applicable to personalty—Right of residuary legatees to lands subject of lapsed devise. *Re Bicen* (N.W.T.), 4 W. L. R. 477.

**20. Lapsed devise**—Residuary devise.—By one clause of his will a testator devised and bequeathed all his real and personal estate, etc.; by another clause he provided that a sister should have certain lands owned by him, which devise lapsed; and the last clause was as follows: "All the rest and residue of my estate, consisting of money, promissory note or notes, vehicles and implements, I give and bequeath to my brother:—"*Held*, that the will must be construed to prevent an intestacy as to the lapsed devise, and that the lands given to the sister passed to the brother under the residuary clause. *Re Farrell*, 12 O. L. R. 580, 8 O. W. R. 442.

**21. Legacies to nephews and nieces and children of deceased nephews and nieces**—Children of persons predeceasing testator—Cumulative legacies—Deficiency of assets—Abatement of general legacies—Residuary bequest—Persons entitled to share. *Re Church*, 8 O. W. R. 228.

**22. Legacy**—Interest in company—Shares—Arrears of salary.—A particular legacy by a testator, who is both a shareholder in, and a creditor for arrears of salary of, a joint-stock com-



pany, of "all his right, title, and interest, whatever it may consist of, whether in stock or otherwise in the company," includes both his shares and his claim for arrears of salary. *Cochrane v. Royal Trust Co.*, Q. R. 29 S. C. 117.

**23. Life estate**—Remainder to brothers and sisters of life tenant, "or their legal representatives." *Parker v. Black*, 1 E. L. R. 128.

**24. Life estate to widow**—Remainder to "first family or the survivors"—Costs. *Ward v. McKay*, 1 E. L. R. 427.

**25. Life interest of widow**—Personalty — Beneficial enjoyment in specie — Household furniture — Executors — Power of sale—Payment of debts—Legacy—Assent of executors—Trustees and cestui que trust—Devolution of Estates Act — Real estate — Specific devises — Equitable tenant for life—Lease—Sale — Discretion. *Re Sibbett*, 7 O. W. R. 173.

**26. Monthly allowance to widow**—Payment out of income or corpus—Legacies — Postponement — "Balance" — "Extra" — Abatement — Dower — Election. *Re Morrison*, 7 O. W. R. 231.

**27. Omission in will**—Giving effect to intention—Distribution of estate.]—P. K., who left a widow and five children by his last will directed that his property should be sold in two years after his decease by his trustee, who, in the meantime, should pay the interest and rents to his wife and four of the children who were named. On the death of any one of the four children named, leaving a child or children, the share of such child was to be paid to the offspring. Whenever one of his children should die leaving children, the estate was to be divided equally among his children. Should his wife marry again, her share of the interest money was to be divided among his children, and, after her decease, not having remarried, the interest of her share was to be paid to his son W., and on his death to be equally divided among his children. Reading the will literally, no share was given to the widow, beyond a share of the interest payable to her, until the estate came to be divided, but it was obvious that it was the intention of the testator that the widow should share equally with the four children named, and that, on her death unmarried, such share should go to his son W., and on his death be equally divided among his children:—*Held*, that the Chambers Judge, on application under O. 55, r. 2, was right in disregarding the literal reading of the will

and in so construing it as to give effect to the obvious intention of the testator. —*Held*, also, that the Judge was right in construing the direction made by testator in relation to the division of his property among his children, as referring to the four children named. *Eastern Trust Co. v. Rose*, 38 N. S. R. 546.

**28. Period of ascertainment of class**—Period of distribution—Validity of bequest. *Re Mackay*, 7 O. W. R. 318.

**29. Personal estate**—Life interest with power of control.]—The testator by his will provided, "If I predecease my wife I give and bequeath to her the whole control of my real and personal estate as long as she lives." He then made disposition of his real estate to take effect after the death of his wife, and of the stock and implements appertaining thereto, but did not otherwise dispose of his personal estate. As a fact his personal estate included a mortgage. His widow survived him only a few days and made no disposition of the mortgage:—*Held*, that the widow had only a life interest in the mortgage, with power of control during her life; and, as she had made no disposition of it, whether entitled to do so or no (as to which, *quære*), it fell into the testator's undisposed of estate, and went according to the Statute of Distributions, the widow's next of kin taking the moiety to which she was entitled notwithstanding her life interest under the will. *In re Turnbull Estate*, 11 O. L. R. 334, 7 O. W. R. 358.

**30. Residuary bequest** — "Parties mentioned" in will who shall be living at winding-up of estate — Corporations — Poor of town—Period of distribution—Executors. *Re Miles*, 8 O. W. R. 817.

**31. Residue** — "Survivors" — "Child" — Distribution of estate.]—Testator, by his last will, after providing for his wife during her lifetime, and setting apart a sum of money to be invested after the wife's death for his two daughters, left his business and the residue of his estate to his two sons.—In case of the death of either or both of the daughters without issue, it was provided that her or their shares of the estate should become part of the residue thereof, and be divided equally among the survivors, and the issue of any child who should then be deceased. One of the daughters having died without leaving issue:—*Held*, that the use of the words "survivors" and "child" in the clause in question excluded the idea that the share of the deceased daughter was to go to the two sons as part of the residue of the es-

tate, and indicated an intention, on the part of the testator, that this particular part of the residue was to be divided equally among the surviving children of the testator and the issue of any deceased child; and that it was only subject to this disposition that all the rest and residue of the estate was to go to the two sons exclusively. *In re Mackinlay*, 38 N. S. R. 254.

**32. Specific devise — Charge of "debts" and testamentary expenses in residuary fund—Municipal taxes—Succession duty—Arrears of taxes—Locke King's Act.]**—The testatrix made a will in 1896 leaving certain lands to devisees therein named. Between the date of the will and her death, in 1900, municipal and provincial taxes had accumulated on the devised lands. The persons taking the lands under the will claimed the right to have the taxes paid out of moneys which had been realized by the executors from the other parts of the estate, on the ground that the residuary fund was, by the will, expressly made liable as a fund for the payment of her funeral and testamentary expenses and debts:—*Held*, that the succession duty payable under the Succession Duty Act, R. S. B. C. 1897 c. 175, in respect of the real estate of a deceased person, did not form part of the testamentary expenses of the deceased, but was chargeable against the different properties devised under the will.—(2.) That the taxes due by deceased were payable out of the residuary estate, and not chargeable against the different properties in respect of which the taxes had been imposed.—(3.) To allow taxes to fall into arrears does not charge land by way of mortgage so as to bring it within the operation of Locke King's Act, 17 & 18 V. c. 113. *In re Watkins*, 12 B. C. R. 97, 3 W. L. R. 471.

**33. Specific devise — Residuary devise—Bequest of personal estate—Provision for payment of debts, etc., "Out of my estate"—Incidence of—Bequest of chattels under conditional sales agreement—Devolution of Estates Act.]**—A testator bequeathed all his personal estate to his son, to whom he also specifically devised a farm, and he devised the residue of his real estate to his executors upon certain trusts, and directed that the debts and funeral and testamentary expenses should be paid "out of my estate:—"*Held*, that the whole personal estate was primarily chargeable with such payment, and that the balance remaining unsatisfied should be borne by all the real estate *pro rata*.—Section 7 of the Devolution of Estates Act pro-

vides that "the real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto), be applicable ratably, according to the respective values, to the payment of his debts:—"*Held*, that this section does not apply where there is not both real and personal property comprised in the residuary gift, and, as the bequest of the testator's personal property was not in its nature residuary in the ordinary sense, the section did not apply to it.—Among other personal property bequeathed were a threshing machine and engine under the usual conditional sales agreement:—*Seemle*, that, as the gift was in no sense a specific legacy, these chattels were not exonerated from the liens created by such agreement at the expense of the real estate. *Re Moody*, 12 O. L. R. 10, 7 O. W. R. 808.

**34. Trust — Conditional devise.]**—A will provided as follows: "I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am at present possessed, whether real or personal or wherever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them, and also order that all my just and lawful debts be paid out of the same;" and appointed executors:—*Held*, affirming the judgment appealed from, 38 N. S. R. 60, that the widow took the real estate in fee, with power to dispose of it and the personalty whenever she deemed it was for the benefit of herself and her children to do so. *McIsaac v. Beaton*, 26 C. L. T. 188, 37 S. C. R. 143.

**35. Trust — Precatory trust—Power — Execution of.]**—A testator whose mother owned an estate for life in a farm in which he had the remainder in fee, by his will devised to her his interest in the farm "to be disposed of as she may deem most fit and proper for the best interest of my brothers and sisters." The mother, after his death, conveyed the farm in fee simple to one of his sisters, the expressed consideration being one dollar and natural love and affection, and the deed containing no reference whatever to the will, or anything indicating on its face that it was executed in pursuance of a power or trust:—*Held*, that it was not necessary to determine whether the mother took absolutely, or whether, if she had not taken absolutely, a trust was created or a power, inasmuch as, even if a trust was created in the mother, the conveyance

by her operated, and was intended to operate, as an execution of the trust, although the whole of the property was granted to one daughter only. *Pettypiece v. Turley*, 13 O. L. R. 1, 8 O. W. R. 617.

## II. DEVISE SUBJECT TO RESTRAINT ON ALIENATION.

### 1. Construction—Exercise of power.]

—A testator devised land to his daughter subject to the following conditions: "My said daughter shall not sell or will or dispose of this 100-acre lot to any person or persons except to one or more of my children or my grandchildren, to whom she may dispose of it if it is her will to do so." By her will, the daughter assumed to charge upon the land two legacies, and directed that her husband might occupy the land for one year after her death, and, subject to these charges and her debts and testamentary expenses, devised the land to her executors upon trust for the plaintiff, one of the testator's grandchildren, as beneficial owner. There were several other children and grandchildren of the testator surviving:—*Held*, that the restraint on alienation in the testator's will was valid, and that, inasmuch as the daughter's will must be held to have been made by her in pursuance of the power of disposition given her by him, though she intended to defeat the restraint against alienation by indirect means, the legacies in her will failed, as also her devise of the right of occupation in favour of her husband, and the plaintiff took the whole property free from any condition. *Rogerson v. Campbell*, 10 O. L. R. 748, 6 O. W. R. 617.

### 2. Partial restriction — "Mortgaging or selling"—Vendor and purchaser.]

—A testator by his will, after directing payment of his debts, funeral and testamentary expenses, devised to his son W. M. certain lands, "subject to the following conditions, reservations, limitations therein," (directing the payment of two sums of money), "to have and to hold the same unto the said W. M., his heirs, executors, administrators, and assigns forever:" and, after making four other devises of other lands to four other sons, provided as follows: "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described, but if one or more of these lots have to be sold on account of mismanagement, the executors will see that the same will remain in the Martin estate." W. M. was one of the executors named in the will. The sons became indebted,

and neither they, nor the daughters, nor the widow, nor the executors, were in a position to purchase the lands, and W. M. agreed to sell the land devised to him:—*Held*, that the restraint on alienation was valid, and that he could not make title.—Review of the cases here and in England.—*In re Macleay*, L. R. 20 Eq. 186, followed.—*In re Rosher*, *Rosher v. Rosher*, 26 Ch. D. 801, not followed. *Re Martin and Dagneau*, 11 O. L. R. 349, 7 O. W. R. 191.

### 3. Partial restriction — Validity. *Re Porter*, 8 O. W. R. 588.

4. Substitution—Restraint on alienation—Statute.]—A clause in a will providing for the substitution of immovables upon the condition "*que mes biens-fonds ou immeubles, de quelque nature et qualité qu'ils soient, passent en nature à mes dits petits-enfants (the substitutes), et qu'en conséquence, ils ne puissent être en tout ou en partie rendus ou aliénés par quelque autorité que ce soit, ni sous quelque prétexte que ce puisse être, ni me sous celui du plus grand avantage de mes dits petits-enfants,*" does not take the property out of the operation of 61 V. c. 44 (Q.), which provides that substituted property may be definitely alienated, when such alienation is to the interest of the institute and of the substitute. The above prohibition to alienate adds nothing to the substitution under which, taken alone, the property is intended to pass to the substitute, and the statute is enacted for the purpose of defeating that intention, in the case it contemplates. *Prévost v. Prévost*, Q. R. 27 S. C. 490.

## III. EXECUTION, TESTAMENTARY CAPACITY, AND UNDUE INFLUENCE.

1. Action to set aside will—Insanity of testator—Proof of—Undue influence.]—A universal legatee under a prior will, plaintiff in an action to set aside a subsequent will upon the ground of insanity of the testator, will be allowed to prove facts occurring before both wills, in order to establish the intellectual condition of the testator at the period of the will which he attacks.—2. Incapacity to make a will by reason of insanity cannot be proven from facts establishing simply failures of memory, oddity or eccentricity of ideas, momentary lapses of thought, and weakening of the mind caused by old age.—3. Influence and suggestion are not grounds for setting aside a will unless they result from fraud and deceit, corrupt practices, or lying insinuations, which have



deceived the mind and imposed upon the will of the testator. An inference of such practices cannot be drawn from means employed by a person benefited by the will to attract the good will of the testator as long as there is no practice which prejudices his moral liberty. *St. Andrew's Church v. Brodie*, Q. R. 14 K. B. 149.

**2. Execution — Evidence — Onus — Beneficiary — Subsequent conduct of testator—Residuary devise—Trust.]** — In proceedings for probate by the executors of a will, opposed on the ground that it was prepared by one of the executors, who was also a beneficiary, there was evidence, though contradicted, that before the will was executed it was read over to the testator, who seemed to understand its provisions:—*Held*, IDINGTON, J., dissenting, that such evidence and the fact that the testator lived for several years after it was executed, and on several occasions during that time spoke of having made his will, and never revoked nor altered it, satisfied the onus, if it existed, on the executor to satisfy the Court that the testator knew and approved of its provisions.—*Held*, also, that where the testator's estate was worth some \$50,000, and he had no children, it was doubtful if a bequest to the propounder, his brother, of \$1,000 was such a substantial benefit that it would give rise to the onus contended for by those opposing the will.—Judgment of the Court of Appeal, 4 O. W. R. 360, affirmed. *Connell v. Connell*, 26 C. L. T. 383, 37 S. C. R. 404.

**3. Holograph will — Evidence—Intrinsic evidence of insanity — Probate — Onus.]** — When an alleged testator is shewn to have been an educated person, well versed in the English language, and accustomed to speak and write it correctly, and is moreover proved to have been a confirmed dipsomaniac for 20 years, and an inmate of an inebriate asylum for 14 years preceding the date of a supposed holograph will; incorrect, ungrammatical, and meaningless language used therein is sufficient evidence that, if written at all by the testator, it was so written at a time when he was not of sound and disposing mind.—2. Probate of a will is *prima facie* evidence, under the law of Quebec, of the sanity of the testator, at the time it was made. The burthen of proof of insanity is on the party who impugns the will. *Doucet v. Macnider*, Q. R. 14 K. B. 232.

**4. Holograph will — Validity — Statutory formalities.]**—A will entirely typewritten and signed by the testator satisfies the requirements of art. 850, C.

C., which prescribes that a holograph will shall be written entirely and signed with the hand of the testator. *In re Aird*, Q. R. 28 S. C. 235.

**5. Promoter — Evidence — Corroboration.]**—Where the promoter of and a residuary legatee under a will, executed two days before the testator's death, and attacked by his widow and a residuary legatee under a former will, the devise to the latter of whom was revoked, failed to furnish evidence to corroborate his own testimony that the will was read over to the testator, who seemed to understand what he was doing, and there was a doubt under all the evidence of his testamentary capacity, the will was set aside.—GIBOUARD, J., dissenting, held that the evidence was sufficient to establish the will as expressing the wishes of the testator.—Per DAVIES, J.—The will should stand except the portion disposing of the residue of the estate, the devise of which, in the former will, should be admitted to probate with it. *British and Foreign Bible Society v. Tupper*, 37 S. C. R. 100.

**6. Undue influence — Want of testamentary capacity — Examination of conflicting evidence—Onus—Expert testimony—Change of domicile—Execution of will in foreign country—Proof of execution according to foreign law—Admission of evidence.** *Hopper v. Dunsmuir* (B. C.), 3 W. L. R. 18.

## WINDING-UP.

See COMPANY, III.—PARTNERSHIP.

## WITNESS FEES.

See COSTS, VII, 3, 11.

## WITNESSES.

See EVIDENCE—TRIAL, III.—VENUE.

## WOODMAN'S LIEN.

See LIEN, 5, 6.

## WORDS.

"A good and sufficient roadway not less than ten feet in width."—See WAY, VI. 1.

"Account current."—See SHIP, 22.

"Acting executor."—See MORTGAGE, 2.

"Appointee of Dominion," — See CROWN, 8.

"As now enjoyed."—See RAILWAY, II. 1.

"Assign."—See COPYRIGHT, 3.

"Augmentations."—See CONTRACT, III. 7.

"Balance."—See WILL, I. 26.

"Beneficiary."—See INSURANCE, III. 1.

"Book."—See COPYRIGHT, 3.

"Business tax." — See ASSESSMENT AND TAXES, 4.

"By reason of the railway."—See LIMITATION OF ACTIONS, II. 4—RAILWAY, VI. 1.

"Catholic freeholder."—See ASSESSMENT AND TAXES, 7.

"Child."—See WILL, I. 31.

"Children."—See DEED, 3.

"Claim."—See MECHANICS' LIENS, 15—MINES AND MINERALS, 4.

"Cost."—See CROWN, 2—MUNICIPAL CORPORATIONS, VIII. 1.

"Counterfeit token of value." — See CRIMINAL LAW, III. 16.

"County."—See CANADA TEMPERANCE ACT, 1.

"Court en Banc."—See APPEAL, XIII. 1.

"Court or a Judge."—See APPEAL, XIII. 1.

"Debt."—See SMALL DEBT PROCEDURE, 2. 3.

"Debts."—See WILL, I. 32.

"Deemed to be abandoned." — See MINES AND MINERALS, 9.

"Dependents."—See MASTER AND SERVANT, II. 13.

"Die without lawful issue." — See WILL, I. 8.

"Dower of one-third of my estate."—See WILL, I. 4.

"Dying without issue."—See WILL, I. 14.

"Effect." — See ASSESSMENT AND TAXES, 21.

"Equipment."—See CROWN, 2.

"Event."—See COSTS, II. 1. 2.

"Extra."—See WILL, I. 26.

"Factory."—See FACTORIES ACT.

"First family or the survivors."—See WILL, I. 24.

"Foreign-going ship."—See SHIP, 26.

"Forged note."—See CRIMINAL LAW, III. 16.

"Front."—See STREET RAILWAYS, I. 3.

"Goods, wares, or merchandise."—See HAWKERS AND PEDLARS.

"Greek Catholic Church." — See CHURCH.

"House, office, room, or other place."—See CRIMINAL LAW, III. 17.

"In any event."—See COSTS, VII. 9.

"In full satisfaction."—See JUDGMENT, IV. 4.

"Infamous and disgraceful conduct in a professional respect." — See MEDICAL PRACTITIONER, 1.

"Instrument."—See REGISTRY LAWS, 3.

"Instrument in writing."—See INSURANCE, III. 5.

"Justice or justices."—See LIQUOR LICENSES, 11.

"Lands." — See ASSESSMENT AND TAXES, 15.

"Legal proceeding." — See REGISTRY LAWS, 3.

"License year."—See MUNICIPAL CORPORATIONS, VII. 4.

"Limited."—See EVIDENCE, III. 2.

"Machinery hereinafter mentioned."—See STATUTES, 1.

"Mortgaging or selling." — See WILL, II. 2.

"Movable effects."—See HUSBAND AND WIFE, III. 3.

"My family."—See WILL, I. 3.

"Net proceeds."—See CONTRACT, III. 10.

"Not improved or settled and inclosed."—See RAILWAY, I. 1.

"Occupant." — See CONSTITUTIONAL LAW, 12—MUNICIPAL ELECTIONS, 14.

"Or their legal representatives."—See WILL, I. 23.

"Other insurance." — See INSURANCE, II. 10.

"Otherwise."—See RAILWAY, I. 6.

"Out of my estate."—See WILL, I. 33.

"Owner."—See DITCHES AND WATERCOURSES ACT, 2—MUNICIPAL ELECTIONS, 14.

"Parties mentioned."—See WILL, I. 30.

"Passenger."—See IMMIGRATION ACT.

"Permanent improvements." — See LANDLORD AND TENANT, 22.

"Person charged." — See CRIMINAL LAW, III. 32.

"Person interested."—See COURTS, IV.

"Persons."—See SCHOOLS, 10.

"Place."—See LIQUOR LICENSES, 7.

"Plant."—See MORTGAGE, 13.

"Polling division." — See CRIMINAL LAW, III. 1.

"Postmasters in cities."—See Penalty, 4.

"Practising."—See MUNICIPAL CORPORATIONS, VII. 2.

"Practising medicine."—See STATUTES, 3.

"Proceeding."—See PARTIES, III. 9.

"Propelled wholly or in part by steam."—See SHIP, 23.

"Protest."—See GOLD COMMISSIONER.

"Reasonable price."—See PATENT FOR INVENTION, 8.

"Registration district."—See CRIMINAL LAW, III. 1.

"Residence."—See COSTS, V. 8.

"Satisfaction."—See RAILWAY, VIII. 4.

"Serious neglect." — See MASTER AND SERVANT, II. 33.

"Signing judgment."—See JUDGMENT, I. 2.

"Solely."—See MASTER AND SERVANT, II. 33.

"Stationery and furniture."—See MUNICIPAL CORPORATIONS, X. 4.

"Survivors."—See WILL, I. 31.

"While at work."—See MASTER AND SERVANT, I. 4.

"Whole operation of its railway."—See STREET RAILWAYS, I. 2.

"Wilfully."—See HABEAS CORPUS, 3.

"Without impeachment of waste."—See WASTE.

"Works or operations of the company."—See RAILWAY, VI. 1.

"Worth."—See LANDLORD AND TENANT, 22.

## WORK AND LABOUR.

See CONTRACT, I. 2, II., VIII. — MECHANICS' LIENS—MINES AND MINERALS.

## WORKMEN'S COMPENSATION ACT.

See APPEAL, I. 2 — ARBITRATION AND AWARD, 4—COSTS, V. 24 — MASTER AND SERVANT, II.—NEGLIGENCE, 25.

## WRIT OF SUMMONS.

**1. Action for money demand—Service of writ without copy of account—Previous receipt—Prejudice.]**—A defendant who has received, before the action, a duplicate of the account sued upon, suffers no prejudice from the non-service of a copy thereof with the writ and declaration, and cannot make such want of service the basis of an exception to the form. *Lidstone v. Hamming*, 7 Q. P. R. 431.

**2. Description of defendant—Irregularity—Exception to form—Service—Replevin — Affidavit — Practice.]**—The defendant was described in the writ of summons as "Marie Godon, wife (*commune en biens*) of Arthur Godon, labourer, of the city and district of Montreal, and the latter for the purpose of authorizing his wife," whereas she should have been described as "Victoria Lacroix, boarding-house keeper, of Montreal, widow of the late Adélard Godon, in his lifetime labourer, of the same place:"—*Held*, that this designation was erroneous and irregular, and an exception to the form based upon such irregularity should be allowed.—2. That the omission to serve a copy of the affidavit upon the defendant or to leave it at the record office for her within three days of the service of the

writ of replevin, was fatal. *Bartlett v. Godon*, 7 Q. P. R. 372.

**3. Description of defendant—Mistake — Irregularity — Exception to the form.]**—A defendant described in the writ of summons served upon her as "May Ardagh, widow of S. Ardagh," when her name is May Jones, and the name of her deceased husband was Thomas William Ardagh, is not in a position to know with certainty whether it is really she who is intended to be sued, and there is an irregularity which she has the right to invoke by way of exception to the form. *Kent v. Ardagh*, 8 Q. P. R. 31.

**4. Irregularity — Setting aside —** Failure to name place of trial not fatal. *Churchill v. Shand*, 1 E. L. R. 225.

**5. Irregularity — Style of Court—Judicial district—Amendment.** *Theriault v. Evans* (N.W.T.), 4 W. L. R. 550.

**6. Irregularity — Style of Court—Judicial district—Amendment — Mechanics' Lien Act—Procedure — Originating summons.** *Cushing Brothers Co. v. Groos* (N.W.T.), 4 W. L. R. 351.

**7. Order for service on defendants resident out of the jurisdiction—Service on agent in Ontario—Substitutional service — Cause of action—Rule 162—Carrying on business in Ontario — Irregularities in service—Conditional appearance.** *Collier v. Heintz*, 8 O. W. R. 340.

**8. Residence of defendant wrongly stated — Exception to form.]**—An exception to the form, founded upon the allegation that the residence of the defendant is not given or is not correctly given in the writ of summons served upon the defendant, must clearly indicate the real residence of the party; if not it will be dismissed. *Congregation of Roumanian Jews Beth v. Backman*, 8 Q. P. R. 108.

**9. Revocation of probate — Practice — Affidavit verifying indorsement—Citation—Stay of proceedings.]**—Where, in an action brought for the purpose of revoking a probate, the Rule requiring the filing of an affidavit verifying the indorsement on the writ of summons has not been complied with, the proceeding should not be invalidated, but the curative provisions of Order LXX., r. 1, ought to be applied. Where the Rule requiring the issue of a citation calling on the defendant to produce the probate has not been complied with, proceedings will be stayed until this has been done. *McLagan v. McLagan*, 11 B. C. R. 325, 2 W. L. R. 12.

**10. Service—Absent defendant—Personal service—Dispensing with.]—**Where the plaintiff lives in the premises formerly occupied by the defendant, now temporarily absent from the province, the service of process in an action must be made personally, except upon leave granted by the Judge or prothonotary. *Normandin v. Renaud*, 7 Q. P. R. 421.

**11. Service on agent of defendant company resident out of Ontario—**Service on alleged agent in Ontario—Cesser of business formerly carried on in Ontario. *Mackenzie v. Fleming H. Revell Co.*, 7 O. W. R. 414.

**12. Service on agent of defendant company—**Proof of agency—Notice to company. *Baird v. McLean Co.*, 8 O. W. R. 345.

**13. Service on president of trade union—**Effect of registration of union under Ontario Insurance Act—Body corporate—Party to action. *Pepper v. Ottawa Typographical Union No. 102*, 8 O. W. R. 409, 445.

**14. Service out of jurisdiction—Appearance — Motion to withdraw—Attornment to jurisdiction.]—**An application by a defendant resident in Montreal who had been served there with the writ of summons in an action brought in Ontario on two promissory notes payable, if at all, in Montreal, for leave to withdraw his appearance and enter a conditional appearance, was refused, it having been shewn that the defendant had not only appeared but had also successfully resisted a motion for immediate judgment on material alleging his intention to counterclaim to have a partnership between the plaintiff and himself in Ontario wound up. *Croil v. McCullough*, 11 O. L. R. 282, 7 O. W. R. 152.

**15. Service out of jurisdiction—**Bill of exchange—General acceptance in England—Acceptor's duty to pay where bill held. *Sanders v. St. Helen's Smelting Co.*, 1 E. L. R. 56.

**16. Service out of jurisdiction—**Cause of action—Breaches of contract—Delivery of goods — Place of delivery. *Cuthbertson v. Canada Radiator Co.* (N. W.T.), 3 W. L. R. 86.

**17. Service out of jurisdiction—**Cause of action—Claim for commission and expenses — Place of payment—Contract. *Dickson v. McInnes* (N.W.T.), 3 W. L. R. 60.

**18. Service out of jurisdiction—**Cause of action—Contract — Services—Place of payment — Conditional appearance—Motion to set aside writ and service — Material upon—Action against member of foreign partnership — Non-joinder of partners—Foreign co-debtor—Costs. *Craddock v. Bull*, 7 O. W. R. 343.

**19. Service out of jurisdiction—**Contract—Sale of goods—Action for price —Place of payment—Conditional appearance. *Dominion Canister Co. v. Lamouroux*, 7 O. W. R. 272, 378.

**20. Service out of jurisdiction—**Contract for sale of land—Place of making and performance — Completed contract.]—A contract made by correspondence between a resident purchaser and a non-resident vendor for sale of land in the Territories—the acceptance of the vendor's offer to sell having been mailed in the Territories—is one which, according to the terms thereof, ought to be performed within the Territories.—In an action for damages for breach of such a contract:—*Held*, that service out of the jurisdiction was properly allowed.—The question, where it is doubtful, whether there was a completed contract should not be determined on an application to set aside the order for service *ex juris*. *Bishop v. Scott*, 6 Terr. L. R. 54.

**21. Service out of jurisdiction—**Joint cause of action—Rule 162 (g)—One defendant in jurisdiction—Necessary party out of jurisdiction—Joinder of defendants. *Haight v. Menzie Wall Paper Co. and T. S. Patillo Co.*, 7 O. W. R. 122.

**22. Service out of jurisdiction—**Motion to set aside—Grounds—Res judicata — One defendant in jurisdiction—Conditional appearance. *McRae v. Balantyne*, 8 O. W. R. 289, 314.

**23. Service out of jurisdiction—**Order for—Foreign defendant — Service on agent in jurisdiction—Irregularities—Proceedings set aside. *Johnson v. Burtis*, 7 O. W. R. 803.

**24. Service out of jurisdiction—**Rule 162 (e)—Tort committed within Ontario.]—It is only where the tort for which the plaintiff brings action has been "committed" within Ontario, that Con. Rule 162 (e) entitles him to ask the Court to entertain an action against a non-resident defendant who is to be served with process abroad.—An order permitting service upon the defendants abroad was set aside where the cause of action alleged against the defendants, a company engaged in the manufacture of

explosives in Scotland, was that they were negligent in allowing a fuse, which had been purchased by the plaintiff's employers, and which injured the plaintiff at a place in Ontario, to be manufactured and sold in a defective condition, the manner in which the fuse reached the plaintiff's employers not being alleged or suggested. The manufacture and sale must be deemed to have taken place in Scotland, and, although the invasion of the plaintiff's right of personal security occurred in Ontario, the tort comprises also the wrongful act or omission of the alleged tort-feasor. Orders of the Master in Chambers and MABEE, J., affirmed. *Anderson v. Nobels Explosive Co.*, 12 O. L. R. 644, 8 O. W. R. 439, 558, 644.

**25. Service out of jurisdiction—***Unlicensed foreign corporation — Method of service — Publication — Time for appearance.*]—Section 146 of the Companies Act, R. S. B. C. 1897 c. 44, defines an unlicensed and unregistered extra-provincial company. Section 147 provides that any writ or summons . . . may be served as against the company by delivering the same at Victoria to the registrar of the Supreme Court. Section 148 enacts that it shall be the duty of such registrar to cause to be inserted in four regular issues of the British Columbia Gazette, consecutively following the delivery of such writ or summons to him, a notice of such writ or summons, with a memorandum of the date of delivery, stating generally the nature of the relief sought, the time limited, and the place mentioned for entering an appearance. Section 149 enacts that after such four issues the delivery of such process to the registrar as aforesaid shall be deemed, as against the defendant company, to be good and valid service of such writ or summons:—*Held*, in the case of an issue of an ordinary eight-day writ under part VII., that it is the duty of the registrar

to notify the defendant in the publication in the Gazette that the time for appearance is eight days after the fourth publication.—*Per* IRVING, J.:—As the writ is a writ for service on a foreign corporation, without the jurisdiction, application to a Judge for leave to issue the writ and proceed under the Act is necessary before any writ is issued. The Judge in giving leave would limit the time within which appearance should be entered. *Youdall v. Toronto and British Columbia Lumber Co.*, 12 B. C. R. 12.

**26. Solicitor — Firm—Practice.**]—It is permissible to issue a writ of summons in the name of a firm of solicitors. English practice followed. *Protestant Orphans' Home v. Daykin*, 12 B. C. R. 128.

**27. Stamps — Insufficiency—Amendment after declaration.**]—A plaintiff who has not sufficiently stamped his writ of summons may, after service thereof, when the declaration shews exactly the extent of his claim, apply to the prothonotary for leave to change the *fiat*, by inserting the correct amount demanded in the action, and adding the required stamps.—*Quere*, how must such application be made? *Sherwood v. Shepard*, 8 Q. P. R. 116.

See DOMICILE — JUDGMENT, I. 2, 9—PENALTY, 5—PLEADING, VIII. 18—STAY OF PROCEEDINGS, 4.

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## WRONGFUL DISMISSAL.

See MASTER AND SERVANT.

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## YUKON TERRITORIAL COURT.

See APPEAL, XIII.













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